

PRACTICAL APPLICABILITY OF THE DELEGATION OF POWERS IN CAPITAL COMPANIES (An approach to the questions raised in Spanish Law)

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Abstract

Commercial Law, in particular Company Law, is subject to continual changes due to the constant need to adapt to reality. Proof of this is the reform of the Capital Companies Law under Law 31/2014 of 3 December, which amends the Capital Companies Law in order to improve corporate governance. The aim of this reform is to improve the corporate governance of corporations. One of the measures taken to do this is to strengthen the role of the board of directors as supervisor of the actions performed by executive directors. Some of the changes included to meet this objective are the board's obligation to meet quarterly, an increase in the number of non-delegable powers, and the need for the CEO's or an executive director's relation within the company to be reflected in a contract approved by the board of directors. In this article, we aim to analyse the above points.

Keywords

Corporate governance, board of directors, delegation of powers, management contract, remuneration, executive functions, non-delegable powers.

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I. INTRODUCTION

This study addresses the question of the current state of the delegation of powers as a result of the amendment of the Capital Companies Law (Royal Legislative Decree 1/2010, of 2 July, approving the Consolidated Text of the Capital Companies Law) under Law 31/2014 of 3 December, which amends the Capital Companies Law in order to improve corporate governance.

In light of the developments in the cited Law, we aim to re-examine an issue which has always raised concerns: the delegated management of companies. This Law introduces important changes affecting different aspects of corporate activity. One aspect of particular relevance is the delegation of powers. In this respect, the Law provides for a new corporate management contract, with special reference to the remuneration of board members who perform executive functions, and the modification of the regime for non-delegable powers.

The words of CRISTOBAL MONTES are especially opportune with respect to this issue. When referring to public limited companies, he points out that it is difficult to find another legal concept where changes and alterations are very much the order of the day, and where economic tensions, factors and characteristics are so influential, pre-emptory and critical¹. Consequently, special attention should be given to the amendments made to the management of capital companies. In this

respect, we should refer to the movement known as *corporate governance* which, among its other manifestations, gave rise to the Law discussed in this study. The main contribution of corporate governance, in general terms, is to explicitly ascertain that it is impossible for members of the board to perform the functions that they have traditionally been entrusted with and to redirect the board's role towards one of management control. It endeavours primarily to transform the board of directors into a monitoring body and to guarantee that it fulfils its role adequately.

Over the last few years, the corporate governance of companies has come to have a far-reaching impact for two fundamental reasons². On the one hand, there is a general conviction of the usefulness of these types of business practices insofar as everyone accepts the value of an adequate and transparent management of companies. On the other hand, the structure of corporate governance in companies can be complex, with a poor and inadequate composition of company governing bodies, lack of transparency and unwise decision making. These are some of the causes that have led to a review of company management systems and more specifically of the board of directors of capital companies.

Spain has been aware of this movement and shares in the belief that it is important for companies to establish corporate governance³. Thus, in 1998, the Olivencia Report was drawn up by the Special Committee for the Study of an Ethi-

¹ CRISTOBAL MONTES, A., *La administración delegada de la sociedad anónima* [EUNSA] Pamplona, 1977, p. 11.

² In this respect, v. the Presentation of Statement of Legal Reasons 31/2014, of 3 December, which amends the Capital Company Law in order to improve corporate governance.

³ The first initiatives in this area come from professional associations in the business world. The starting point is the document "Reflexiones sobre la reforma de los Consejos de administración" drawn up by the 'Comité de Gestión Empresarial y Productividad del Círculo de Empresarios' in 1995. This document is followed by another by the Círculo de Empresarios in 1996, called "Una propuesta de normas para un mejor funcionamiento de los Consejos de administración", which includes a catalogue of suggestions for listed companies to adopt through self-regulation.

cal Code of Company Boards. Following this, in 2003, the Aldama Report was drawn up by the Special Committee for Transparency and Security in Financial Markets and Listed Companies, modifying the former Code and adding new recommendations. Finally, in 2006, a Special Working Group was created to harmonize and update the contents of the Good Governance Code in line with European tendencies, which led to the Unified Code of Good Governance for Listed Companies, updated in 2013 and in force until the approval of the new Good Governance Code through the Agreement by the Board of the Spanish National Securities Market Commission of 18 February 2015.

Our country has also been aware of the discussion about the expediency of using non-binding recommendations based on the “comply or explain” principle, or alternatively, to resorting to mandatory legal norms as measures to promote good governance, as referred to in the Statement of Legal Reasons 31/2014. Along with the above-mentioned Codes, the Spanish legislator has also adapted the legal system in areas of corporate regulation, where deemed necessary, through different laws. For example: Law 44/2002 of 22 November for Financial System Reform Measures; Law 26/2003 of 17 July amending the Securities Market Law and the Consolidated Text of Company Law approved by Royal Legislative Decree 1564/1989 of 22 December in order to reinforce the transparency of listed public limited companies; Law 25/2011 of 1 August, a partial reform of the Capital Company Law; or, the Sustainable Economy Law 2/2011 of 4 March

The direct antecedent of Law 31/2014 can be found in the Agreement of the Council Of Ministers of 10 May 2013, whereby a Committee of experts in matters of corporate governance was created to propose initiatives and regulatory re-

forms for guaranteeing the good governance of firms, and to lend support and advice to the NSMC in the modification of the Unified Code of Good Governance of Listed Companies. On 14 October 2013, the Committee’s Report was presented, and on the basis of this report, respecting almost entirely its recommendations, this Law was drawn up.

The modifications that the Law introduces in the Consolidated Text of the Capital Company Law can be broadly grouped into two categories:

- Those concerning the general shareholders’ meeting, which we will not discuss as it is beyond the scope of our study.
- Those concerning the administration body (duties of diligence and loyalty; liability regime, directors’ remuneration ...) and more specifically, those concerning the board of directors. Important new elements affecting different aspects of corporate life are introduced in this area. The following epigraphs include an analysis of these new elements.

II. GENERAL CONSIDERATIONS IN RELATION TO THE DELEGATION OF POWERS.

1. Corporate management.

The Capital Company Law maintains two types of corporate bodies in the internal structural order, which are mandatory for all companies:

- The general shareholder’s meeting, consisting of an assembly and regulated in Title V.
- And the management body regulated in Title VI.

As indicated in article 210 of the Capital Company Act, company management may be entrus-

ted to a single director, several directors acting jointly or jointly and severally or a board of directors. Regardless of which form this administration body takes, its responsibility is to manage and represent the company. For the most part, much of our doctrine understands that the management or administration of a company refers to all the different actions carried out regarding corporate assets and those that aim to achieve the corporate purpose as stipulated in the bylaws⁴.

With respect to the composition of company administration, for the most part, our doctrine has always differentiated between management and representation. This criterion is still followed in article 209 of the current Capital Company Law, which establishes that the directors have the power "to manage and represent the company under the terms provided in this Law". Management comprises actions that do not go beyond the internal sphere of the company, and representation comprises actions that link the company to third parties⁵. At the same time, a new distinction can be made within management actions: those related to company organization and those related to corporate business⁶, in other terms, "inter-

nal company management" or "actual business management"⁷. However, this doctrinal approach of separating management and representation, which is now legal, has not been unanimously accepted by the doctrine because these activities are not considered to be completely different⁸.

