NEW INTERPRETATION OF THE REMUNERATION OF DIRECTORS - PWC

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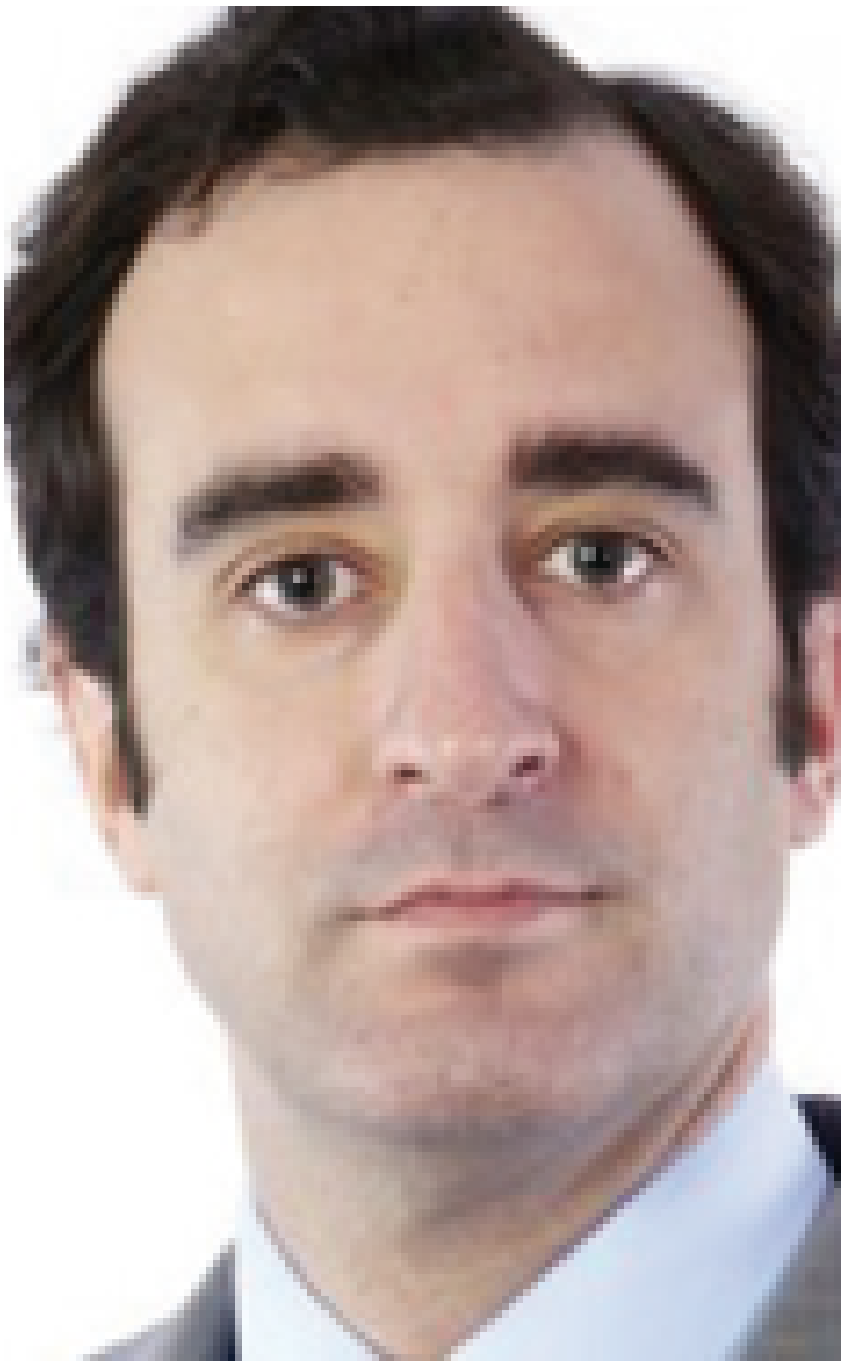

Category: Corporate

Since the amendment of the Spanish Companies Act made by Law 31/2014 and its interpretation by the Directorate General for Registries and Notaries (mainly by its resolution of 17 June 2016), and also by the majority of doctrine and different courts, a kind of duality regarding the remunerations received by any director of a non-listed company has been admitted.

The first one is the remuneration that they could receive in his/her condition as director, that would require: (a) a provision in the by-laws including the system for such remuneration; and (b) a General Shareholders Meeting deciding about the maximum yearly remuneration for all the directors (art. 217 Companies Act).

The second one is the remuneration of any director who, in addition to his/her inherent, exclusive and non-delegable functions, could have executive functions (for example, as an executive or managing director). In this case, for such remuneration to be valid it was not necessary to have a provision in the by-laws nor a resolution of the General Shareholders Meeting, since it was not considered as remuneration received "as a director". In this case, only a written contract between the company (represented by the Board of Directors, to decide with the favourable vote or 2/3) and the relevant director (who could not participate in the deliberation and vote) was required. All of it in accordance with article 249.3 of the Companies Act.

The Spanish Supreme Court, in a recent judgment dated 26 February 2018, revises such interpretation and concludes that the relationship between both articles must be understood as cumulative for executive directors, and therefore article 217 must be applicable to any and all remunerations received by any director, including those perceived by any director for his/her executive functions.

In this regard, the Supreme Court argues that the remuneration system designed by the law can only be understood as being structured in three levels:

The first level, to be included in the company´s by-laws, must foresee any type of remuneration to be received by any director, either because of their functions "as directors" or because of their executive functions.

The second level, to be approved by the General Shareholders Meeting, must decide the maximum yearly remuneration of all the directors, including the remuneration for their executive functions, with such maximum in place until a new shareholders meeting modifies it.

And the third level, consisting of the resolutions of the Board of Directors concerning the distribution of such maximum remuneration among its members, taking into consideration the functions and responsibilities of each of them. Furthermore, if any of them performs executive functions, a contract between such director and the company must be signed, always within the scope and maximum limits given by the by-laws and by the shareholders in the two prior levels.

It can be said that the interpretation arising from this judgement completely alters the most up-to-date doctrine, which was not easy to reach given the – in our view – poor drafting of the Companies Act with regard to this particular issue. If this new interpretation is consolidated (either by courts and tribunals or by a new amendment to the law to make matters clearer), certain necessary actions

must be taken by Spanish non-listed companies in order to avoid a scenario where any director receives any remuneration without prior provision in the by-laws, and without such remuneration being under the maximum yearly limit approved by the General Shareholders Meeting for all the directors. All of it in accordance with article 217 of Spanish Companies Act.

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