Corporate and Financial Markets Law

The Spanish Reform of Director's Duties and Liabilities

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Abstract

Spain has introduced one of the most far-reaching European reforms in the area of directors' liability over the last few years. This article analyses and assesses this reform, which affects directors' duties as well as their liability, and which may serve as a model for amendments to the legislation in place in other countries, primarily in Europe and North and South America.

I. Introduction

Spain has introduced one of the most far-reaching European reforms in the area of directors' liability over the last years, set out in *Ley 31/2014, de 3 de diciembre, por la que se modifica la Ley de Sociedades de Capital para la mejora del gobierno* corporativo (*Act 31/2014 of 3 December amending the Companies Act to improve corporate governance (hereinafter 'the Reform')*.

Act 31/2014 includes nearly all the recommendations contained in the report entitled 'Study of proposals for legislative amendments'[1] drafted by the Government's Expert Commission on Corporate Governance. Other provisions introduced by the Reform were taken from the 'Proposal for Mercantile Code' of June 2013, drafted by the country's General Codification Commission at the behest of the Ministry of Justice.[2] Yet other provisions set forth in the Reform were formerly voluntary recommendations laid down in the 'Code of good governance for listed companies' (adopted in 2006 and updated in June 2013), which were now placed on a statutory (and consequently binding footing) for all companies.

The changes introduced by the Reform amending the Companies Act (*Ley de Sociedades de Capital*, hereinafter 'LSC')[3] refer to the two bodies around

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[1] The Expert Commission's Report is available (in Spanish) at https://tinyurl.com/y55eks97 (last visited 27 December 2020).

[2] The Proposal is available (in Spanish) at https://tinyurl.com/y9t58eqt (last visited 27 December 2020).

[3] Real decreto legislativo 20 July 2010 no 1, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital. The Ministry of Justice (Ministerio de Justicia) has published an 'unofficial'

which companies are structured. Some provisions affect the rules on the general shareholders' meeting and shareholders' rights with a view, as stated in the statute, to 'reinforce the role (of the general meeting) and encourage shareholder participation' (Preamble, section IV). Other provisions refer to the company's administrative body and, more specifically, in connection with listed companies, to the board of directors. Their aim is to 'regulate certain aspects to which increasingly greater importance is being attached, such as governing body transparency, egalitarian treatment of all shareholders, risk management, and board member independence, participation and professionalization' (Preamble, section V).

This Article presents a discussion of the most prominent changes introduced by the Reform *vis-à-vis* the regulation of directors' duties (II below) and the provisions governing their liability (III below).

II. Directors' Duties

1. Introduction. Fiduciary Duties

a) Fiduciary Duties and General Thrust of the Reform

Directorship of a company entails the assumption of a series of fiduciary responsibilities or 'duties'. These duties are rules of conduct that present a template for the exercise of directors' responsibilities and serve as a basis to establish liability where such criteria go unmet. There are essentially two fiduciary or 'behavioural' duties: the duty of care and the duty of loyalty.[4]

The approach to directors' duties has changed radically in recent years, in both legal doctrine and positive law.[5] Up to fairly recently, directors' duties have been traditionally and predominantly viewed as the premise or grounds for the corporation or a third party claiming liability for damages. In the wake of the corporate governance movement, however, a new approach has emerged, whereby directors' duties are regarded as an ideal instrument to secure the objectives pursued by that movement.[6] This new approach stresses not the *ex-post* effectiveness of such duties in the event of non-compliance, but their power as an *ex-ante* deterrent. They play a normative role,[7] by aligning directors' and

English translation of Act https://tinyurl.com/y97bhd07 (last visited 27 December 2020).

[4] See J. García de Enterría, 'Los deberes de conducta de los administradores. Deber de diligencia y deber de lealtad', in J. García de Enterría ed, *La reforma de la Ley de Sociedades de Capital en materia de gobierno corporativo* (Cizur Menor: Clifford Chance-Thomson Reuters Aranzadi, 2015), 62.

[5] A synthesis of these changes in legal doctrine and positive law can be found in J.O. Llebot, 'El deber general de diligencia (art. 225.1 LSC)', in F. Rodríguez Artigas et al eds, *Junta General y Consejo de Administración en la Sociedad Cotizada* (Cizur Menor: Revista de Derecho de Sociedades-Thomson Reuters Aranzadi, 2016) II, 320-323.

[6] A pioneering study in Spanish legal doctrine was authored by C. Paz-Ares, 'La responsabilidad de los administradores como instrumento de gobierno corporativo' *InDret*, 4, 3 (2003).

[7] The theoretical grounds for the new regulation of directors' duties are to be found in agency

shareholders' interests in terms of value creation and distribution (which is also the primary aim pursued by the corporate governance movement).[8] Moreover, the existence of an effective scheme for establishing directors' liability that identifies and penalises a breach of a director's fiduciary duties is an essential element in the generation of trust on securities markets.[9] Accordingly, the regulation of directors' fiduciary duties is now an essential element in any corporate governance system.

The duty of care is associated with value creation: it calls upon directors to maximise value, and, when they fail to do so, their acts constitute mismanagement. The duty of loyalty, which is related to the distribution of that value, aims to minimise the risks of undue distribution. Failure to comply with this duty constitutes misappropriation.[10]

The Reform amending the LSC includes many provisions set out in the June 2013 Proposal for Mercantile Code. It focuses primarily on two matters. First, it defines the content of the duty of care while on the other it reinforces the duty of loyalty by reformulating its overall content and main channels for fulfilment. The new regulation is binding not only on listed companies, (for which no specific provision is established) but on all companies. The Reform was clearly informed and inspired, however by the singularity of circumstances surrounding listed companies.[11]

b) Differential Treatment of Negligence and Disloyalty

Although both duties contribute to define what is expected of directors, the Reform purposes to treat them with differing rigour and consequently penalise their non-compliance with different degrees of penalty. Essentially, the principle underpinning the Reform is that the law should be lenient and tolerant toward a breach of the duty of care, ie, towards negligence (hence the introduction of the business judgement rule, discussed later), but strict and severe toward breach of the duty of loyalty, which ultimately consists in disloyal conduct (explaining, also as discussed later, the possible direct standing of corporate liability action by a minority shareholder in the event of such infringements).[12]

That philosophy is supported by a number of considerations, including

cost theory.

[8] J. García de Enterría, n 4 above, 63. As pointed out by C. Paz-Ares, 'Anatomía del deber de lealtad', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 427, the goal of any corporate governance system 'is to align the incentives of insiders (management, directors and, as appropriate, control shareholders) with those of outsiders (minority shareholders)'. Similarly, J. Alfaro, 'Artículo 225. Deber general de diligencia', in J. Juste ed, *Comentario de la reforma del Régimen de las Sociedades de Capital en materia de Gobierno Corporativo (Ley 31/2014). Sociedades no cotizadas* (Cizur Menor: Thomson Reuters-Civitas, 2015), 313-317.

[9] J. García de Enterría, n 4 above, 63

[10] See C. Paz-Ares, n 8 above, 427; J. Alfaro, n 8 above, 317.

[11] J. García de Enterría, n 4 above, 62.

[12] See J. García de Enterría, n 4 above, 63; C. Paz-Ares, n 8 above, 434.

those set forth below.

First, the two conducts constitute different degrees of jeopardy for company equity. Unlike disloyal conduct, negligent behaviour does not normally entail any significant earnings for the perpetrator. The 'earnings' are normally confined to a savings of time and effort, with no material benefit. Moreover, the directors involved must assume part of the costs of their sloth because, if the company falters, they lose their jobs and consequently their main source of income. Therefore, directors have greater incentive to appropriate company assets than to manage them negligently, while fraudulent conduct is much more detrimental to the integrity of company equity than negligence.[13]

Secondly, the likelihood of commission for each conduct also varies. Breach of the duty of care not only entails no benefit for directors, but usually generates visible effects that can be recognised and penalised by shareholders and the market. In principle, then, directors have no incentives to carry them out. Inherent in disloyal conduct, in contrast, is the incentive afforded by the opportunity to benefit personally, albeit at the expense of shareholders, so the probability of them being displayed is greater. Moreover, the very nature of disloyal acts, which tend to be concealed behind ordinary and formally legitimate operations, hinders their identification and persecution. For all the foregoing, disloyalty is more likely or foreseeable than negligence, that is a breach of the duty of care.[14]

Thirdly, companies (listed companies in particular) have powerful market mechanisms with which to penalise director negligence (reputation, forfeiture of future job opportunities and so on). No market mechanisms are in place, however, that would constitute an alternative to liability rules as effective penalisation for fraudulent conduct.[15]

Last but not least, the degree of legal uncertainty attached to each conduct also differs. The possibility of court error (misclassifying conduct and imposing undue liability) is scant in the case of the duty of loyalty, for loyalty is a moral conceit, for which human beings in general and judges in particular are well prepared. Conversely, negligent conduct poses serious risk of error, for judges are not business management experts.[16] The likelihood of misjudging such behaviour is therefore greater. If it were severely penalised, directors would tend to adopt overly conservative business strategies to minimise the possibility of their governance being deemed negligent.

In our opinion, that difference between how breach of the two types of duties is appraised ('lenient and tolerant toward breach of the duty of care', but 'strict and severe toward breach of the duty of loyalty') is mirrored as well in the nature, mandatory or otherwise, of the regulation in question. Hence, the legislator

[13] See J. Alfaro, n 8 above, 317.
[14] See J. García de Enterría, n 4 above, 63-64.
[15] ibid 317-318.
[16] ibid 318.

explicitly provides that the rules governing the duty of loyalty are mandatory (Art 230.1 LSC), which is not incompatible with the likewise explicit provision on the possible dispensation, for certain cases, from compliance with this duty in connection with certain instrumental obligations designed to elude conflicts of interest. On the other hand, nothing is said in this respect about the duty of care. Such 'eloquent silence' should be interpreted as an indication that these are dispositive provisions (with the probable exception of gross dereliction). Consequently companies are free to limit directors' liability for failure to comply with this duty in their articles of association.[17] Nevertheless, provisions limiting liability for breach of the duty of care cannot exempt directors from liability for direct damage to third party equity (Art 241 LSC, non-contractual liability proceedings).[18]

[17] See C. Paz-Ares, n 8 above, 446; J. Sánchez-Calero, 'La reforma de los deberes de los administradores y su responsabilidad', in M. Alba Fernández et al eds, *Estudios sobre el futuro Código Mercantil: Libro Homenaje al profesor Rafael Illescas Ortiz* (Getafe: Universidad Carlos III de Madrid, 2015), 911. J. Alfaro, n 8 above, 324, deems that although the articles of association cannot abolish this duty entirely (as that would be tantamount to leaving performance of the contract to directors' discretion), articles provisions that limit directors' liability for breach of the duty of care are valid. J. Juste also appears to acknowledge this possibility in 'Artículo 230. Régimen de imperatividad y dispensa', in J. Juste ed, *Comentario* n 8 above, 361, 416; Id, 'Artículo 236. Presupuestos y extensión subjetiva de la responsabilidad' ibid 443-446. J.O. Llebot, n 5 above, 340, in turn, deems that the duty of care could be overruled.