But, regardless of the composition of company management, it is important to highlight that management activity constitutes a coherent whole involving actions and decisions with respect to the same assets, those of the company, and with the same purpose, that of achieving its corporate objective. However, this unified procedure consists of a series of phases or stages that are usually articulated as follows: planning, direction, execution and control⁹. Apart from execution (since this term refers to material activities beyond the scope of management in its strictest sense), management itself comprises a triple task that can be broken down into a series of different elements. These three tasks consist of:

a) Formulating the company's strategy and objectives, taking into account internal resources and the company's circumstances.

⁴ CRISTOBAL MONTES, *La administración...*, p. 74; GIRÓN TENA, J., *Derecho de Sociedades Anónimas (según la Ley de 17 de julio de 1951)* [Publicaciones de los Seminarios de la Facultad de Derecho, Universidad de Valladolid] Valladolid, 1952, p. 359; IGLESIAS PRADA, J. L., *Administración y delegación de facultades en la sociedad anónima* [Tecnos] Madrid, 1971, p. 99; RODRÍGUEZ ARTIGAS, F., *Consejeros delegados, Comisiones Ejecutivas y Consejos de Administración* [Montecorvo] Madrid, 1971, p. 76; SUÁREZ-LLANOS GÓMEZ, L., "Sobre la distinción entre administración y representación de las sociedades mercantiles," *Revista de Derecho Mercantil (RDM)*, n^o 85, 1962, p. 47, pp. 59 to 61.

⁵ In this sense, IGLESIAS PRADA, *Administración...*, p. 99.

⁶ V., also, RODRÍGUEZ ARTIGAS, *Consejeros...*, p. 76 and "La delegación de facultades del Consejo de administración de la sociedad anónima", *Revista Derecho de Sociedades (RdS)*, n^o 1, 1993, p. 91, p. 101.

⁷ Thus, POLO SÁNCHEZ, E., "Los administradores y el Consejo de Administración de la Sociedad anónima. Arts. 123 a 143 de la Ley de Sociedades Anónimas", *Comentario al Régimen Legal de las sociedades mercantiles*, t. VI, (dir.) Uría, Menéndez, Olivencia, [Civitas] Madrid, 1992, p. 478.

⁸ Thus, for example, the professor SUÁREZ-LLANOS GÓMEZ, L., *RDM*, n^o 85, 1962, p. 48.

⁹ CRISTOBAL MONTES, *La administración...*, pp. 74 & 75; RODRÍGUEZ ARTIGAS, *Consejeros...* pp. 76 & 77.

b) Drawing up a set of general plans for applying the general policy or strategy formulated, and simultaneously creating a proper organization for the execution of these plans.

c) Directing and controlling the organization created according to this policy.

Note that our attention is drawn to these categories because they reveal the real situation of company management. That is to say, it is a procedure that can become highly complex according to the dimensions of each company and is linked to other factors, referred to below, that reveal how the traditional configuration of management bodies must undergo important changes if they are to face the business world successfully¹⁰.

Undoubtedly, the organization of company administration in the form of a board has its advantages compared with the other possibilities. There are two main reasons for this: on the one hand, the presence of various directors makes it possible to weigh up and balance the interests at stake; and on the other hand, the mutual control that is established among the directors in these cases. Nevertheless, it is also a verifiable fact that the board has proved to be an entity that is not always capable of carrying out a company management that is effective and suited to reality. The main problem that it presents, apart from the abovementioned complexity of the management procedure itself, is the need to act collectively in order to develop its management function. This circumstance implies that the board could prove to be operationally weak and may cease to be a suitable entity for effective company manage-

ment. In addition, boards of directors occasionally comprise people without the qualifications or training necessary to deal with the task of managing a company. This situation means that in practice actions by the board as such are being replaced either by its chairman, a general director or delegated bodies. In this sense, and in the interest of a more flexible, agile and effective performance, its management function usually consists of a dual system: on the one hand, there is a multi-person body whose functions are fundamentally to control; and on the other, one or various one-person or collegial bodies which ultimately manage the company. This separation is required in the regulations where a dualist system of corporate management is in place, while in others, where the single system prevails, it is carried out through the so-called delegation of powers¹¹.

Through the delegation of powers, it is therefore possible to create a series of decision centres with a sphere of competence that includes the material execution of specific functions as well as a certain authority and the corresponding responsibility it entails¹². However, two clarifications should be made:

1. The creation of these decision centres, which have a certain autonomy, does not imply breaking up the unity aimed for throughout the management process. After all, this process responds to the idea of prioritization that ensures a coordinated implementation of all actions and decisions in order to achieve a common goal.

2. There are functions which are considered non-delegable. As the board is the highest management body of the company, it must at the

¹⁰ This is expressed by CRISTOBAL MONTES, *La administración...*, p. 76.

¹¹ Among others, SÁNCHEZ CALERO, F., *Los administradores de las sociedades de capital*, Thomson-Civitas, Cizur Menor, 2005, p. 546.

¹² RODRÍGUEZ ARTIGAS, *Consejeros...*, p. 82.

very least establish the corporation's general policy, which is essential and central to management. "In this way, a distinction, the limits of which are not always clear, is established between the nucleus or essence of power in management, which is non-delegable, and the rest of the activity that is usually called 'day-to-day management', which can be entrusted to others"¹³. It is in the context of non-delegable powers that numerous amendments have been introduced in relation to the previous regulation. We will return to this point further on in the study.

2. Regulation of the board of directors in the Capital Company Act.

The regulation of the board of directors under the Capital Company Act is based on a mandatory rule applicable to public limited companies which is contained in article 210.2. Article 210.2 states that in a public limited company when joint management "is entrusted to more than two directors, they will form a board of directors". Subsequently, in Chapter VI, a series of regulations are included which are only applicable to the case of a collegial management. Thus, articles 243 to 248 refer to the system of proportional representation, co-optation, and the organization and *modus operandi* of the board. A special mention should be given to the new point 3 of art. 245 referring to notice of board meetings, which requires the board to meet at least once every quartile, to its constitution and to the adoption of agreements. However, the articles that are of most interest to the subject of this study are article 249, related to the delegation of powers by the board of directors (amended by Law 31/2014 of 3 December), and article 249 *bis* about non-delegable powers (intro-

duced by Law 31/2014 of 3 December).

3. Amendments to the delegation of powers.

As we have previously indicated, the Law reforming the Capital Company Law has introduced important amendments in relation to the delegation of powers by the board of directors of capital companies. This reform comes within the scope of corporate governance and is aimed at strengthening the board's supervisory role with respect to actions taken by executives. Through this Law a more detailed regulation is achieved for an issue, which despite being of great practical importance, had not been developed or given a lot of attention by the legislator.

The reform affects the delegation regime from different perspectives, all of which, in our opinion, are of extraordinary interest. Thus:

1st. Article 249.3 establishes some additional formal requirements, the most relevant being that the company shall sign a contract with the managing director or executive director under another title.

2nd. Article 249 *bis* establishes a much more extensive catalogue of non-delegable powers than those provided for under the previous article 249.2.

Before examining the two most noteworthy aspects of the delegation of powers, which we discuss in the two epigraphs below, it is essential to consider some general points about this subject. We refer specifically to some earlier amendments made to this concept with respect to the regulation contained in article 249 of Capital Company Law.

¹³ RODRÍGUEZ ARTIGAS, *Consejeros...*, p. 83 *et seq.*.

3.1. Redrafting of article 249. 1 of the Capital Company Act.

Article 249.1 states that “when the company bylaws does not provide otherwise, the board of directors can appoint from among its members one or several managing directors or executive committees, without prejudice to the powers that may be vested in any person, establishing the content, limits and the form of delegation”. There are several points that we can consider with respect to the content of this first point of article 249.

