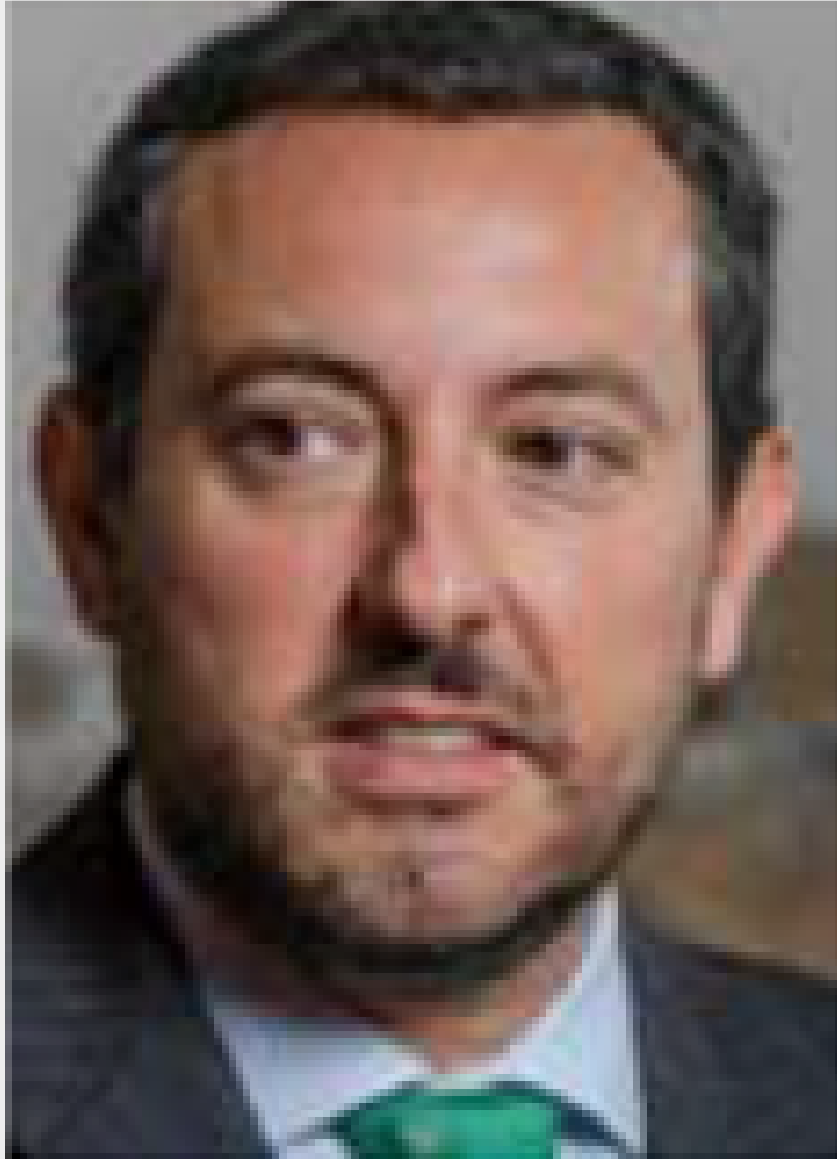


POTENTIAL LIABILITY OF ADMINISTRATOR OF COMPANY SUBSIDIARY - DELOITTE ABOGADOS

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By virtue of a recent Resolution dated 11 December, 2015, the Spanish Supreme Court has clarified an existing legislative gap deriving from the current insufficient regulation of corporate groups in Spain.

The Supreme Court analyses the potential liability of the administrator of a subsidiary company in the event the subsidiary (and indirectly third parties, such as minority shareholders and creditors) are adversely affected following specific instructions from the management of the group due to "corporate group interest" reasons.

The Supreme Court confirmed that the administrator cannot be exonerated of responsibility on the grounds that he was acting under the instructions of the management of the group, and resolved he would be responsible on the basis of infringement of his loyalty duty to the corporate interest of the subsidiary.

While a detailed systematic regulation on corporate groups in Spain is still a pending issue (note that it is foreseen in the Spanish commercial code draft, currently in the process of approval, but it is still at a very preliminary stage), we must assume that many aspects in this regard arising from the corporate business practice are to be dealt with by the courts.

One of these issues (i.e. the conflict of interest between the corporate group and a subsidiary, and how the decisions adopted by the subsidiary's administrators under these situations, following the instructions of the management of group, may impact on their liability) has been addressed by the Spanish Supreme Court (*Tribunal Supremo*) in its Resolution dated 11 December, 2015.

In wider terms, the Supreme Court Resolution deals with the assignment of some of a client's portfolio from a subsidiary to another company in its group. Such an assignment, which is considered by the Supreme Court to be harmful to the subsidiary, was performed by the subsidiary's administrator following instructions from the management of the group. One of the minority shareholders of the harmed subsidiary claims the damages against the administrator.

The Supreme Court Resolution confirms that the administrator cannot be exonerated of his liability on the grounds that he was acting under instructions received from the management of the group, and resolved he would be responsible on the basis of infringement of his loyalty duty to the corporate interest of the subsidiary.

Inter alia, the following statements of the resolution are considered of special interest:

- The legal duties of the administrators, and in particular the obligation to protect the corporate interest in case of conflict (*Loyalty Duty*), shall exclusively refer to the company they represent, excluding, among others, other companies of the group or the "corporate group interest" itself.
- The "corporate group interest" does not excuse any harm caused to a subsidiary, which ultimately entails unfair damage to its minority shareholders and creditors. The administrators of the harmed subsidiary shall keep their own scope of autonomy and cannot shield themselves, to avoid their responsibility, by using the argument that they are following instructions received from the management of the group when those instructions harm the interests of the subsidiary they represent.
- In the event that a conflict of interest between the corporate group and a particular company of such group arises, an adequate balance between both interests shall be obtained, such balance entailing an adequate and flexible management of the corporate group, but in no event causing a harm to the subsidiary (so that the interest of its minority shareholders and creditors are also being duly protected).
- The above referred balance may be obtained by using "compensating advantages" (*ventajas compensatorias*) by the corporate group. In other words, a specific action which is taken under a corporate group interest may be allowed, even if it is individually considered damaging for the subsidiary, provided that other advantages to compensate such damage are obtained by the

subsidiary. The Supreme Court Resolution defines the "compensating advantages" concept in very wide terms, specifying that they can be simultaneous or subsequent to the eventual harmful act to the subsidiary, but also previously obtained if it may be considered that, before the harmful act, the subsidiary obtained a relevant financial benefit because of the fact of being part of the group. According to the Supreme Court Resolution, an "overall balance" on the advantages rendered in both directions shall be evaluated to determine if there is a negative outcome for the subsidiary. In any event, the "compensating advantages" obtained by the subsidiary must have an economical value, be proportional to the damage suffered by the subsidiary and be verifiable (vague or ambiguous advantages shall not be considered).

- Finally, the survival of the subsidiary shall always be a limit to the corporate group interest. No acts performed on the grounds of the corporate group interest shall involve putting in danger the solvency or feasibility of the subsidiary

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