J. Hernando, 'La business judgement rule' *Revista de Derecho Mercantil*, 299, 355-360 (2016), adopts a different approach to the content of the articles, drawing a distinction between the possibility of modulating directors' duty of care and the possibility of exonerating or limiting their liability for failing to comply with this duty.

In connection with the former, Hernando deems that regulation of the duty of care, like that of the duty of loyalty, is *ius cogens* and consequently cannot be addressed in the articles (The grounds for that argument lie in the imperative wording of Art 225 LSC. Moreover, in the author's opinion, thinking that shareholders could empower the directors to act with a standard of care less strict than demanded of a reasonable business person would be as senseless as believing that directors could be released from the duties of gathering the information needed to perform their assigned tasks, devoting suitable time to their responsibilities or adopting measures that would ensure good company management and control).

Nonetheless, the author believes the solution to the second problem is different and that directors' liability to the company for breach of this duty can be regulated by the articles, where it may be excluded or limited. The reasoning is that 'while it is true that the possibility of excluding directors' liability (but not the duty per se) from the articles constitutes a radical departure from Spanish Company Law tradition, it is in fact in line with the general provisions on contractual liability set out in the Spanish Civil Code. Thus, Art 1102 provides that the action to enforce liability arising from wilful misconduct shall not be waived, *contrario sensu* whereas in the event of guilty negligence it may'. Hernando adds that this rationale is consistent with the fact that the possibility of compromise or waiver of the corporate liability action (by the General Meeting unless shareholders representing five per cent or more of the share capital object) has always been acknowledged, along with the possibility that the articles (see Arts 60 *j*) and 161 LSC) may vest the General Meeting with more management powers.

[18] As rightly noted by J. Juste, n 17 above, 447. See also J.O. Llebot, n 5 above, 341, who writes that as modification in the articles of the duty of care is one of the instances of voluntary exclusion of the applicable law pursuant to Art 6, para 2, of the Civil Code, it is subject to the limit established in the legal text itself, to the effect that the change may not jeopardise third party (such as company

2. The Duty of Care[19]

a) Modulation of the Duty of Care in Keeping with the Nature of the Position and Functions Performed

aa) Directors, as managers of others' wealth, are bound by the duty of care, which entails securing the maximum value for that wealth. [20]

The standard set out in Art 225.1 LSC defining the degree of care is that of an 'orderly (ie, reasonable and prudent) businessman', an allusion to the degree of dedication, skill, foresight and knowledge required to manage any company.[21] That standard is comparable to those of other legal systems[22] and determined in keeping with each specific company's size, the industry in which it operates and the business conducted.[23]

bb) The Reform modulates directors' general duty of care by associating it with 'the nature of the position and duties attributed to each' (Art 225.1 LSC).[24]

This change is particularly relevant to the board of directors. Despite its collegiate nature and the fact that its members are jointly and severally liable for violations of the duty of care (Art 237 LSC, not amended), distinctions can now be drawn among the functional specialisations characteristic in practice of the most complex forms of business administration, such as in listed companies.[25]

Nevertheless, all the board members are bound by the duty of care as regards the board's non-delegable powers.[26] Even in that area, however, the degree of

creditor) interests.

[19] For a comprehensive analysis of this duty after the Reform see J.O. Llebot, n 5 above, 319-341.

[20] See C. Paz-Ares, n 8 above, 427; J. García de Enterría, n 4 above, 64; J. Alfaro, n 8 above, 317.

This opinion is not unopposed. In Spanish legal doctrine, for instance, J. O. Llebot, n 5 above, 328, deems that the objective, rather than maximising the value of the company, should be to maximise profits or positive results, for that alone ensures business profitability and suitable incentives to conduct such activity in the interest of all concerned, while guaranteeing the company's on-going presence on the market.

[21] J. García de Enterría, n 4 above, 64, and J.O. Llebot, n. 5 above, 328, believes that the adjective 'reasonable' applied to an entrepreneur is an indication that the lawmaker decided to require average behaviour, ie, behaviour displayed by most business people.

[22] See for example in German Law, with regard to the *Aktiengesellschaft* (AG) §93(1) Satz 1 *Aktiengesetz* which provides, Die Vorstandsmitglieder haben bei ihrer Geschäftsführung die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters anzuwenden 'or concerning the *Gesellschaft mit Beschränkter Haftung* (GmbH) §43(1), which reads, Die Geschäftsführer haben in den Angelegenheiten der Gesellschaft die Sorgfalt eines ordentlichen Geschäftsmannes anzuwenden'.

[23] See J. Alfaro, n 8 above, 319. This author contends that, while no specific expertise is needed to be a director, compliance with their obligations requires them to acquire the skills needed to perform their duties. That, in turn, depends on the business conducted by the company and each director's specific role: being an executive officer is hardly the same as being a member of the auditing committee, for instance (see J. Alfaro, n 8 above, 321).

[24] This provision aims to improve on the former legislation, criticised for not taking the differences in board members' roles in corporate management into consideration (cf J. Sánchez-Calero, n 17 above, 899).

[25] See J. García de Enterría, n 4 above, 64-65.

[26] On this matter J.O. Llebot, n 5 above, 337-339.

skill and dedication (care) demanded of executive directors cannot, obviously, be required of non-executive directors. The former must be subject to a higher standard of care than the latter, for they are entrusted with the company's actual management, whereas non-executive directors engage primarily in control and supervision. In addition, the existence of certain commissions under the aegis of the board (mandatory in listed companies, such as the auditing commission and a single joint or two separate appointment and remuneration committees, (see new Art 529-*terdecies*.2 LSC) means that the duty of care incumbent upon the directors sitting thereon is extensive to the tasks entrusted to such committees (see new Arts 529-*quaterdecies*.4 and 529-*quindecies*.3 LSC).[27] In other words, while all members are bound by a duty of care, that duty is not identical for all, but must be delimited in keeping with the responsibilities in fact entrusted to each.[28]

cc) In addition to this modulation of the duty of care, the Reform introduces two explicit specific descriptions of it.[29] On the one hand, directors are bound to devote due effort to their position (Art 225.2 LSC). That obligation also entails having the skills required to manage the company and hence to be personally qualified to perform the duties inherent in the position to which they are appointed in the company at issue.[30] Attendant upon that obligation is the duty to adopt the measures necessary for good governance and control (Art 225.2 *in* fine

[27] See J. Sánchez-Calero, n 17 above, 900; J.O. Llebot, n 5 above, 339.

The same author (cf J.O. Llebot, n 5 above, 333-334) deems that account should be taken not only of the nature of the specific position (for instance, when administration is vested in a board of directors, being CEO or a member of the executive committee) or in listed companies, of director status (executive director is not the same as proprietorship director or independent director), but also the nature of any supplementary position that may be assumed by the director (which would logically be applicable, to come back to the example of a board of directors, to executive directors; who, for instance, in addition to being directors is chief financial officer).

[28] J. García de Enterría, n 4 above, 65. J.O. Llebot, n 5 above, 334-335, notes that the duty of care is incumbent not only upon *de jure* directors, but also upon anyone subject to directors' liabilities: (a) *de facto* and shadow directors (Art 236.3 LSC); (b) the person, whatever their position, who has the highest management role in the company, when no permanent delegation powers of the board exist in one or more directors (without prejudice to the actions of the company based on their legal relation to said person) (Art 236.4 LSC); and (c) natural persons representing a body corporate director (Art 236.5 LSC).

[29] Concerning them see V. Mambrilla, 'Las concretas manifestaciones del deber general de diligencia de los administradores', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 360.

J.O. Llebot, n 5 above, 332, contends that the duty of independence (*ex* Art 226.2 LSC) and compliance with the law (*ex* Art 225.1 LSC) must be added to those two, noting that directors' personal liability for breach of the law is set out in the Penal Code ad many provisions of administrative law. Nonetheless, the duty to comply with the law stemming from the duty of care laid down in Art 225.1 LSC refers not to the establishment of such personal liability, but to requiring directors to guarantee company compliance with all applicable legal provisions, for if it fails to do so the company itself may incur liability (see J.O. Llebot, n 5 above, 332-333).

[30] As pointed out by J. Sánchez-Calero, n 17 above, 901. See in the jurisprudence the Judgement of the Tribunal Supremo 7 June 2017 no 360, available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

LSC).[31] On the other hand, directors are bound by the duty to demand from and entitled to the right to obtain from the company the information needed to comply with their obligations (Art 225.3 LSC). Both are essential, bearing in mind that directors' duty of care refers to means, not to outcomes.[32]

The degree of information they must obtain depends on the gravity and urgency of the decision to be adopted by the board. One consequence of this duty to be informed is the obligation to adopt a critical attitude toward the information received from company managers, usually referred to as the duty to investigate. That said, inasmuch as directors should be able to trust corporate information, they would not be held liable when they adopt decisions or fail to take action on the grounds of data furnished by outside experts or company managers or employees. This is especially true in large companies, in which sheer size prevents directors from acquiring detailed knowledge of all aspects of company business.[33]

b) Duty of Care and the Business Judgement Rule

aa) The most significant change in respect to the duty of care has to do with the inclusion of the Anglo-Saxon and more specifically the US conceit known as the business judgement rule, translated in the LSC as *protección de la discrecionalidad empresarial*, which back-translates literally as 'protection of business discretion'.[34] The new text of Art 226.1 LSC provides that:

> 'Where strategic and business decisions are subject to protection of business discretion, the standard of care of an orderly businessman will be understood to be met by directors adopting decisions in good faith, with no personal interest in the object of the decision, with sufficient information and in keeping with proper decision-making procedures'.

bb) The *object* of the rule, then, is strategic and business decision-making.[35]

[31] J. Sánchez-Calero, n 17 above, 901, interprets this second clause of Art 225 LSC to mean that directors must be diligent not only in their individual tasks, but also in the general organisation of company governance, ie, the duty to establish the policies that guide company management and monitor them.

[32] This interpretation of the duty of care as a means- rather than and outcomes-related obligation has been reinforced with the inclusion in Spanish law of the *business judgement rule* (see J. Hernando, n 17 above, 321).