The mention of the delegation of powers in the bylaws differs; firstly, with respect to the previous mention in the same provision according to which the delegation of powers by the board was possible as long as the bylaws “did not provide otherwise”. This mention of article 249 prior to its reform (and likewise included in article 141 of the Consolidated Text of the Public Limited Company Law) for much of the doctrine had the effect of underlining the primacy of the bylaws in this matter such that it was necessary to comply with them¹⁴. Consequently, the possibilities that could arise in practice were diverse: the bylaws could: authorize delegation, keep quiet about it, forbid it,

enforce delegation or even entrust the board with the decision in matters of delegation.

Currently, however, the Law establishes that delegation will be possible as long as the company bylaws “do not provide otherwise”. In this way, it seems that the possibilities of the bylaws in matters of delegation are reduced to simply not allowing or forbidding delegation, and the board therefore has more freedom to act.

Secondly, the Law maintains the reference to the power of attorney that may be granted to any person. What it establishes here is simply a manifestation of the power vested in any individual entrepreneur or a company to “appoint special or general attorneys or representatives” (article 281 Commercial Code). Nevertheless, the doctrine has criticised that the reference to the powers of attorney that the board can grant should be included here (now under the Consolidated Text of the Public Liability Company Act) because of the inadequacy of where it is placed, since there are significant differences between the concepts that regulate this provision¹⁵. In addition to this, these concepts are not given any special treatment in Spanish legislation and this prevents their definition, which has already become obscure due to the variety of formulas and expressions provided in the legal system.

¹⁴ ARANGUREN URRIZA, F.J., “Los órganos de la sociedad anónima”, *Las sociedades de capital conforme a la nueva legislación*, (dir.) Garrido de Palma [Trivium], Madrid, 1990, p. 566; HERNÁNDEZ MARTÍ, J., “Órganos de la Sociedad Anónima: el órgano de administración”, *Revista General de Derecho (RGD)*, n^o 559, abril, 1991, p. 2947, p. 2957; MARTÍNEZ SANZ, F., “Régimen interno y delegación de facultades en el Consejo de administración de la sociedad anónima”, *Derecho de Sociedades, Libro Homenaje al Profesor Fernando Sánchez Calero*, vol. II [McGraw Hill] Madrid, 2002, p. 1752; POLO SÁNCHEZ, E., “El nuevo Reglamento del Registro Mercantil y los órganos de las sociedades de capital”, *Revista General de Derecho (RGD)*, n^o 634-635, 1997, p. 9119, p. 9121; Comentarios..., p. 468; RODRÍGUEZ ARTIGAS, *Consejeros...*, pp. 186, 187 & 200; RdS, n^o 1, 1993, pp. 93 & 94.

¹⁵ Among others, SÁNCHEZ CALERO, F., “Administradores. Art. 123 to 143”, *Comentarios a la Ley de Sociedades Anónimas*, t. VI (dir.) SÁNCHEZ CALERO [EDERSA], Madrid, 1994, p. 502.

So, for example, while the delegation of powers is only possible when company management is implemented through a board of directors, the appointment of either special or general attorneys is possible however the company administration is structured (single administrator, various administrators, who act severally or jointly or board of directors). On the other hand, if we look at the wording of article 249, delegation must be undertaken by members of the board of directors, while power of attorney can be granted to "any person". We also find differences in the requirements for adopting one or the other of the agreements (delegation or power of attorney), in the nature of the posts, in their representation and scope of action (for either delegates or attorneys), in their responsibilities, duration and termination in the post etc.

In any case, under these conditions (that the company bylaws do not provide otherwise and without prejudice to the power of attorney that may have been granted), the board of directors can appoint one or various managing directors or executive committees from among its members (now, it is possible for there to be more than one executive committee) establishing the content, limits and procedures of the delegation³. The latter reference is new to the Law. However, its aim was fulfilled before the reform thanks to the mandate of article 149.1 of the Commercial Registry Regulations¹⁷, according to which "the inscription of

an agreement by the board of directors in relation to the delegation of powers to an executive Committee or to one or various managing directors and the appointment of the latter, must contain either a precise enumeration of the powers that are delegated, or state that all powers are delegable legally and according to the bylaws. In cases where various managing directors are named, it must be indicated which powers will be exercised severally and which jointly, or where appropriate, whether all the powers that are delegated must be exercised either one way or another".

To date, therefore, the delegation agreement must include (as established in article 149.1 of CRR) an enumeration of the delegated powers or the most usual expression that all powers are delegable legally and are in accordance with the bylaws¹⁸. If various managing directors are named, it must also indicate whether the regime of action will be several or joint as well as the rules for the distribution of competences.

3.2. The requirements of article 249.2 of the Capital Company Law.

The Law subsequently adds that the permanent delegation of any of the board's powers to the executive committee or the managing director and the appointment of directors to these posts will require the favourable vote of two-thirds of the members of the board and will not take effect

¹⁶ As indicated by prof. LEÓN SANZ, F.J., in AA.VV., *Comentario de la reforma del régimen de las sociedades de capital en materia de gobierno corporativo (Ley 31/2014)*, JUSTE MENCÍA, (coord.), Thomson-Civitas, Cizur Menor, 2015, p. 503, "la flexibilidad en la configuración de los órganos delegados es una de sus principales virtualidades ya que permite adecuar el desempeño de las funciones ejecutivas a los intereses sociales (...)"

¹⁷ Royal Decree 1784/1996, of 19 July, whereby the Commercial Registry Regulations are approved. Hereon cited as CRR.

¹⁸ The enumeration of the non-delegable powers in art. 249 bis serves as a support to be able to maintain the validity of the regulation and the use of the most usual formula to date in company practices. Thus, LEÓN SANZ, *Comentarios...*, p. 502.

until registered in the Commercial Registry. Various issues have been raised about this point. Firstly, it should be indicated that this article refers to two agreements; consequently, there are two agreements for which requirements are made. Namely:

- The agreement for a permanent delegation of any of the board's powers to the executive committee (or to the executive committees, if there are various) or to the managing director.
- And the agreement for the appointment of the directors who will hold these positions.

Secondly, it should be noted that the Law refers to the necessary requirements for the adoption of the permanent delegation agreement. To a large extent, the doctrine characterizes permanent delegation as being stable and continuous. Specific delegations for a single matter, or temporary ones, are not actual delegations. Permanence does not therefore conform to temporary parameters but should be understood to reflect and indicate the continuity, stability and autonomy of the delegated body. Delegations in the strictest sense are only those that have these characteristics, and the law sets out more demanding requirements for them than for the ordinary regime¹⁹. To be exact, it stipulates a double majority: requiring a favourable vote from two-thirds of the total number of board members (in contrast to the majorities required in articles 245 and 248 for adopting agreements by the board of directors of limited liability companies and public limited companies, respectively). This same double majority is also required for adopting an agreement for the appointment of the directors who will hold these posts.

As well as the aforementioned requirement (a favourable vote from two thirds of the board members), the law requires the permanent delegation and appointment of the directors who will hold these posts to be registered in the Commercial Registry. After acceptance by the appointees has been acknowledged, registration should be made by public deed, (articles 150 and 151 CRR). Once the registration is completed, any acts executed from the date of appointment shall take effect as from the moment they were agreed. Finally, the contents of this registration can be referred to in the provisions set out for content, limits and procedures of the delegation (article 149. 1 CRR).

III. THE NEW ADMINISTRATION CONTRACT.

One of the newest and most important changes that law 31/2014 introduces, referring specifically to the delegated management of the company, is the regulation of a new management contract in sections 3 and 4 of article 249, both of which are new.