[33] See J. Alfaro, n 8 above, 322.

[34] J. García de Enterría, n 4 above, 65. In connection with this rule and its acceptance in Spanish law, see J. Hernando, n 17 above, 313; and A. Roncero, 'Protección de la discrecionalidad empresarial y cumplimiento del deber de diligencia', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 383-419.

[35] Regarding the objective scope, in the absence of limitations or nuances, directors have been argued to be protected by the rule wherever the decision can be defined as a business decision, irrespective of the industry involved, parties possibly affected, financial magnitude or other factors (see J. Hernando, n 17 above, 336-337).

Strategic and business decisions must be understood to include all decisions related to any business directly or indirectly engaged in by the company. The company purpose is the natural realm in which directors should act (Art 234.1 LSC), adopting both strategic and ordinary management decisions through which innovation and the assumption of risk characteristic of business activity are channelled. (such as acquisitions or investments or the launch of a new product or service).[36]

Strategic and business decisions are understood to be subject to the business judgement rule when, while lying within the competence of company directors, they are unregulated and require opting for the most suitable and optimal of the alternatives that will best serve the company's interests, in keeping with criteria of prudence and sound judgement. Decisions based on compliance with legal or statutory obligations or unrelated to the company purpose consequently lie outside the bounds of strategic and business decisions and hence of the scope of the business judgement rule.[37]

cc) By introducing this rule, the *legislator assumes* that, provided the aforementioned requirements are met, directors are deemed to comply with the duty of care to which they are bound.[38] Therefore, even where such decisions ultimately prove to be erroneous or even ruinous for the company, they cannot be regarded as negligent nor used as grounds to establish directors' legal liability.[39] Hence, the business judgement rule creates an area of judicial immunity around such decisions[40] (a 'safe harbour' for directors).[41]

[36] See J. García de Enterría, n 4 above, 65; J. Hernando, n 17 above, 337.

[37] See J. Hernando, n 17 above, 337.

[38] As J. Hernando, n 17 above, 333 argues, although the law maker does not specify what sort of presumption is at issue, it should be understood to be an absolute or *iuris et de iure* presumption. Therefore, if the requirements stipulated are met, the provision cannot be nullified.

[39] Nor does the law maker specify whether the presumption is applicable to anyone who claims liability from directors, irrespective of the jurisdiction and branch of law on which it is grounded, or whether, on the contrary, it can only be alleged in the realm of corporate liability.

In light of this legal vacuum some authors have stated that, while its inclusion in the LSC argues in favour of its application to the latter only, the general wording in which it is couched and the fact that it is not included in Chapter V of the LSC (which governs liability), but in Chapter III (on duties), would provide grounds for contending that the 'protection of (directors') business judgement' covers a wider radius than corporate liability (see J. Hernando, n 17 above, 336).

[40] See J. García de Enterría, n 4 above, 66.

[41] Inasmuch as application of this rule is made contingent upon the presence of certain premises, it would seem to be better regarded as a safe harbour (further to J. Alfaro, 'Artículo 226. Protección de la discrecionalidad empresarial', in J. Juste ed, n 8 above, 313, 327) than as a presumption (on the differences with respect to the requirements for application, and in particular to the burden of proof, between formulating the business judgement rule as a safe harbour (as in German law, for instance: see §93 *Aktiengesetz*) or as a presumption (as, paradigmatically, in Delaware) see J. Hernando, n 17 above, 324 and 339.

That means that it is not automatically applicable to liability claims in connection with the breach of the duty of care (in which case the burden of proof of directors' negligence would lie with the plaintiff). Rather, the directors, to benefit from the protection afforded by the rule, must prove that the circumstances required for its application are in place (see J. Hernando, n 17 above, 329).

It has formalised a principle roughly outlined by previous case law, which had already denied that 'the review of the intrinsic wisdom of the economic aspects (of business decisions) can be made subject to court control'.[42]

dd) Its fundamentals lie on different reasons.[43]

i. Given the uncertainty surrounding directors' management performance, this rule attempts to prevent strict rules on negligence-related liability from obstructing the risk-taking inherent in any business activity (ie, directors' decisions which, while risky, as befits any mercantile endeavour, enhance company profits, maximising share value).

ii. That circumstance is reinforced by the difficulties normally attendant upon determining, in retrospect, whether the hypothetical economic damages stemming from a business decision can be attributed to mere risk or to negligence.

iii. That, in turn, should be viewed against the backdrop of the peril inherent in judging such decisions; given the absence of technical rules (*lex artis*) with which to objectively evaluate them; judges' usual lack of technical expertise; and the flagrant risk that their review may be affected by 'retrospective bias' or the tendency to associate the cause of economic loss with negligence in the decision to which it can be traced.[44]

iv. Lastly, this rule also aims to avoid discouraging skilled individuals from accepting the position and to furnish an incentive for directors to perform their duties honestly and in a manner that is in the company's best interest.

ee) Application of this rule is nonetheless contingent upon *compliance with a series of requirements* laid down in Art 226.1 LSC.[45] These requirements are set forth below.

i. Directors must have acted with *sufficient information*, ie, decisions must be adopted with suitable and sufficiently pondered and reasoned supporting data. Thus, obtaining the information required for due compliance with directors' responsibilities is not only one of their rights but, as specified in new Art 225 LSC, an explicit duty.[46]

ii. Directors must act within the framework of a *suitable decision-making procedure*, ie, further to company rules governing decision-making.

iii. Directors must *act in good faith and on matters in which they have no*

[42] See eg before the reform, the Judgments of the Tribunal Supremo 12 July 1983 and 17 January 2012 no 991; Judgements of the Audiencia Provincial de Sevilla 18 March 2015 no 115, 21 May 2015 no 206 and 6 October 2015 no 340; Judgement of the Audiencia Provincial de Vizcaya 24 March 2014 no 203; Judgement of the Audiencia Provincial de La Rioja 18 February 2015 no 36; Judgements of the Audiencia Provincial de Granada 20 April 2012 no 174 and 5 December 2014 no 303, all available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

[43] On the *raison d'être* for this rule, see J. García de Enterría, n 4 above, 66; J. Hernando, n 17 above, 320-321.

[44] See C. Paz-Ares, n 8 above, 31.

[45] Cf J. García de Enterría, n 4 above, 66-67. For further detail see J. Alfaro, n 42 above, 330.

[46] See Judgement of the Tribunal Supremo 26 November 2014 no 653, available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

personal interest. That excludes participating in decisions in which they have a direct or indirect interest, as well as any affecting other directors or related parties and in particular any associated with dispensation from obligations deriving from the duty to avoid conflicts of interest (see Art 226.2 LSC). Where directors' impartiality is compromised, their action must be judged in keeping with the parameters not of the duty of care, but of the stricter and more rigorous duty of loyalty.

The absence of these requirements does not, per se, lead to director liability. The implication is merely that, if the business judgement rule is not applicable, judges would be empowered to review management performance in depth and determine whether it complies with the standard of care practised by a prudent and reasonable businessman, as defined in Art 225.1 LSC.[47]

3. The Duty of Loyalty[48]

The legislation governing the duty of loyalty is, as noted earlier, mandatory.[49] Consequently, company articles of association cannot override the obligations laid down in Arts 228 and 229 LSC (although the *General Meeting* or *the administrative body* may grant a dispensation in connection with the instrumental obligations set out in Art 229 LSC on a case-by-case basis). Nevertheless, the articles of association should, logically, be able to add to the provisions on the duty of loyalty by introducing new obligations or prohibitions.[50]

a) Reformulation of the Duty of Loyalty

The other duty incumbent upon directors is the duty of loyalty, the former standard for which was the 'loyal representative'. With the Reform, this standard has been reformulated, however, and directors are now required to act 'with the loyalty of a faithful representative, in good faith and in the company's best interest'

[47] See in this sense J.O. Llebot, n 5 above, 340.

[48] Regarding this duty see especially C. Paz-Ares, n 8 above, 427.

[49] As C. Paz-Ares explains, n 8 above, 446-447, that is based on two types of reasons that lie in different domains. 'The first is positioned internally. If shareholders decide to exempt directors from their duty of loyalty, actually (or at least normally) they would be exempting them from liability for wilful misconduct in the event of non-compliance. That clashes with the very notion of commitment inherent in the definition of contract (such is the justification underlying Art 1102 Civil Code and, ultimately also, Art 1256 Civil Code). The second reason is external. Waiving the protection afforded by loyalty is (or under certain circumstances could be) tantamount to an atypical configuration of the ownership of the assets entrusted to directors for management. That destroys the so-called 'categorisation' function, which seeks to establish typical bounds (hence the principle of *numerus clausus* in property rights) to minimise third party transaction costs in business conducted with the company'.

According to J. Sánchez-Calero, n 17 above, 911 shareholders' agreements that limit this duty are likewise contrary to law.

[50] Legal doctrine appears not to have paid much attention to this possibility (see for instance J. Juste, n 17 above, 415-417).

(Art 227 LSC).[51] Although the law maker does not define what is meant by company interest, requiring directors to act in the company's best interest underscores the notion that it is not sufficient to make just any effort to serve such interests; rather, directors must act in a manner that most effectively ensures their defence.[52]

Faithful or loyal representatives are those which are taken for the purpose of furthering and defending their principals' interests, and subordinating their own personal interest thereto, particularly when conflicts arise,[53] This duty is required, not only of loyal representatives, but also of anyone who assumes management of someone else's interests.[54]

While the duty of care focuses on value creation, the duty of loyalty deals with the distribution of value, preventing directors from performing their duties for their own benefit to the detriment of shareholders.[55] The rule is a general provision, by virtue of which conduct not explicitly set out in the implementing regulations or in connection with subjects not identified therein can still be regarded as disloyal.[56]

b) Reformulation of Its Fulfilment

The Reform essentially undertakes to detail and systematise the various existing formulations of the duty of loyalty and to add others.[57]

More specifically, it establishes two groups of related obligations: (a) *'basic'* or *substantive* obligations deriving from this duty (Art 228 LSC), which indisputably constitute absolute and unconditional prohibitions; and (b) a suite of *instrumental obligations* referring to the 'duty to avoid conflicts of interest' (Art 229 LSC), which embrace relative prohibitions that, as such, may be lifted 'in special cases' (Art 230.2 LSC).[58]

aa) The *substantive obligations*[59] include a few already stipulated in the LSC, such as:

- the duty of secrecy (Art 228.b) LSC);[60]

[51] See J. García de Enterría, n 4 above, 67-68.

[52] See J. Sánchez-Calero, n 17 above, 903-904.

[53] See J. García de Enterría, n 4 above, 68.

[54] For further detail see J. Juste, 'Artículo 227. Deber de lealtad', in Id ed, *Comentario* n 8 above, 363.

[55] See J. García de Enterría, n 4 above, 68.

[56] Cf J. Juste, n 54 above, 367.

[57] See J. García de Enterría, n 4 above, 68. As has been rightly noted, the enforceability of the duty of loyalty is reinforced by the fact that the Reform lists the primary obligations stemming therefrom (see C. Paz-Ares, n 8 above, 437, who also discusses the reasons for such explicit provisions, see 437-438).

[58] See J. García de Enterría, n 4 above, 68.

[59] See in this connection J. Sánchez-Calero, n 17 above, 902; J. Juste, 'Artículo 228. Obligaciones básicas derivadas del deber de lealtad', in Id ed, *Comentario* n 8 above, 378 *et sequentes*; C. Paz-Ares, n 8 above, 438-442.

[60] For the content of this duty after the Reform, see S. Suárez, 'El deber de secreto de los

- the duty to abstain from discussing or voting on matters in which they have a direct or indirect conflict of interest (Art 228.c) LSC) (although 'decisions affecting their status as directors, such as appointment to or revocation of positions on the board of directors or analogous, will be excluded from the aforementioned obligation to abstain from voting').[61]

The new obligations include:

- the general duty to refrain from using their powers 'for purposes other than those for which they were granted' (Art 228.a) LSC);[62]

- the obligation to act at all times to 'further to the principle of personal liability with freedom of criterion or judgement and independence from third party instructions or relations' (Art 228.d) LSC), which is a rule of particular significance for proprietorship directors and, in general, for any directors related to shareholders or third parties.[63]

bb) The duty to avoid conflicts of interest.[64]

In addition to the non-revocable basic obligations described above which constitute its core, the duty of loyalty entails a series of instrumental obligations stemming from directors' general duty to refrain from placing themselves in situations in which their interests might clash with those of the company (Art 228.e) LSC).[65] Accordingly, the new rules do not confine directors' obligation to abstaining from voting in such cases (as per Art 228.c) LSC especially), but establishes the duty to avoid the vote altogether. In other words, the Reform prohibits them from creating such risk *ex ante*. It therefore introduces the 'no

administradores de las sociedades de capital' *Revista de Derecho de Sociedades*, 45, 359 (2015).

[61] Although this duty was included in the former legislation (cf former Art 229.1 II LSC, that provided that 'The director concerned shall abstain from participating in agreements or decisions concerning the operation involved in the conflict'), the wording has been improved in the new version. As noted by J. Sánchez-Calero, n 17 above, 905, the new text is more precise, for in addition to reiterating that abstention is in order in situations involving direct or indirect conflict, it adds other criteria that establish its applicability more precisely. The director must, for instance, abstain not only from voting, but from participating in the debate, an indication that he/she must leave the administrative body meeting as soon as the agreement at issue is tabled. It also states that the director must abstain not only when personally affected by the conflict, but also when related parties are involved.

[62] As J. Sánchez-Calero, n 17 above, 904, explains, this mandate is closely related to the type of administrative system of the company. That means, among others, that account must be taken of the objective scope of the powers vested in the director; those entrusted, for instance, with a given area of business, act disloyally if they use those powers outside such area.

[63] Cf J. García de Enterría, n 4 above, 69.

[64] On this matter see J. Juste, 'Artículo 229. Deber de evitar situaciones de conflicto de interés', in Id ed, *Comentario* n 8 above, 396 and for a more exhaustive discussion, P. Portellano, *El deber de los administradores de evitar situaciones de conflicto de interés* (Cizur Menor: Thomson Reuters Aranzadi, 2016), passim.

[65] Cf J. García de Enterría, n 4 above, 69. As C. Paz-Ares, n 8 above, 442, explains the so-called *conflict of duties* should be likened to *conflict of interest*. 'Such equivalence is justified because in both cases the risk of breakdown of due objectivity and, hence, of undermining the integrity of the protected interest is similar. So much so that the *conflict of duties* is usually called a *conflict of interest on behalf of others*'.

conflict' rule, ie, avoiding situations in which directors' loyalties are divided (between serving the company or some other interest).[66]

These instrumental obligations also some of those addressed in the former legislation, which have been subject to some technical improvements[67] (Art 229 LSC contains a non-exhaustive list of examples of situations that directors should avoid to elude conflicts of interest).[68] Such situations, in particular, involve, in particular:[69]

- the prohibition of using the company name and invoking their status as directors, although only (as the LSC now stipulates) when such use or invocation is to their own undue benefit in private transactions (Art 229.1.b) LSC);[70]

- the prohibition of taking personal advantage of the company's business opportunities (Art 229.1.d) LSC);

- the prohibition of competing with the company for their own- or third-party concerns or interests (Article 229.1.f) LSC);[71]

- the obligation to notify the other directors and, where necessary, the board of directors or, in the event of a sole director, the general meeting, of any direct or indirect conflict of interest situation that they or any related party may have with the company's interests (Art 229.3 LSC).[72]

[66] See J. Juste, n 64 above, 397-398. See also A. Díaz, 'Deber de lealtad y conflictos de intereses (observaciones al hilo del régimen de las operaciones vinculadas)', in A. Carrasco et al eds, *Las reformas del régimen de sociedades de capital según la ley 31/2014* (Madrid: Gómez-Acebo & Pombo, 2015), 28. This author deems that where the director has an indirect interest (through a third party), the duty to elude the conflict should be commensurate with the director's ability to control the third party.

[67] On the innovations entailed in the Reform in connection with such instrumental obligations, see C. Paz-Ares, n 8 above, 443.

[68] The fact that this duty of loyalty is mandatory should not, naturally, be construed to mean that the list cannot be enlarged upon in the articles of association.

[69] See J. García de Enterría, n 4 above, 69-70.

[70] The former wording of this prohibition was broader, for it stated only that 'directors may not use the company's name or invoke their status as directors thereof for operations for their own private benefit of that of related parties' (cf former text of Art 227 LSC). As a result, some authors deemed that the rule was intended to ban operations with the director or related parties, even though the reference in the literal wording is not to directors' business dealings with the company, but to their own private dealings (see J. Juste, n 64 above, 400).

This interpretation, now referring to Art 227.1.b) LSC, continues to be defended by some authors after the Reform (see I. Ramos, 'El deber de abstenerse de usar el nombre de la sociedad o la condición de administrador para influir indebidamente en la realización de operaciones privadas' *Revista de Derecho de Sociedades*, 44, 303 (2015)), whilst the inclusion of Art 229.1.a) LSC (which bans doing business with the company) should have put an end to the debate. Another argument for disregarding that approach lies in what the present author believes to be the very significant exclusion by the law maker of the possibility of dispensation from the provisions of Art 229.1.b) LSC which, in the aforementioned interpretation, would entail banning the company from granting dispensation for self-dealing.

[71] In connection with this prohibition as an instance of special conflict of interest deriving from the duty of loyalty, see S. Gómez, 'La prohibición de competencia del órgano de administración frente al interés de la sociedad representada' *Revista de Derecho Mercantil*, 297 (2015).

[72] See in this regard Judgement of the Tribunal Supremo 7 April 2016 no 222, available at

New prohibitions have also been added to this list, such as:[73]

- the prohibition to conduct business with the company other than in ordinary transactions of scant significance (understood to be those that need not be reported to furnish a true and fair view of the company's net worth, financial position or results) concluded under standard conditions for clients (Art 229.1.a) LSC);[74]

- the prohibition to use company assets (including confidential company information) for private purposes (Art 229.1.c) LSC));

- the prohibition to derive advantage or remuneration from third parties in connection with the performance of their role, outside of mere courtesies (Art 229.1.e) LSC).[75]

The LSC explicitly stipulates that these prohibitions are also applicable when the beneficiary is a party related to a director (Art 229.2 LSC). The term 'related party' must be interpreted as broadly as possible. For natural persons, it includes not only kinship, but joint involvement in other businesses, and for corporate bodies, membership in a group or any other manner of inter-company association.[76] This legal provision must also be interpreted as a reference to *id quod plerumque accidit* (that which usually happens), whereby the pursuit of non-personal interests or interests not associated with related parties also constitute a breach of the duty of loyalty.[77]

Directors must report any action that may entail non-compliance with the duty to avoid conflicts of interest and such information must be included in the

www.poderjudicial.es.

[73] See J. García de Enterría, n 4 above, 70.

[74] For further discussion about the content of this prohibition after the Reform, see A. Díaz, n 66 above, 28-34. See also C. Paz-Ares, n 8 above, 437, fn 38), who deems that defining relevance on the grounds of the impact on financial statements, as in Art 229.1.a), is a major error.

[75] This issue has prompted considerable legal debate in other countries a propos of certain types of remuneration favoured by hedge funds and private equities (cf C. Paz-Ares, n 8 above, 444, and especially Id, 'La anomalía de las retribuciones externas de los administradores. Hechos nuevos y reglas viejas' *Revista de Derecho Mercantil*, 290, 85 (2013)).

[76] See in this sense J. Sánchez-Calero, n 17 above, 910.

[77] Cf J. Juste, n 54 above, 367. C. Paz-Ares, is particularly critical of the delimitation of related parties in n 8 above, 445. This author stresses that the literal wording of Art 231.1 LSC (not amended by the Reform) includes only kinship (sections a), b) and c) and companies under the director's control (d). The provision therefore 'opens an inordinate gap, from a value perspective, in the definition of related parties, for it leaves out three especially significant cases: (i) entities in which the director performs executive duties or holds a significant share; (ii) entities in which the director's related parties perform executive duties or hold a significant share; and (iii) shareholders who appointed the director or fostered his/her appointment (such as, for instance, managers in the parent company appointed as directors in a subsidiary). That value contradiction must be rectified hermeneutically, with a systematic interpretation of the legal provisions and an 'economic appraisal' of reality (*wirtschaftliche Betrachtungsweise*)'. In that author's opinion, the fact that the legal notion of related party cannot be extended is no obstacle to achieving the result sought through the notion of conflict of interest that is normatively relevant. This notion covers (i) conflicts with either own-interest or others' interest (*arg. ex* Art 228e) LSC); (ii) both direct and indirect conflict (*arg. ex* Art 229.3 LSC); and (iii) both upward and downward conflicts (*arg. ex* Art 529ter.1 h) LSC)'.

notes to the company's financial statements (Art 229.3 LSC).[78]

c) Dispensation

Unlike the 'basic' obligations laid down in Art 228 LSC, this second group of obligations may be eligible for dispensation or waiver, given their instrumental and accessory nature, although never as a general policy and only 'in special cases'[79] (Art 230.2 LSC). By way of exception to this premise, the very formulation of the prohibitions laid down in Art 229.1. b LSC to 'use the company name or invoke their status as directors to exert undue influence on private transactions'[80] precludes dispensation or waiver. In other words, the company may, on a case-by-case basis, authorise directors to engage in an operation involving a conflict of interest.[81] That would be the case, for instance, of authorisation to use company assets, seize a business opportunity or conduct a business transaction with the company.