According to these sections:

"3. When a member of the board of directors is named managing director or is granted executive functions under another title, it will be necessary to establish a contract between this individual and the company, which must be approved a priori by the board of directors through a favourable vote from two-thirds of its members. The affected board member must abstain from attending the deliberations and from participating in the vote. The approved contract must be included as an annex to the minutes of the meeting.

4. The contract will set out in detail all the

¹⁹ RODRÍGUEZ ARTIGAS, RdS, n° 1, 1993, p. 97; IGLESIAS PRADA, Administración..., pp. 158 & 159.

concepts corresponding to the remuneration to be paid for performing executive functions, including, if appropriate, future compensation due to early termination of services, and the amounts to be paid by the company in costs for insurance premiums or contributions to savings schemes. The board member will not receive any remuneration for performing executive functions for which the amounts or concepts are not set out in this contract.

The contract must be in accordance with the remuneration policy approved, if appropriate, by the general meeting.”

1. The new management contract: formal requirements.

In accordance with the legal mandate contained in section 3, the managing directors and board members attributed executive functions under another title must sign a management contract with the company²⁰.

Subsequently, it adds a series of formal requirements in relation to the cited contract. Thus:

- This contract must be approved a priori by the board of directors with a favourable vote from two-thirds of board members, which means a qualified majority as legally required for the adoption of the agreement of delegation and appointment of the individuals who are to hold these posts.
- In any case, the affected board member must abstain from attending the deliberations and from participating in the vote.

- Once approved, the contract must be included as an annex to the minutes of the session.

2. The new management contract: content

With respect to the content of the contract, article 249.4 states that all the remuneration concepts payable to the managing director for carrying out executive functions will be specified in detail, and if appropriate, include future compensation for early termination of services and the amounts to be paid by the company in concept of insurance premiums or contribution to savings schemes. The managing director will not receive any remuneration for performing executive functions for which the amount or concepts are not set out in the contract. This must also comply with the remuneration policy approved by the general meeting.

Various points can be considered in relation to all the regulations in section 4 of article 249.

One relevant point is the reference to the remuneration system for performing executive functions. In the wording of the previous Capital Company Law, there was no provision with respect to this specific point. The only reference to the remuneration system was included in article 217 (which was based on the premise of the unpaid nature of the position of director “unless the company bylaws state otherwise in determining the remuneration system”) about directors in general without specifying directors with exe-

²⁰ In the opinion of Prof. LEÓN SANZ, *Comentario...*, p. 518., “que la fórmula empleada, atribución de funciones ejecutivas a un consejero por un título diferente al de la designación como administrador delegado, se debe interpretar en el sentido de una cláusula general, que tiene como finalidad la equiparación de ambas figuras a los efectos de control por parte del consejo de administración de la atribución de las funciones y del contrato que se ha de suscribir por la sociedad con el consejero”

cutive functions²¹.

In the cases of the managing director or board member with executive functions under another title, and certainly for directors in general, contracts have frequently been entered into between them and the company whereby they have received additional remunerations not included in the provisions set out in the bylaws, and without prior approval by the general meeting. On many occasions, this has meant they have disregarded the interests of the shareholders, or in other words, it was a way of concealing the board member's remuneration without its provision in the bylaws²².

Secondly, and in line with the jurisprudence that advocates establishing that all remuneration concepts should be set out in the bylaws²³, all remuneration concepts payable for performing executive functions should be specified in the contract, and the law makes special reference to:

- future compensation for early termination (also known as "severance clauses" or "golden parachute clauses" not precluded in the company regulations, and whereby compensations for termination in favour of the individual who during an indefinite period carries out their activity on behalf of another, although these clauses make it difficult for the directors to exercise the power to

²¹ The new article 217 is based on the premise ("The position of director is unpaid unless the company by-laws provide otherwise and establish a remuneration system) but adds that "2. The established remuneration system will determine the concept or concepts for which directors should be remunerated and which may consist, among others, of one or various of the following:

- a) a fixed assignment,
- b) attendance allowance,
- c) shares in the profits,
- d) variable remuneration with general indicators or benchmarks,
- e) remuneration in shares or linked to their growth,
- f) compensation for dismissal, assuming that the dismissal was not motivated by incompleteness of the director's duties and
- g) Any savings schemes or provision deemed appropriate.

3. The maximum amount of annual remuneration for all directors in their capacity as such must be approved by the general meeting and shall remain valid until its amendment is approved. Unless the general meeting decides otherwise, remuneration distribution among the different directors will be established by agreement by them, and, in the case of the board of directors by their decision, which must into consideration the duties and responsibilities of each director.

4. In any event, directors' remuneration must remain proportionate to the importance of the company, the economic situation at that time and the market standards of comparable companies. The established remuneration system must be designed to promote the company's long-term profitability and sustainability and incorporate the necessary precautions to avoid excessive risk-taking or rewarding unfavourable results".

As we can see, this article has been the subject of reform through Law Ley 31/2014. It maintains the presumption of the post being unpaid, except when the bylaws provide otherwise. However, substantial changes have been introduced in the regulations for the remuneration of the company management bodies, so that remuneration adapts the market practices and is more transparent.

²² Regarding this question, the STS (supreme court sentence) 24 April 2007 specified (citing the SSC of 9 May 2001) that, so that the statutory remuneration system of managers can be eluded with a contract, it is necessary that the powers and functions granted to the manager in it go beyond those typically carried out by managers, since accepting otherwise would violate the legal mandate in this respect. The sentence of 31 October 2007 declared the same, with the argument that otherwise the contract for senior management would be no more than a way of concealing the manager's remuneration, and not provided for in the bylaws (citing the sentence of 21 April 2005). For this particular case, v. also SSC of 29 May 2008. They all refer to art. 130 of the Public Limited Companies Law, previous to art. 217 of the Capital Companies Law.

²³ Jurisprudence, however, has also begun to accept that although a certain remunerative concept is not included in the bylaws, it would be valid if all the shareholders were aware of it and accepted it, since, in this way, they would be protected against

dismiss directors *ad nutum*²⁴).

- the amounts to be paid by the company in concept of insurance premiums or contribution to savings schemes²⁵.

Given the purpose of the contract, the board member cannot receive any remuneration for performing executive functions for which the amounts or concepts are not set out in the contract. In any case, these remunerations received for performing executive functions are independent of the remunerations that correspond to them in their capacity as directors, the maximum amount of which must be approved by the general meeting (article 217. 3)²⁶.

Ultimately, due to the importance of this question and the possible conflicts of interest that could arise, the board of directors will determine

the remuneration of board members who perform executive functions under the safeguards provided for in the law (requirement of enhanced majorities, abstention of the affected board members...) ²⁷. It seems that the legislator wanted the board of directors to have a certain autonomy in determining the remuneration for executive functions excluding the shareholders from this decision. Nevertheless, as in the case of any director's remuneration, it must be governed by the principles of proportionality and reasonableness and the contract must comply with the remuneration policy approved by the general meeting, which in practice means that any remuneration set out in the contract must be approved by the general meeting.