The award of dispensation does not revoke the duty of loyalty, but merely entails company admission that in a given specific case a director's actions do not risk damaging company interests[82] (or even that they may favour such interests).[83]

The legislator establishes rules on dispensation that are easy to administer and, at the same time, fairly difficult to elude. New Art 230 LSC revolves around three basic rules: (i) a procedural rule that ensures or attempts to ensure the independence of the body awarding the dispensation from the director involved; (ii) a fairness rule that attempts to guarantee that the transaction is fair, either because it is innocuous for company equity (for instance, a business opportunity rejected by the company or the dispensation of the non-competition obligation based on a forecast of greater benefit than anticipated harm) or because it is conducted under market conditions; and (iii) a transparency rule.[84]

Of the three, the most important probably is the procedural rule, the purpose of which, as noted, is to ensure the independence of the body awarding the dispensation. Competence to grant such authorisation therefore depends on the

[78] Regarding the substance of this notification duty see J. Juste, n 64 above, 411-412.

[79] See J. García de Enterría, n 4 above, 70. The rationale behind such ad hoc dispensation principle, by virtue of which certain transactions can be authorised on a case-by-case basis, lies in the ability of so-called 'related party dealings' to create value by reducing transaction costs (cf C. Paz-Ares who in n 8 above, 447, notes that 'insiders, given the private information at their disposal and their lower monitoring costs, can offer the best terms. They are also often the only ones willing to support the company financially or in other ways (so-called propping) or in a better position to generate synergies or allocate resources more efficiently between inter-related business operations, etc)'.

[80] See J. Juste, n 17 above, 417.

[81] J. Sánchez-Calero, n 17 above, 912 notes that dispensation can also be granted to a director's related parties when affected by the ban laid down in Art 229.2 LSC.

[82] Cf J. Juste, n 17 above, 415.

[83] See n 77 above.

[84] Cf C. Paz-Ares, n 7 above, 447.

significance of the operation.

aa) The general meeting is the sole body competent to award dispensation in the cases of greatest consequence (Art 230.2 II LSC),[85] including:

- dispensation from the prohibition to derive advantage or remuneration from third parties;[86]

- transactions between the director and the company for a value greater than ten per cent of the company's assets;

- in limited liability companies, the grant of any manner of financial assistance, including company guarantees in a director's favour or when intended to establish a relationship for services or works with the company.

The general meeting is also the sole body that can grant dispensation from the prohibition to compete. In this case, however, the new rules stipulate that the operation must not be expected to be detrimental[87] to the company or that any such detriment must be expected to be offset by the benefits afforded by the dispensation. The dispensation must, moreover, be granted by an explicit and separate general meeting decision (Art 230.3 I LSC). The Reform also enables any shareholder to raise a proposal to the general meeting to dismiss directors competing with the company, in case the risk of harm to its interests became relevant (Art 230.3 II LSC).

bb) In all other cases, authorisation may also be granted by the administrative body,[88] providing the following conditions are guaranteed (Art 230.2 III LSC):

- The independence of the directors from the applicant for dispensation.

- The operation is harmless to the company's assets or, where appropriate, that it is carried out under market conditions and that the process is transparent.

It should be noted that the award of the dispensation does not exempt directors from their liability in any way whatsoever. The sole implication is that

[85] Further to new Art 190.1 e) LSC, when directors with conflicts of interest are also shareholders, they may not vote. See in this regard J.M. Embid, 'Los supuestos de conflicto de interés con privación del derecho de voto del socio en la Junta General (art. 190.1 y 2 LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, I, 114-117.

[86] C. Paz-Ares, n 8 above, 448, deems that this exclusive power refers at least to the part of the remuneration controlled by the General Meeting, but considers (cf fn 58) that 'in respect of the remuneration not linked to the duties of the position, such as consideration for the executive tasks performed by executive directors, the body competent to grant dispensation is the board of directors. In this regard, Art 230 LSC should be subordinate to the respective teleological reduction (see C. Paz-Ares, n 75 above, 125-126)'.

[87] The notion of damage should be interpreted broadly to include both loss and *lucrum cessans* (see J. Sánchez-Calero, n 17 above, 914).

[88] In the opinion of C. Paz-Ares, n 8 above, 448, authorisation may also be granted by 'another company body comprising independent directors only. This term should be interpreted not in respect of rules on reporting on corporate governance (see Art 529-*duodecies*.4 LSC), but on the understanding that its members are not tied by any particular bonds to the directors at issue other than the collegiate relationships deriving from membership in the same body. In listed companies, a report from the Auditing Commission (*arg. ex* Art 529-*quaterdecies*.4. g).3 LSC), or as appropriate the Appointments and Remuneration Commission, is normally necessary as well (see last paragraph of the aforementioned provision)'.

the operation is no longer subject to the stricter duty of loyalty, but to the laxer duty of care (although the decision to grant authorisation does not accord the beneficiary the privileged protection conferred by the business judgement rule, further to new Art 226.2 LSC).[89]

III. Directors' Liability

1. Purpose of the Reform

The regime governing directors' liability aims to lower the costs of monitoring directors' conduct via provisions which, by requiring restitution or indemnity for the damage caused by misconduct, serve as an incentive to manage companies in their owners' interests.[90]

The Act on Reform of the LSC introduces amendments to the directors' liability regime with a view to reinforcing directors' fiduciary duties, especially the duty of loyalty, and facilitating the exercise of liability actions.[91]

The Reform adopts essentially three mechanisms:

(i) enlarging the number of people subject to directors' liability by explicitly extending it to those in comparable positions;

(ii) elasticising the requirements for standing to bring a corporate liability action;

(iii) clarifying the judicial remedies that can be demanded of directors.

2. Objective Scope of Liability

The material prerequisites for claiming directors' liability are:[92]

- the existence of illicit or unlawful conduct on the part of directors;

- the existence of damage to company assets, in corporate liability actions, or to the net worth of shareholders or third parties, in individual liability actions; and

- the existence of a causal link between such action or omission and the damage caused.

The first of these requirements can, in turn, be split into two elements:

(a) the existence of an unlawful act or omission on the part of the directors;

[89] See in this regard C. Paz-Ares, n 8 above, 453, who also notes that the burden of proof lies with the plaintiff.

[90] J. Alfaro, n 8 above, 317.

[91] Cf T. Cid and T. García, 'El régimen de responsabilidad de los administradores', in J. García de Enterría ed, *La reforma de la Ley de Sociedades de Capital en materia de gobierno corporativo* (Cizur Meror: Clifford Chance-Thomson Reuters Aranzadi, 2015), 72.

[92] See by way of example of case law, the Judgements of the Tribunal Supremo 4 April 2003 no 345, 26 December 2014 no 732 and 3 March 2016 no 13, all available at https://tinyurl.com/go9gzxz (last visited 27 December 2020); and of legal doctrine V. J. Quijano, 'Los presupuestos de la responsabilidad de los administradores en el nuevo modelo del consejo de administración (arts. 236.1 y 2 LSC9)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 596.

(b) the existence of a criterion for the attribution of liability.

The Reform has specifically affected the objective scope of the directors' liability, because it has introduced changes that have an impact on these last two issues.

a) First, the delimitation of the unlawful conduct of directors has been affected as a result of changes in the rules governing directors' duties (introduction of the business judgement rule, broadening of the notion of related party, etc).

b) Secondly, new provisions have been added to establish when these conducts are to be attributed to directors of a company.

aa) the Reform first added, at the end of Art 236.1 I LSC, a phrase explicitly stating that directors shall be liable 'whenever negligence or wilful misconduct is involved'. With this specificity, the legislator clarified that the principle of fault-based liability, which is the general rule of liability, is also applicable with respect to the liability of directors, a position that had already been maintained by the courts and by the majority of the legal doctrine.[93] The wording adopted means all forms of negligence fall within it, both because of their content (culpa *in comittendo, in omittendo, in vigilando, in eligendo, in instruendo*, etc) and because of their severity (grave, slight, etc).[94]

bb) Secondly, the Reform has introduced the presumption that directors are guilty 'unless proven otherwise, when the act is contrary to the law or the articles of association' (cf the new Art 236.1 II LSC). This rebuttable presumption is a reversal of the burden of proof, but only in cases where the conduct is contrary to legal provisions or the articles of association. In these cases, therefore, the plaintiff must prove that the act is contrary to them and the causal link with the damage, while the defendant director must prove the absence of wilful misconduct or negligence.[95]

cc) Finally, it is necessary to comment regarding the ineffectiveness of general meeting exoneration of directors' liability foreseen in Art 236.2 LSC. Although this provision undergoes no formal change (so that it continues to provide that 'Under no circumstance shall the fact that the act or agreement has been adopted, authorised or ratified by the general meeting waive liability for the detrimental

[93] See for all, J. Quijano, n 92 above, 603; J. Juste, n 17 above, 447-448; M.I Grimaldos, 'La reciente redacción del artículo 236 de la Ley de Sociedades de Capital: ¿nuevos presupuestos? ¿nuevos responsables?' *Revista de Derecho de Sociedades*, 44, 233, 236-237 (2015); J. Hernando, n 17 above, 313, 344. Prior to the Reform, the notion of liability for conduct contrary to law or the articles of association prompted intense doctrinal debate. Whereas one group of authors deemed liability to be strict in such cases, the majority opinion was to continue to require wilful misconduct or guilty negligence as a criterion for establishing liability (see a recent reference to this debate in M.I. Grimaldos, 235-236).

[94] See by way of example J. Quijano, n 92 above, 603-604, stating that the latter distinction will be taken into account when quantifying the damage.