What seems questionable about the content of the law is that it is not necessary to sign a management contract if a previous one already

the possible discretion or abuse of the board of directors. In this sense, there are some relevant Sentences from the Supreme Court, among which are: the sentence of 31 October 2007 and the Sentence of 29 May 2008. In both sentences, the SC accepts the effectiveness of the remunerations though they are not provided for in the bylaws, as the company's shareholders are aware of this circumstance. A similar sentence is that of SC of 25 June 2013. On the other hand, the bylaws that establish the directors' remuneration do not have to include the amount that the director receives in concept of remuneration. V., in this sense the SCS of 25 June 2013 and different Resolutions from the General Directorate of records and Notaries, among others, those of 27, 29 and 30 April 2013 and of 3, 4, 6 and 22 May 2013. However, there are sentences in the Supreme Court that seem to point in the other direction (v. SSC of 13 November 2008) which has been criticised by the doctrine. Thus, PAZ-ARES RODRÍGUEZ, C., "*Ad impossibilia nemo tenetur* (o por qué recelar de la novísima jurisprudencia sobre retribución de los administradores)", *Diario La Ley*, nº 7136, Sección Doctrina, *La Ley* (17 de marzo de 2009), Año XXX, Ref. D- 88 (*La Ley*10983/2009), pp. 2 et. seq..

²⁴ V. among others, las SSC of 25 June, of 31 October 2007 and of 19 December 2011.

²⁵ However, they do not mention, insurances for public liability, which could also be considered remunerative concepts and not as a compensation expense. In this sense, LEÓN SANZ, *Comentarios...*, p. 515.

²⁶ With respect to the provisions under art. 217 and under art. 249, regarding the remuneration of directors with executive functions, v. FERNÁNDEZ DEL POZO, L., "El misterio de la remuneración de los administradores de las sociedades no cotizadas. Las carencias regulatorias de la reforma", *Revista de Derecho Mercantil (RDM)*, nº 297, 2105, pp. 199 *et seq.*. One of the most important changes to Law 31/2014 is the recognition of the double remuneration of the managing directors which obliges them to recognise two types of remunerations subject to two different regimes. In this sense, , JUSTE MENCÍA, J./ CAMPINS VARGAS, A., "Retribución de los consejeros ejecutivos. Comentario a la RDGRN de 30 de julio de 2015", *Revista Derecho de Sociedades (RdS)*, nº 45, 2015, p. 496.

²⁷ About this question, v. PAZ ARES, C., "El enigma de la retribución de los consejeros ejecutivos", *Indret*, 1-2008. About the remuneration of managing directors, also, CABANAS TREJO, R., "La retribución del consejero delegado y la celebración de un contrato con la sociedad", *Law*, 5 March 2015.

exists (be it for senior management or for providing services), even though this contract establishes the remuneration for carrying out executive functions. Neither do we know the repercussions that the subsequent ratification of this contract by the board of directors could have. It does seem clear, however, that if the position was unpaid it would not necessary for any contract to be signed²⁸.

Therefore, the first important change that the law introduces in relation to the delegated management of companies is the need for the relationship of the managing director or director with executive functions under another title to be reflected in a contract that must be approved by the board of directors. The content of this law, as can be observed, only refers to the need to specify in detail all the concepts for which a director can obtain a remuneration when they are granted executive functions. However, in our opinion, it could also be useful to define some important aspects about the relationship between the directors and the company, such as details about the service provision system, duties of confidentiality, or for example, post-contractual prohibition on competition.

Questions also arise about the legal status or legal nature of the relations established as a result of the contract, or whether this commercial link, created between the directors and the com-

pany, is compatible with previous or subsequent employment contracts intended for the development of employment functions and different to the executive functions of senior company management, leading to double bind situations²⁹.

With respect to the compatibility between a director's corporate relation and an employment or commercial relation with the company, the jurisprudence of the 4th Chamber of the Supreme Court understands that "(...) in cases of the simultaneous performance of activities corresponding to the company's board of directors and to senior management, what determines the relation as commercial or as employment is not the content of the functions that they perform but the nature of the relation. Therefore, if there is a relation of organizational integration in the area of corporate management, whose powers are exercised directly or through internal delegation, it is not an employment relation but commercial. Hence, as a general rule, only where work relations consist of employee status and cannot be qualified as senior management, but as joint relations, would the simultaneous performance of company management responsibilities and employment relations be admissible (...) "³⁰.

In view of these considerations, it seems reasonable to conclude that these contracts should be drawn up more specifically in order to clarify the purpose of some aspects of the relations between directors and the company, which in many

²⁸ In this respect, in case where the bylaws establish that the post of managing director should not be paid, it seems unnecessary to draw up a contract between the company and the managing director. In this sense, LEÓN SANZ, *Comentario...*, p. 508 y 509.

²⁹ In the opinion of prof. LEÓN SANZ, *Comentario...*, p. 508, that the contract between the company and the managing director can be considered as "una modalidad de los contratos de prestación de servicios, cuya tipicidad se encuentra recogida en sus aspectos fundamentales en la propia Ley de Sociedades de Capital".

³⁰ Sentences from the Supreme Court of 26 December 2007; of 9 December 2009; of 24 May 2011; of 20 November 2012. V., also, the Sentence of 25 June 2013.

cases are forgotten about. In its report about the preliminary draft Law of the Commercial Code, the Spanish Council of State adopt a similar stance. In this report, they sustain that it would be useful if the norms applicable to the new figure “of contract with managing director and with the director with executive functions” included in article 231.100 were more specific and clarified the compatibility or not of these different relations (commercial/working)³¹.

3. Autonomy of the management contract and record of remuneration in the bylaws. Sentence by Supreme Court of 26 February 2018 [Civil Court, Section 1., (R) 2018, 635)].

After the reform of the Capital Companies Law through Law 31/2014, one of the questions that has raised most doubts and uncertainties is the one related to the autonomy of the management contract and a record of directors’ remuneration in the bylaws, and especially about the remuneration of managing directors or those with executive functions under another title. In other words, since the enactment of Law 31/2014, one of the most controversial questions and the one that

has led to most discussion, is related to the directors’ remuneration: more specifically whether the remuneration regime set out in arts. 249. 3 and 4 for executive directors is a special regime; or whether otherwise, it should be integrated with the general provisions in arts. 217 to 219 LSC. In particular, the question is whether it should be integrated with the requirement of a record of remuneration in the bylaws (art. 217.2) and approval by the general meeting regarding the maximum amount of remuneration (art. 217. 3). Hence, the importance of the recent Sentence by the Supreme Court of 26 February 2018 and of the subsequent Resolutions of the DGRN (General Directorate for Records and Notaries)³².

Without going into too much detail about the issue, so as not to go beyond the strict limits of the subject of this study³³, in our doctrine the majority believe that the directors’ remuneration “in their capacity as such” must comply with the requirements of being recorded in the bylaws and approval by the general meeting as established in article 217 CCL. To the contrary, if there were a board of directors with executive directors, it would suffice to establish their remuneration in the contract referred to in article 249 CCL, which

³¹ Art. 231. 100 of the Draft of the Commercial Code Law reproduces the content of sections 3 and 4 of art. 249 of the Capital Companies Law. It specifically states, that “1. When a member of the board of directors is appointed managing director or is granted executive functions under another title, it will be necessary to draw up a contract between the director and the company. The contract will detail all the concepts for which a remuneration can be obtained for the performance of executive functions, including, if appropriate, future compensation for early dismissal from these functions and the amounts to be paid in concept of insurance premiums or contributions to savings schemes, the amounts of which are set out in this contract 3. The contract must be approved a priori by the board of directors with a favourable vote of two-thirds of the board members and must be in accordance with the remuneration policy approved, where appropriate, by the general meeting. Once the contract is approved it must be included as an annex the session minutes.”

³² Resolutions of 31 October 2018, (RJ 2018, 4846), of 8 November 2018 (RJ 2018, 4863) and 12 December 2018 (RJ 2018, 5624).

³³ For further details about this question, see, ORTIZ DEL VALLE, M^a CARMEN, “La retribución de los consejeros ejecutivos de las sociedades de capital: constancia estatutaria de la retribución y autonomía del contrato”, *La administración de las sociedades de capital desde una perspectiva multidisciplinar*, Cizur Menor, 2019, pp. 281 *et. seq.*

was analysed in the previous section.

The sentence from the Supreme Court of 26 February 2018 [Civil Chamber, 1st Section, (RJ 2018, 635)] modifies this interpretation and sustains that the remuneration of executive directors should also be recorded in the bylaws and the maximum amount should likewise be approved by the general meeting. The Supreme Court understands that “the relation between art. 217 CTCCL (and its further regulation through arts. 218 and 219) and art. 249 CTCCL is not an alternative (...), in the sense that the remuneration of directors that are not managing or executive directors is governed by the first set of provisions, and the remunerations of managing directors or executives is governed exclusively by art. 249 CTCCL, so that the latter are not affected by the statutory reserve under art. 217, the intervention of the general meeting under arts. 217.3, 218 and 219, the general criteria determining remuneration under art. 217.4 and the specific requirements for cases of participation in benefits or remuneration linked to shares under arts. 218 and 219.

The relation between some provisions and others (...) is cumulative, (...). The general regime is contained in arts. 217 to 219 CTCCL, provisions that are applicable to all directors, including managing or executive directors (...): “For its part, art. 249 “contains special provisions that are applicable specifically to managing or executive directors, whereby they must sign a contract with the company that is approved by the board of directors with a favourable vote from two-thirds of the members, and the affected director must

abstain from the deliberations and the vote, but its content must be adjusted to the “statutory framework” and the maximum annual amount of the director’s remuneration must be determined by agreement of the general shareholders meeting, within which the board of directors exercises its power to decide on the distribution of the corresponding remunerations to the directors. Likewise, this remuneration of the managing or executive director as set out in the contract must comply with the general criteria established under art. 217.4 CTCCL and comply with the specific requirements established under arts. 218 and 219 CTCCL when remuneration concepts are established according to those set out in such legal provisions”. However, the Supreme Court adds that the overall consideration of the new system that regulates directors’ remunerations “should lead to a less rigid interpretation of the statutory reserve, and without such rigorous demands for precision, which on occasions had been established in sentences by various chambers of the Supreme Court and by the DGRN itself (...).”

Attributing this power to the board implies acknowledgement of the scope of autonomy within the statutory framework which, in the view of the Supreme Court, must be understood more flexibly, allowing “managing directors’ remunerations to be adjusted to the changing requirements of the companies themselves and to the general course of business, in combination with due guarantees for shareholders, who should not be taken by surprise by disproportionate remunerations not provided for in the bylaws and over the maximum annual amount that the general meeting agreed for all managers”.

³⁴ It should be considered that, in accordance with art. 529 bis, 1. “Listed companies must be managed by a board of directors”

4. The remuneration of directors of listed companies: a brief note.

Before the reform of the Capital Companies Law, the regulation of directors' remuneration established a general regime equally applicable to listed and non-listed companies. There was no different legal regime for the remuneration of directors of listed companies or for directors within these companies who performed executive functions. It is only in the different Codes of corporate governance where some measures are established and are fundamentally directed at increasing the transparency of remuneration systems in these types of companies.

Law 31/2014 introduces a specific regulation in relation to the remuneration of directors of listed companies³⁴ (articles 529 *sexdecies* to *novodecies*) and it specifically regulates the remuneration of directors who perform executive functions. The latter is referred to in Article 529 *octodecies*, according to which, remuneration of directors who perform executive functions must be set out in a contract between them and the company which, as already seen, must comply with the remuneration policy for directors and must necessarily contemplate:

- The fixed annual amount of the remuneration and its variation in the period to which the policy may refer to;

- The different parameters for determining the

variable components;

- The principal terms and conditions of their contracts, comprising, in particular, their duration, compensations for early dismissal or termination of the contractual relation;

- Exclusivity, post-contractual non-compete and permanence or loyalty covenants.

Finally, we should remember that it is the board of directors that determines the directors' remuneration for performing executive functions and the terms and conditions of their contracts with the company in compliance with the provisions set out under 249.3 and with the remuneration policy for directors approved by the general shareholders meeting.

IV. NON-DELEGABLE POWERS.

As we pointed out above, the reform introduced in the Capital Companies Law through Law 31/2014 also influences the regime of non-delegable powers. Before the reform carried out by the cited Law, the only delegation of powers explicitly prohibited by the Law was "the accountability of corporate management and the presentation of the account balances to the general shareholders meeting," as well as "the powers granted to the board by the general meeting, except where explicitly authorized by it" (previous article 249.2³⁵). This provision, however, was broadly interpreted, and included other non-delegable powers corresponding to the Board, although they were

³⁴ It should be considered that, in accordance with art. 529 *bis*, 1. "Listed companies must be managed by a board of directors"

³⁵ In the same sense, art. 141.1 para. 2 of the Consolidated Text of the Public Limited Companies Law.

not explicitly established as such in the Law³⁶.

After the reform, a new article is introduced in the Law. Article 249 *bis*, where these same powers considered to be non-delegable continued to be included, although with a different formulation in some cases. In addition to these powers (which were already considered non-delegable under the Capital Companies law of 1989) there is a notably longer list of powers which are also non-delegable. The majority of them are powers that other regulations attribute to the board or which correspond to the board because they affect its internal organization and its position within the company. The change therefore lies in that all these powers, considered as non-delegable, are grouped under one provision and this contributes to reinforcing legal certainty.

The board of directors, in particular, will not be able to delegate the following powers under any circumstance:

a) *The supervision of the effective control and modus operandi of the committees that may have been constituted and the performance of the delegated bodies and of management bodies that may have been appointed.* This power involves the task of supervising and monitoring the modus operandi of any committee that the board may have created, of any executive director or director that the board may have appointed. The reform of the Capital Companies Law, as we have already pointed out, aims fundamentally to strengthen

the role of the board of directors as supervisor of the performance of executives. It is clear, in light of the reasons discussed above, that effective management by the board as a collegial body is limited. Management must be carried out by people, or in any case small groups of people. At the same time, the actions of these managers must be supervised, which is the role that the board must assume.

b) *The determination of general company policies and strategies.* The role of determining general company policy represents the essential nucleus of management. For this reason, the body mandatorily entrusted with this will not be able to delegate the function of determining general company policy nor the tasks implicitly associated with it. A distinction, the limits of which are not always clear, is thereby established between the nucleus or the essence of management power, which is non-delegable, and the rest of the activity (day to day management), which can be entrusted or delegated in other people. In any case, the exercise of this power could at least involve the approval of the annual budget for each financial year, the investment plan and the strategic plan where the objectives, policies and strategies of the company are established.³⁷.

c) *The authorization or waiver of obligations arising from the duty of loyalty in accordance with the provisions of article 230.* This is truly a new function and gives rise to the new article 230 re-

³⁶ This is what happened, for example with the appointment to posts within the board, convening the general meeting, the co-optation of a new director. A part of these competences are now explicitly mentioned as non-delegable powers under art. 249 *bis*. This is not the case for the co-optation of directors. However, although there is no legal mention, this competence of the board of directors must be considered as non-delegable because of its special relevance to the company organization. About this point v. LEÓN SANZ, *Comentarios...*, p. 536 & SÁNCHEZ CALERO, *Los administradores...*, p. 560.