[95] Cf J. Quijano, n 92 above, 604, who further deems that the rebuttable presumption of Art 236.1. II LSC is applicable as well to acts contrary to company regulations.

agreement'[96]), there is an indirect impact of the Reform on this issue. Insofar as the application of this provision has been *de facto* altered as a result of the fact that the legislator has broadened the powers and possibilities of intervention of the general meeting in management affairs (see paradigmatically the new wording of Art 160 f of the LSC); and has introduced 'additional powers' of the general meeting of the listed company) by new Art 511-*bis* LSC.[97]

3. Subjective Scope of Liability

Another fundamental change in the directors' liability regime has been the extension and clarification of its subjective scope.[98] This has been carried out in a three different ways.

a) The first extension and clarification involves the concept of *de facto* administrator. Thus, although the LSC already provided for the extension of the directors' liability regime to de facto directors prior to the Reform, new Art 236.3 LSC has specified the content of this figure, indicating that it includes both (a) the *de facto* director in a narrow sense (at times called 'notorious *de facto* director'), understood to be 'persons who in actual practice perform a director's duties without any appointment or whose appointment is null or expired, or by virtue of some other appointment';[99] and (b) the shadow director,

[96] Unofficial English translation of Art 236.2 LSC, Ministry of Justice (Ministerio de Justicia), https://tinyurl.com/y97bhd07 (last visited 27 December 2020).

[97] Thus, legal doctrine deems that such exoneration may very likely be enforceable in certain cases: for instance, where the shareholders who themselves approved the instructions attempt to bring corporate liability action against the directors (see J. Juste, n 17 above, 452-453). More broadly, such exoneration would be justified in connection with matters for which competence is attributed to the General Meeting or which require its approval. In such cases the directors (as a general rule although with a few exceptions) would be obliged to implement those decisions, if validly adopted, and should not incur liability for any damages they may cause (see J. Quijano, n 92 above, 611). J.O. Llebot, n 5 above, 336, appears to support that view, deeming that directors are not subject to the general duty of care in instances where, pursuant to the provisions of Art 161 LSC, the General Meeting decides to issue instructions to the administrative body or makes the directors' decisions on certain matters contingent upon its authorisation. In these instances, directors would only be bound by the duty of care in respect of the measures taken to implement the decisions adopted by the General Meeting.

[98] For further detail see J. Juste, n 17 above, 453-462; M.I. Grimaldos, 'Presupuestos y extensión subjetiva de la responsabilidad. Solidaridad: artículos 236 y 237. Otras acciones por infracción del deber de lealtad: artículos 227.2 y 232', in L. Hernando ed, *Régimen de deberes y responsabilidad de los administradores en las sociedades de capital* (Hospitalet de Llobregat: Bosch, 2015), 328-329; I. Sancho, 'La extensión subjetiva del régimen de responsabilidad a los administradores de hecho y ocultos y a la persona física representante del administrador persona jurídica (art. 236.3 y 5)', in F. Rodríguez Artigas et al ed, *Junta General y Consejo de Administración en la Sociedad Cotizada* (Cizur Menor: Revista de Derecho de Sociedades-Thomson Reuters Aranzadi, 2016), II, 613-625.

[99] According to legal doctrine (by way of example, J.O. Llebot, n 5 above, 335), *de facto* directors are those who perform tasks characteristic of directors but have no valid appointment as such, ie, no legitimate power to do so. Such lack of legitimacy may be attributable to the absence of an appointment (someone only with powers of attorney, for instance), its invalidity (for example an irregular appointment) or its expiration.

ie the person 'under whose instructions directors act'.[100] The latter raises more practical uncertainties,[101] given the provision's breadth and possible application to groups of companies (legal doctrine has actually likened *de facto* directors to directors of the dominant company relative to its subsidiaries)[102] or even to the relations between creditor institutions and distressed companies.[103]

It is important to point out, however, that the new provision does not really imply any extension of this figure, but merely makes a simple clarification, because in fact it has merely incorporated the broad concept of a *de facto* administrator that had already been used by doctrine and jurisprudence.[104]

The Reform has thus contributed to establishing a broad and flexible definition of the term director, adopting a material rather than a formal approach to the concept. A director is anyone who acts as such, either directly, performing tasks characteristic of directors, or indirectly, handing down management instructions to a company's formally appointed directors. This premise defines the scope of directors' liability fairly, for such liability is required of anyone who, performing a director's duties, compromises company or third-party assets. It eliminates the need for directors to hold the title as such to be held liable for their actions.[105]

b) Secondly, new Art 236.4 LSC foresees, under some circumstances, the application of the directors' liability regime to the principal manager. Accordingly, where the company has a board of directors and there has not been a permanent delegation of powers to one or more managing directors,

[100] C. Paz-Ares, n 8 above, 449, fn 60, notes that shadow directors may only be regarded as *de facto* directors where they act as such on a routine basis. 'The legal definition should be construed as set out in the Expert Commission's proposal, ie, to refer to persons 'under whose instructions directors are used to acting'. It refers, then, not to sporadic instances, but to continuous and general practice'.

[101] Cf T. Cid and T. García, n 91 above, 75.

[102] See in this regard the comments of M.I. Grimaldos, n 98 above, 319-320; I. Sancho, n 98 above, 621-623; and E. Moreno, 'La responsabilidad de la sociedad matriz como administrador de hecho', in A. Díaz-J.C. Vázquez ed, *Estudios sobre la responsabilidad de los administradores de las sociedades de capital a la luz de sus recientes reformas legislativas y pronunciamientos judiciales* (Cizur Menor: Thomson Reuters Aranzadi, 2018), 253.

[103] As C. Paz-Ares, n 8 above, 449, fn 62, notes, with the recent crisis this new figure has been frequently used in the context of financial institutions that include in their financing or refinancing agreements certain clauses vesting them with the power to approve or veto the borrower company's management decisions. In that author's opinion, however, application of this figure to these cases must be taken *cum grano salis*.

The issue of shadow directors is closely related to the extension of directors' fiduciary duties to controlling shareholders (see C. Paz-Ares, n 8 above, 449; and more recently M. Sáez Lacave, 'Reconsiderando los deberes de lealtad de los socios: el caso particular de los socios de control de las sociedades cotizadas' *InDret* (2016)).

[104] See regarding case law I. Sancho, n 98 above, 619. V. también J. Juste, n 17 above, 454; Id, 'Acción social de responsabilidad contra los administradores: nuevos sujetos responsables', in F. Rodríguez Artigas et al eds, *Estudios sobre Derecho de Sociedades. Liber Amicorum Profesor Luis Fernández de la Gándara* (Cizur Menor: Thomson Reuters Aranzadi, 2016), 434.

[105] See M.I. Grimaldos, n 98 above, 320-321.

> 'all provisions regarding directors' duties and liabilities shall be applied to the person, whatever their position, who has the highest management role in the company, without prejudice to the actions of the company based on their legal relation to said person'.[106]

The *rationale* of the extension only for these managers is to be found in the distinctive features of the board of directors (or to be more precise, of the board without delegation of powers) in comparison with the other possible forms that the administrative body may take (existence of a sole director, or of several directors acting jointly or acting jointly and severally). Thus, unlike the latter, the board is the only one that does not have a permanent character. Accordingly, the legislator has probably presumed that, in these cases, unless one or more managing directors were appointed, there must necessarily be a person who is in charge of the company's management, with that permanent nature that the board lacks. This is certainly the role of managing directors, but as their appointment is optional, in the absence of it, the law will require the person in charge of the day-to-day management to comply with the duties of a director and to be liable as such. In other words, as has been said in very expressive terms, this person is going to be treated as if s/he were some sort of *de facto* managing director.[107]

c) Finally, the other extension of the subjective scope of directors' liability is the one concerning the natural person representing directors who are legal persons. Thus, new Art 236.5 LSC has regulated the legal status of this representative stating that this person

> 'must meet the legal requirements established for directors, shall be subject to the same duties and shall be jointly and severally liable with the corporate director'.[108]

Therefore, the Reform has practically treated the legal status of this representative as that of the corporate director

> 'with the exception that the provision does not directly affect the internal relations between them and that, where applicable, the remuneration

[106] For an analysis of the new provision, see E. Valpuesta, 'Equiparación con el administrador de la persona que tenga atribuidas facultades de la más alta dirección (art. 236.4 LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 633-659.

[107] Cf J. Juste, 'Acción social de responsabilidad contra los administradores: nuevos sujetos responsables', in F. Rodríguez et al eds, *Estudios sobre Derecho de Sociedades. Liber Amicorum Profesor Luis Fernández de la Gándara* (Cizur Menor: Thomson Reuters Aranzadi, 2016), 439-440.

[108] On this provision, see I. Sancho, n 98 above, 626-631.

Nonetheless, company interests could conceivably be adversely affected by body corporate director failure to fulfil its directorship duties to the exclusion of its natural person representative. In such cases legal doctrine deems that the representative, like other directors, may be exonerated under Art 237 LSC (see J. Juste, n 17 above, 462).

entitlement belongs only to the corporate director'.[109]

Certainly, even before the Reform, and despite the fact that the law did not state so, legal doctrine understood that the natural person representative had to comply with the legal requirements demanded in order to be a director and was subject to the same duties.[110] However, and this is the essential change with respect to the former situation, the majority of the authors understood that, in the absence of specific regulation,

> 'the natural person representative of the corporate director could not be held liable as a director *vis-à-vis* the managed company, since only the corporate person held the post and there was no direct contractual relationship between the managed company and the natural person'.[111]

4. Directors' Joint and Several Liability

a) The Reform has not modified the wording of Art 237 LSC, so this provision continues to establish the joint and several liability in those cases in which the administrative body that adopted the resolution or performed the harmful act is made up of a group of persons. Only those members of the administrative body

> 'who prove that having taken no part in its adoption or implementation, they were unaware of its existence or, if aware, took all reasonable measures to prevent the damage or at least voice their objection thereto'

are exempted from this liability.

Such joint and several liability may be equated to establishing a rebuttable presumption (*praesumptio iuris tantum*) of fault for all the members of the administrative body, and liability for all except those able to substantiate the existence of a cause for exoneration.[112] Besides, this entails a reversal of the burden of proof, inasmuch as the plaintiff is released from the need to identify the specific directors who should be held materially liable for the illicit act or omission.[113]

b) However, even though the wording of Art 237 of the LSC has not been amended, the Reform has had an indirect impact on the rule of joint and several liability of directors provided for in it. Since legal doctrine considers that the

[109] Cf J. Juste, n 107 above, 445.

[110] Cf J. Juste, 'Administrador persona jurídica', in C. Alonso ed, *Diccionario de Derecho de Sociedades* (Madrid: Iustel, 2006), 143

[111] Cf J. Juste, n 107 above, 443; I. Sancho, n 98 above, 626-627.

[112] See, by way of example J. Hernando, n 17 above, 345; J. García de Enterría, 'La composición del consejo de administración de las sociedades cotizadas: la función de los consejeros ejecutivos y dominicales', in F. Rodríguez Artigas et al eds, *Estudios sobre Derecho de Sociedades. Liber Amicorum Profesor Luis Fernández de la Gándara* (Cizu Menor: Thomson Reuters Aranzadi, 2016), 576.

[113] Cf T. Cid and T. García, n 91 above, 76.

application of this rule (as is generally the case for the entire directors' liability regime) must take account of the specific features of the different ways of organising the company's administration (sole director, several directors acting jointly or acting jointly and severally, or a board of directors), it is clear that, if the Reform has introduced important changes with respect to the regulation of the board of directors, (especially regarding that of listed companies), these changes must be reflected in the application of the liability regime, and as far as we are concerned here, from the rule of solidarity, to this form of administration.[114]

In this regard, it has been noted[115] that the fact that the Reform, on the one hand, has given legal relevance to the differentiation of internal and individual positions of directors and, on the other, has strengthened the supervisory role of the board as a whole, has an effect (a) in assessing the concurrence of the premises of unlawfulness (since this differentiation of functions makes possible that the content of fiduciary duties may be different in each case, which, in turn, allows for a differentiated application of the liability regime); and (b) in the extension of solidarity (since this differentiation also has an impact on whether or not the grounds for exemption can be applied).

5. The Exercise of Corporate Liability Action

One of the goals of the Reform, as has already been pointed out, was to tighten up the directors' liability regime in general, and more particularly, regarding conduct that might breach the duty of loyalty.[116] To this end, the legislator has introduced some changes concerning the exercise of corporate liability action against directors.

a) First, for listed companies, the Reform has lowered the percentage of share capital needed to request the calling of a general meeting to decide on whether corporate liability action should be taken and, in the event of company refusal or inaction, to bring such action in defence of the company's interest.

This reduction is the outcome of a double amendment. The first one is the removal of the requirement set out in Art 239 LSC that, in order to be able to make this request or bring this action, it is necessary to hold five per cent of the share capital, and its substitution with the need to be in possession of the same percentage as, in general, is necessary to request the calling of the general meeting. This change certainly has no impact on unlisted companies, since Art 168.1 LSC, which has not been amended, still stipulates that five percent of the share capital is required to call a general meeting. However, it does have it with respect to listed companies. In effect, and this is the second of the amendments, the Reform has introduced Section a) into Art 495.2 LSC, which has reduced this percentage for listed companies, leaving it at three percent of the share capital.

[114] Cf J. Quijano, n 92 above, 607-608.
[115] Cf ibid 608-610.
[116] Cf T. Cid and T. García, n 91 above, 76-77.

The result, in the end, is that the percentage of share capital necessary to make such a request or exercise such action is now lower in listed companies (three percent is enough) than in unlisted companies (which is still five percent).[117]

b) Secondly, the Reform has introduced the possibility that the aforementioned minority may also directly bring a corporate liability action 'when it is based on the breach of the duty of loyalty without the need to submit the decision to the general meeting' (cf new Art 239.1 II LSC).[118] Therefore, a clear distinction has been made between directors' disloyal and negligent conduct, a distinction which is based on the Reform's intention to be strict and severe with respect to breaches of the duty of loyalty, but benign and tolerant with respect to those of the duty of diligence.[119] This aim, no doubt to be welcomed, does not prevent the new literal wording from raising some doubts, which have rightly been raised by legal doctrine. Thus, it has been pointed out as being inaccurate that Art 239.1 II LSC states this direct bringing of an action can take place 'without the need to submit the decision to the general meeting'. The inaccuracy would result from the fact that this assertion may wrongly lead one to believe that, in order to bring this action, it would be necessary to make a prior request to the directors to convene the general meeting, when the truth is there is no need to make this request, nor is there any need to wait for the meeting to be held, in the event that the meeting was called.[120]

c) Finally, the Reform, with the aim of lifting or lessening a possible impediment to the bringing of corporate action by minority shareholders, has modified Art 239.2 LSC stating that

> '(i)n the event of total or partial estimation of the claim, the company shall be obliged to reimburse the claimant for the necessary expenses incurred within the limits provided for in Art 394 of Act 1/2000, of 7 January, on Civil Procedure, unless the latter has obtained reimbursement of these

[117] Nonetheless, these percentages have been deemed to be impossible to attain in large corporations, even where not listed (cf J. Hernando, n 17 above, 353).

C. Paz-Ares, is also critical of this provision in n 8 above, 451, arguing that standing requirements should have been relaxed further to concur with the percentages laid down in the LSC for challenging corporate decisions: one percent in non-listed and zero point one percent in listed companies (Arts 206.1 and 495.2 b) LSC).

[118] As J. Juste notes in 'Articulo 239. Legitimación de la minoría', in J. Juste ed, *Comentario* n 8 above, 465, the conversion of subsidiary into direct legal capacity has no effect on the nature of the action, which is regarded as being exclusively instituted by the company (for the intents and purposes of the right to the results of a favourable sentence) (see also 468).

[119] See above II.A).2. This distinction between breaches of the duty of loyalty and those of the duty of diligence is not shared by A. Marina, 'Legitimación y prescripción de las acciones de responsabilidad (arts. 239 y 241bis LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 680.

In the event that the claim against directors is based on both the breach of the duty of loyalty and the perpetration of unlawful acts, shareholders are likewise bound by the procedures laid down in Art 239.1 I LSC (cf J. Juste, n 118 above, 469-470).

[120] See in this regard J. Juste, n 118 above, 468.

expenses or the offer to reimburse the expenses has been unconditional'.[121]

This right to reimbursement merits some comment.[122] Firstly, it is applicable both where shareholders bring corporate liability action according to the derivative standing laid down in Art 239.1 I LSC and where they do so pursuant to the direct and active standing provided for in Art 239.1 II LSC. Secondly, in the absence of any indication to the contrary and bearing in mind that the aim of the provision is to establish the right to reimbursement, the provision's reference to a partially upheld claim must be understood as referring to the indemnity claim. That would only be the case when the finding calls for payment of at least part of the alleged damages. Partially upheld confined to concurrent claims, such as mere declarations about the prerequisites for claiming liability, would therefore be excluded. Thirdly, by analogy to the provisions of Arts 54.4 II and 72.1 *in fine* of the Bankruptcy Act (which acknowledge creditors' active derivative standing to bring non-personal nature actions of the creditor as well as revoke actions), the expenses to be reimbursed must be understood to be limited to the sum obtained by the company as a result of the legal proceedings. Fourthly, the right to reimbursement arises when the award is final or, where appropriate, when the proceedings are brought to an end by means of a settlement in which the directors assume the obligation to indemnify or as a result of the deposit of the sums claimed.

Creditors' derivative standing to bring corporate liability action remains. The Reform does not modify that scheme, under which creditors may bring corporate liability action against directors when it is not brought by the company or its shareholders, although only in the case that company's assets are insufficient to pay their credits (Art 240 LSC). This is, in any event, a hypothesis with limited practical significance, inasmuch as the insolvency regime generally takes precedence over directors' liability one in such cases.

[121] These provisions have nonetheless been criticised. In n 17 above, 354-355, J. Hernando deems that the Reform only apparently solves the problem of the expenses incurred by the minority when bringing corporate liability action. Prior to the Reform, the plaintiffs had to assume the cost of bringing action and could only recover expenses if the ruling upheld their claim in its entirety and the directors were both sentenced to pay the costs and solvent. In Hernando's opinion, the text of Art 239.2 LSC 'mitigates but does not eliminate that obstacle. Given the technical complexity of such cases, they require expert reports, which must be paid in addition to solicitors', barristers' and courtroom fees. Not all these expenses are regarded as transferable to the defendant if sentenced to pay court costs and in any event, the problem usually lies in defraying such expenses prior to bringing action and to the issue of the final sentence, which is when costs can be recovered'. C. Paz-Ares (n 8 above, 450 fn 64), in turn, is critical of the rule for calculating the costs laid down in Art 239.2 LSC. This author observes that inasmuch as the plaintiffs act not only in their own interest, but to the benefit of all shareholders, the problem of collective action is aggravated and can only be overcome with a more generous rule on costs than set out in the provision cited.

[122] For further detail see J. Massaguer, 'Artículo 239. Legitimación de la minoría', in J. Juste ed, *Comentario* n 8 above, 471-476.

6. Statute of Limitations Period for Liability Actions

The Reform also regulates the statute of limitations period for liability actions, settling some of the issues that were formerly the object of debate in connection with the application of Art 949 of the Commercial Code (which provides that 'Action against companies' managers or directors may not be brought when four years have lapsed since the date of their dismissal or resignation for whatsoever reason').

Two main issues were debated in this regard.[123] One was whether this provision was applicable to all director liability actions (the solution ultimately adopted in case law)[124] or only to corporate or individual liability action stemming from a contractual relationship: ie, excluding individual liability actions of a non-contractual nature, to which the one-year term laid down in Art 1968 of the Civil Code would be applicable (the prevalent view in legal doctrine).[125] The other was the day from which the term should be computed, deemed by case law to be the date of the director's resignation or dismissal for any valid cause (as stipulated in Art 949 of the Commercial Code),[126] but by part of legal doctrine as the day on which action could be brought.[127]

This question is now settled in new Art 241-*bis* LSC,[128] which establishes a single, four-year statute of limitations period for both corporate and individual

[123] Regarding this question see J. Massaguer, 'Artículo 241bis. Prescripción de las acciones de responsabilidad', in J. Juste ed, *Comentario* n 8 above, 478-479

[124] See legal doctrine laid down in Judgement of the Tribunal Supremo 20 July 2001 no 749, available at https://tinyurl.com/go9gzxz (last visited 27 December 2020).

[125] On the irrationality of applying the term set out in Art 949 of the Commercial Code to individual action stemming from direct damages to shareholders or third parties, see the remarks of A. Carrasco, 'El nuevo régimen legal de prescripción de las acciones de responsabilidad contra los administradores sociales', in A. Carrasco et al eds, *Las reformas del régimen de sociedades de capital según la ley 31/2014* (Madrid: Gómez-Acebo & Pombo, 2015), 9-10.

[126] By way of example, see Judgements of the Tribunal Supremo 26 October no 986, 12 March 2010 no 24 and 11 November 2010 no 700, all available at https://tinyurl.com/go9gzxz (last 27 December 2020). Nonetheless, applying this rule was ticklish in certain instances, such as when the director's dismissal was not registered at the (Spanish) 'Mercantile Registry', or when the lack of such registration was replaced by knowledge of the events by the plaintiff (cf A. Carrasco, n 125 above, 9) or when a *de facto* director is involved.