³⁷ Thus, LEÓN SANZ, *Comentarios...*, p. 530.

lated to the mandatory regime of duty of loyalty and waivers. According to the provisions in the cited article, the regime of duty of loyalty is imperative. Nevertheless, the article itself accepts waivers of the obligations arising from duty of loyalty, and they are conceded accordingly either by the general meeting or the management body, in this case the board.

So, the company will be able to authorize a director or person connected with a certain transaction within the company to use certain company assets, take advantage of a specific business opportunity, and obtain an advantage or remuneration from a third party.

When the prohibition waiver refers to obtaining an advantage or remuneration from third parties, or it affects a transaction whose value is higher than ten per cent of the corporate assets, this authorization must necessarily be agreed by the general shareholders meeting. In private limited companies, authorization must also be granted by the general meeting when it refers to providing any type of financial assistance, including company guarantees that benefit the director or when aimed at establishing a work or services relationship with the company.

In all other cases, authorization could also be granted by the board as long as there are guarantees that the members who grant it act independently from the director granted the waiver. Besides, it will be necessary to guarantee that corporate assets will not be negatively affected by the authorised operation, or if appropriate, that it is conducted within market conditions and with full transparency.

The obligation of non-competition with the company will be subject to waiver in the event that the company does not expect to suffer dama-

ges, or that the damages expected will be compensated by the benefits that are forecast to be gained by obtaining the waiver. The waiver will be granted through the explicit and separate agreement of the general meeting.

In any case, at the request of any shareholder, the general meeting will decide on the dismissal of a director who carries out competitive activities when there is a high risk of harm to the company.

d) *Its organization and functions.* The board of directors, as a collegial body which requires an internal organization, has the exclusive power unlike any other forms of government in the company to regulate its own functions, organization and course of action. With respect to private limited companies, the bylaws will establish the regime for the organization and functions of the board, which must, in any case include the rules for convening meetings and constituting the board, as well as the system for deliberating and adopting agreements by majority.

In a Public Limited company, unless otherwise specified in the bylaws, the board of directors may designate its chairman, regulate its own *modus operandi* and accept the resignation of directors. These are the terms used in article 245 Capital Companies Law³⁸.

Within this competence we can further include that of designating from among its members one or several managing directors or executive committees, establishing the contents, limitations and delegation procedures (article 249).

e) *The preparation of the consolidated annual financial statements and their submission to the general shareholders' meeting.* In this case we cannot find any changes because before the re-

³⁸ Before the reform it was commonly accepted that the powers related to the organization of the board of directors or the exercise of competences that affect the organization itself were non-delegable. In this sense, LEÓN SANZ, *Comentario...*, p. 532.

form accountability was already considered a non-delegable power by the board of directors. Nevertheless, the wording of article 249 before the reform (as well as that of article 141.1, paragraph 2 of the Public Limited Companies Law) also made a reference to the submission of financial statements to the general meeting. No reference is made, however, in the new text of article 249 *bis* with respect to the submission of financial statements³⁹.

According to article 253 "Within three months of the end of the financial year, the company directors will draw up the financial statements, the management report and the proposed distribution of profit (...)" When the managing body is formed by a board of directors, it corresponds to them and not to the delegated bodies to draw up the annual financial statements. These statements, as we know will comprise the balance sheet, the profit and loss statement, a statement of the changes in the net worth for the financial year, cash flow statement and the respective notes (article 254).

Neither of these two provisions, 253 or 254, have been amended through the Law we are discussing and neither do they differ from the regulation contained in article 172 of the Public Limited Companies Law, except with regard to the content of the annual financial statements. For this reason, as already provided for under this Law, part of the doctrine understood that the reference in article 141.2 to the balance sheet should be extended to the profit and loss account, to the notes, to the management report and to the proposed distribution of profit. That is to say, all the

documents that make up the annual financial statements, the management report and the proposed distribution of profit. In fact, some authors hold the view that it would have been appropriate to refer to the non-delegability of the submission of the annual financial statements to the general meeting, which is formula that was opted for in the wording of the new article 249 *bis*, letter e)⁴⁰.

This therefore ensures that the board as a whole is accountable to the general meeting, not only for the management outcomes and their accounting, but for all management activity. It is understood that the board as a whole should assume accountability to the general meeting about the situation of the company's assets and its accounts, as well as its management. Furthermore, by permitting the delegation of this power, which is a constitutional function of the company, the board of directors would remain void of competences.

Otherwise, it is an absolute prohibition, for which no exception is contemplated.

f) *The preparation of any type of report required from the managing body by law as long as the operation that the report refers to cannot be delegated.* In the opposite sense, when it involves powers that can be delegated, then the report related to them can also be delegated. The board's approval is not required for a report on these operations when they have been delegated to some of its members or to the executive committee.

g) *The appointment and dismissal of any of the company's managing directors, and the es-*

³⁹ Although there is no mention in the Law, we consider this is a non-delegable power given the importance of this information for shareholders and third parties. As expressed by LEÓN SANZ, *Comentario...*, p. 534.

⁴⁰ POLO SÁNCHEZ, *Comentarios...*, p. 483; SALELLES CLIMENT, J. R., *El funcionamiento del Consejo de Administración* [Civitas] Madrid, 1995, p. 100.

establishment of the conditions of their contract. The inclusion of this power as non-delegable corresponds with the regime of the delegation of powers in article 249 of the Capital Companies Law which we have just analysed. In any case, this provision should be extended to the members of the executive committees. Among other things, it therefore ensures that the managing directors are not the ones who establish their own remuneration.

h) *Appointment and removal of directors who may have direct dependence on the board or on any of its members, and the establishment of the basic conditions of their contracts including remuneration.* As already seen in article 249, the appointment of either a managing director or an executive director under another title requires a contract to be entered into between this person and the company which will give details of all the concepts under which a remuneration will be obtained. A contract that must be in accordance with the remuneration policy approved by the general meeting.

i) *The decisions related to directors' remuneration, within the statutory framework, and if relevant, the remuneration policy approved by the general meeting.* This rule is also new and likewise corresponds to the new regulation for directors' remuneration and their competences as referred to in articles 217.3 and 249.3, which have been discussed previously.

j) *Convening general shareholders' meetings and drafting the agenda and the proposal of agreements.* In accordance with article 166 of the Law, the competence to convene a general meeting corresponds to the directors. For years both the doctrine and jurisprudence have debated at length about the convening of the general mee-

ting, each taking an opposite stance on this issue. When the convening of the general meeting was included within the non-delegable powers, the debate came to an end.

k) *The policy related to shares and stakes.* This provision, despite being formulated in general terms, seems to essentially address public limited companies due to the great limitations placed on private limited companies to acquire their own stakes (articles 140 and 140 et seq. of the Capital Companies Law). The content of this power must therefore be specified basically according to the type of company involved in each case.

l) *Any powers that the general meeting may have delegated to the board of directors, unless it had explicitly authorised them to be sub-delegated.* The powers that the general meeting grants the board cannot be delegated either, unless it explicitly authorises it. There are two central issues that are raised in relation to this group of functions or powers, at least in principle: firstly, determining which general meeting matters can be delegated to the board, that is to say, which powers can the general meeting delegate to the board; secondly, the scope and conditions of the authorization by the general meeting. We must mention that if we are dealing with competences belonging to the general meeting that are granted to the board, this concession does not impede their revocation neither will the authorization to delegate be irrevocable.

In response to the first issue, the general meeting will be able to delegate its powers to the board when it is explicitly authorized by law or by the bylaws to do so. However, if the competences have been conferred on the general meeting exclusively by Law, or by the bylaws, then their conferral on the board must be rejected. This is because it is understood that in these cases, it

was sought to remove these competences from the board's scope of decision-making.