[127] Cf J. Massaguer, n 123 above, 479.

[128] For further details on the regulations introduced by this provision, see A. Marina, 'Legitimación y prescripción de las acciones de responsabilidad (arts. 239 y 241bis LSC)', in F. Rodríguez et al eds, *Junta General y Consejo de Administración en la Sociedad Cotizada* (Cizur Menor: Revista de Derecho de Sociedades-Thomson Reuters Aranzadi, 2016), II, 685-687; and J. Massaguer, n 123 above, 479-487.

That notwithstanding, some authors hold a favourable opinion of Article 949 of the Commercial Code and even deem that 'the new wording of Art 241bis LSC (...) should lead to the conclusion that it is a quasi-declaratory rule, inasmuch as it does not substantially alter the former situation governed under Art 949 CC' (see J. Alfaro, '¿Cuál es el *dies a quo* para calcular el plazo de 4 años de prescripción de las acciones de responsabilidad contra los administradores?', entry in the author's blog dated 18 December 2014, available at https://tinyurl.com/y5jwbz9q (last visited 27 December 2020).

liability actions[129] and specifies that the statute runs from the date on which action can be brought.[130]

Controversy has also arisen around the scope of the new rule in connection with the applicability or otherwise of Art 241-*bis* LSC to the so-called 'liability for debts' set out in Art 367 LSC.[131] The possibility of this application is rejected by some authors on the grounds of first the respective position of each article[132] and second on the view that as the liability referred to in Art 367 LSC constitutes a passive assumption of debt, the statute of limitations period should be the same as for the main action against the company, of whom the directors are 'legal guarantors'.[133] Other authors acknowledge that the special legal nature of directors' joint and several liability under Art 367 LSC precludes its treatment as typical liability for damages. They nonetheless deem there to be no reason to break the uniformity of criterion on this issue applied to date in case law, whereby the statute of limitations period for this action is governed not by Art 241-*bis* LSC but by Art 949 of the Commercial Code.[134]

7. Compatibility of the Corporate Liability Action with Other Actions

Finally, the Reform also systematises the consequences of directors' breach of the duty of loyalty, which isnecessary given the absence of a consensus in legal doctrine and case law. Although some authors and judges deemed that companies could only file for liability, further to the general doctrine on

[129] That does not mean that the way to determine the *dies a quo* is the same in corporate as in individual liability action (for the differences, see A. Carrasco, n 125 above, 10-11).

Moreover, in A. Carrasco's opinion (*Reformas*, 12) the four years term laid down in new Art 241bis LSC does not necessarily apply to all individual liability actions, even though this has been the law maker's intention. The author reasons that as civil suits for damages, such actions are subject to the statutes of limitation established in regional civil law (eg, where Catalonian law prevails, the applicable term is 3 rather than 4 years, as laid down in Art 121.21d of the regional Civil Code).

[130] See, however A. Carrasco's remarks in n 125 above, 10, related to the start date for computing the term and in particular the effect of (legal, doctrinal and jurisprudential) subjectivisation of statutes of limitation on that date.

[131] For a synthesis of this discussion, see M. García-Villarubia, 'La prescripción de las acciones de responsabilidad de administradores. El supuesto de la responsabilidad por deudas sociales y la responsabilidad de los liquidadores' *El Derecho. Revista de Derecho Mercantil*, 31 (2015), available at https://tinyurl.com/yxq7hty8 (last visited 27 December 2020).

[132] Art 241-*bis* LSC is included under Title VI ('Company administration'), Chapter V ('Directors' liability') of the LSC, whereas Art 367 LSC is found under Title X ('Winding up and liquidation'), Chapter I ('Winding up'), Sub-chapter 2 ('Winding up for causes provided by law or in the articles of association').

[133] By way of example, see A. Carrasco, n 125 above,10.

[134] Cf R. Cabanas, 'Sobre el nuevo sistema de cómputo de las acciones de responsabilidad contra los administradores' *Diario La Ley*, 8513, Sección Tribuna, 7 April 2015, Ref. D-133. J. Massaguer, n 123 above, 482, likewise supports applicability, based not only on the uniformity of criterion in case law but also on the legal vacuum, the equivalence of the reasoning between both cases (given the coincidence of the circumstances prompting the action), the object of the remedy sought, the narrow margin of the yearly term and the clear existence in this realm of the *pro actione* principle.

contracts, the remedies open to them are much broader.[135]

First, new Art 227.2 LSC attributes companies' status as claimants not only for damages (through corporate liability action), but also for unjust enrichment.[136] The aim of the latter action, which often largely overlaps with claims for damages, is to ensure that all the earnings obtained by a disloyal director are attributed to the company, while requiring the director to individually bear the losses that such conduct may cause.[137] Insofar as it supplements the content of the duty of loyalty, the new articles is also a substantive rule, for it implicitly bars directors from earning any remuneration resulting from their position except as owed them by the company as consideration for their services.[138]

Secondly, the new wording of Art 232 LSC, in turn, stipulates that the bringing of a corporate liability action against disloyal directors

> 'is not incompatible with bringing actions for dismissal, removal of effects or, as appropriate, cancellation of the acts or agreements concluded by directors in breach of their duty of loyalty'.[139]

Lastly, companies may, in addition, file for restraining orders to oblige directors to refrain from prohibited conduct where it has not yet been consummated (claim deriving from the entitlement to demand specific compliance with the non-competition duty binding on directors).[140]

[135] See J. Alfaro. 'La reforma del gobierno corporativo de las sociedades de capital (XIII). El deber de lealtad de los administradores', blog entry of 1 July 2014, available at https://tinyurl.com/y5xqg94s (last visited 27 December 2020).

See also in this regard observations by C. Paz-Ares, n 8 above, 455-457, especially in connection with the possibility of bringing action for unjust enrichment prior to the Reform.

[136] New Art 227.2 LSC provides that 'Directors' infringement of the duty of loyalty shall determine not only the obligation to indemnify for the damage caused to company assets, but also to return to the company the unfair gains obtained'. See in this regard, J. Juste, n 54 above, 370.

Regarding the action for damages, it is convenient to point out, as C. Paz-Ares, n 8 above, 455, fn 71, notes that the profit that the company may have earned from the operation is not deducted in the calculation of damages in such suits, for the *compensatio lucri cum damno* principle is not acknowledged in Spanish law, as inferred in Art 1686 of Civil code.

[137] See J. Alfaro, 'La reforma del gobierno corporativo de las sociedades de capital (XIII). El deber de lealtad de los administradores', blog entry of 1 July 2014, available at https://tinyurl.com/y5xqg94s (last visited 27 December 2020).

New Art 227.2 LSC is not confined to regulating the amount of the indemnity, as might be thought at first glance, but also essentially stipulates that the company may not only sue disloyal directors for damages, but also for unjust enrichment.

[138] Cf J. Juste, n 54 above, 371.

[139] For more on this provision, see J. Massaguer, 'Artículo 232. Acciones derivadas de la infracción del deber de lealtad', in J. Juste ed, *Comentario* n 8 above, 427; J.I. Peinado, 'Las acciones derivadas de la infracción del deber de lealtad (art. 232 LSC)', in F. Rodríguez Artigas et al eds, *Junta General* n 5 above, II, 575-588

[140] See J. Alfaro, n 137 above. This author notes that directors 'dealings with third parties or shareholders must be regarded as null and void insofar as they are contracts aim to prejudice a third party' (the company). Hence the company may bring action to prevent the director from conducting such dealings, if not already undertaken, or otherwise to require their interruption and nullification

IV. Conclusion

The Reform has introduced major changes concerning directors' legal status by modifying the two pieces that make it up: the regulation of directors' duties and their liability regime.

The Reform was intended to correct the inefficiencies of the previous regulation, as well as to update it, in order to convert directors' legal status into a tool that would improve the corporate governance. To this end, the content of directors' duties has been clarified and their liability scheme has been re-strengthened.

In relationship to the first element of this legal status, that relating to directors' duties, the Reform has profoundly modified the regulation of the duty of care as well as the duty of loyalty. Three fundamental adjustments have been introduced regarding the duty of care. First, its content has been made more specific, indicating that it includes the requirement to fulfil the legal and statutory duties, to have an adequate devotion to their duties, to gather the information needed and adopt the measures required for a good management and control of the company. Secondly, the Reform specifies that the standard of compliance can vary for each director, since the nature of the position and functions of the director must be taken into account. Thirdly and most importantly, its implementation has been softened due to the newly introduction in our legal system of the so-called 'business judgement rule'.

Equally significant are the changes made by the Reform with respect to the regulation of the duty of loyalty. Thus, its general content has been re-formulated by eliminating the inaccuracies of the previous diction. Similarly, it has been clarified that its infringement not only gives rise to the obligation to compensate for the damage suffered, but also to return to the company any unjust enrichment. Lastly, the main obligations that derive from this duty of loyalty have been collected, making it easier to identify the conducts that pose a breach thereof.

Concerning the second element of directors' legal status, their liability regime, the Reform has introduced important changes, most of which essentially aimed to strengthening it. Therefore, it has been clarified that the general rule for attribution of responsibility also applies to the directors' liability, which means that they will only be liable responsible if there is fraud or negligence.

Secondly, the subjective scope of application of this liability regime has been broadened, since it covers not only the director strictly speaking, but also the de facto director, the hidden director, the main executive of the company (in certain cases) and the natural person representative of the legal person director. In addition, the requirements and legal standing cases for filing corporate liability actions have been made more flexible by lowering the percentage of

of the effects thereof. In this respect, legal doctrine may be of substantial assistance in connection with the application of the rules governing action that can be brought in the event of unfair competition as laid down in Act 3/1991 on Unfair Competition.

capital demanded in listed companies and removing its subsidiary nature in cases where it is based on a breach of the duty of loyalty, which facilitates its exercise by the minority; this fact is also favoured by the introduction of a reimbursement right in the event of total or partial estimation of the claim.

Finally, the remedies against directors in the event of breach of the duty of loyalty have been clarified. Thus, it is explicitly stated that these are not only limited to the action for damages, but also included the actions for challenging, dismissal, removal of effects or, as appropriate, cancellation of the acts or agreements concluded by directors.

In conclusion, although there are issues relating to the Reform that may be subject to criticism (the delimitation of related parties, the percentage of share capital that is still necessary to be able to bring the corporate liability action, the generalization of the dies a quo of the statute of limitations period to individual liability actions or the type of expenses that can be refunded), the general opinion that the Reform is very positive as a whole, since it has meant an important modernization of the legal statute of directors. This improvement has placed the Spanish legislation among the most advanced regulations within our neighbouring countries.