Among the most relevant cases of explicit legal provision under which the general meeting can delegate powers to the board are, for example, those provided for in article 297 of the Capital Companies Law. According to this provision, in public limited companies' powers can be delegated to the directors by the general meeting under the requirements established for the amendment of the company bylaws:

"a) The power to set the date on which the previously adopted agreement to increase share capital by an agreed amount will take effect and to establish the conditions which were not provided for in the general meeting's agreement. The term in which this delegated power must be exercised may not exceed a year, except as regards convertible bonds". The doctrine considers that they are essential conditions for establishing the increase, and it must therefore be the general meeting that determines the amount of the increase, the par value of shares and the conditions under which the portion of uncalled capital should be raised⁴¹. Through delegation by the general meeting, the directors can set the issue price, the completion term, which can be no longer than a year except for convertible bonds, the form and period of disbursement of called-up share capital, and other points that refer to, for example, where and how to subscribe for shares. To sum up, it is the general meeting that should determine the conditions of the increase and the directors determine the conditions under which they will be issued.

"b) The power to agree on a capital increase in one or several stages up to the sum specified, when and for the amounts that they decide on, without previously consulting the general meeting. Such increases may under no circumstance

be higher than half the company capital at the time of the authorization and must be implemented in the form of cash contributions within a maximum term of five years from the general meeting's decision". This case is also one of the situations where the Law permits the general meeting to delegate powers to the directors as long as the quantitative and qualitative limitations established in the provision are respected.

Finally, section 2 of article 297 adds that under the delegation "the directors are authorized to redraft the company bylaws related to share capital, once the increase is agreed and implemented".

With regard to the second issue raised, the authorization by the general meeting makes it possible for the powers granted to the board to be sub-delegated. But prior authorization by the General meeting is not sufficient for the board to be able to delegate since, in accordance with article 149.2 of the Commercial Registry Regulations, "the delegable powers granted by the General meeting to the Board can only be delegated by the latter if explicitly listed in the delegation agreement".

Finally, the powers of representation correspond to the board itself which will act collegially, although the bylaws may also confer representative powers on one or several members of the board individually or jointly. Likewise, when the board appoints one or several managing directors through a delegation agreement, it must indicate the scope of their action [article 124.2 d) CRR and article 233.2 d) CCL].

Managing directors will therefore have power of representation. Nevertheless, this does not imply that the board will lose its power of repre-

⁴¹ On this point, the words expressed under the Law of 17 July 1951 on the legal regime of public limited companies are legitimately applicable, among others, by GIRÓN TENA, J., *Derecho...*, p. 480 & RODRÍGUEZ ARTIGAS, F. *Consejeros...*, pp. 232 *et seq.*

sentation, as it will have concurrent competence with the managing directors. The scope of directors' power of representation will be as specified in article 234.1 of the Capital Companies Law. Thus, representation will be extended to all acts included in the business objective as defined in the bylaws.

Apart from the non-delegable powers we have just referred to, and which are included in article 249 bis, Law 31/2014 establishes that the board of directors of listed companies (the form of administration that all listed companies must mandatorily take, article 529 *bis*) are explicitly forbidden to delegate another set of powers. These additional powers that the board of listed companies cannot delegate are the following (article 529 3rd):

"a) The approval of the strategic or business plan, the annual management objectives and budget. investment and financing policy, corporate social responsibility policy and dividend policy.

b) The determination of risk management and control policy, including tax risks, and the supervision of internal information and control systems.

c) The determination of the company's corporate governance policy and that of the group where it may be parent company: its organization and *modus operandi* and especially the approval and amendment of its own regulations.

d) The approval of financial information, which as a listed company, must be made public periodically.

e) The definition of the structure of the group of companies for which it is parent company.

f) The approval of investments or operations of any type, which because of their high value or special characteristics are of a strategic nature or have a special tax risk, except when their approval corresponds to the general meeting.

g) The approval of the creation or acquisition of shares in entities with a special purpose or resident in countries or territories that are considered

tax havens, as well as any other transaction or operation of a similar nature, which due to their complexity could undermine the company's transparency and that of its group.

h) The approval, subject to a report by the audit committee, of operations that the company or companies in its group perform with directors, under the terms set out in articles 229 and 230, or with any shareholders acting individually or in concert with others, or with those who have a large shareholding, including shareholders represented on the company's board of directors or on that of other companies within the same group or with individuals related to them. The affected board members or those who represent or are linked to the affected shareholders must abstain from participating in the deliberation and vote as to the agreement on the matter. The only exceptions to this approval are the operations that meet the following three characteristics simultaneously:

1st that they are governed by standard contracts which are applied *en masse* to a high number of clients.

2nd that they are performed at general prices or tariffs established by the supplier of the good or service in question, and

3rd that the amount for these operations does not exceed one percent of the company's annual income.

i) Establishing the company's tax strategy"

Nobody can ignore that these are issues of special importance and responsibility in the area of company management. The aim is therefore to involve the board in the company's management and for it to have the role of supervising business, and to avoid excessive delegation which will thereby ensure that the board fulfils its most essential and inalienable function. However, given the broad scope of the legal regulation on non-delegable powers, in practice, questions arise about the powers that the management director can really

exercise. Consequently, it would be suitable for the delegation agreement to give details about the scope of representation and to also take into account that unlike the non-delegable powers under article 249 *bis*, if urgent circumstances concur and are duly justified, the corresponding decision could be adopted by delegated bodies or people. However, these decisions must be ratified at the first board of directors meeting after the adoption of these decisions (article 529 3th, sec. 2).

V. FINAL OBSERVATIONS.

Commercial Law undergoes permanent changes, which is nothing new, at least in recent times. And Company Law in particular is an extraordinary manifestation of this phenomenon. Corporate governance has been especially sensitive to the need for change and the consequent adjustment to the new reality of its system. The board of directors has a leading role in this area. For this reason, and on the occasion of the latest reform, we felt that it was of interest to shed light on the current state of the delegation of powers. It should be noted that in considering that certain decisions are non-delegable, the legislator has expressed with clarity what he believes to be the essential nucleus of management and supervision, which is extensive.

Under Law 31/2014, of 3 December, an important amendment was consequently made to the Capital Companies Law. We have already commented that the fundamental objective of this Law is to improve corporate governance of capital companies, especially listed companies. One of the main segments that the reform focuses on is the management body of capital companies. So, a more specific bylaw on directors has been established. Their duties and the remuneration system have been specified and extended. Likewise, the new Law regulates in more detail the modus

operandi of the board of directors as a supervisor of the actions of executives. In this sense, it establishes the board's obligation to meet quarterly, the number of non-delegable powers are increased (article 249 *bis*) and it establishes the need for the relation of the managing director or an executive director to be reflected in a contract approved by the board (article 249).

Another change introduced is related to the remuneration system of the managing director or executive director. All remuneration concepts that are received for performing executive functions must be specified in the contract signed between them and the company. And it is not possible to perceive remunerations for concepts not set out in the contract. In any event, the remuneration agreed must be in accordance with the remuneration policy approved by the general meeting. In our view, the legal requirement of a contract between the company and the managing director or executive director under another title means a great advance has been made in contrast to the previous regulation. The requirement that the contract should also state the remuneration to be received for performing these functions also seems a move in the right direction. However, it would have been an ideal occasion to clarify some aspects of the relation between the directors and the company that lead to some problems in practice. We could ask ourselves, for example, if these contracts should refer only and exclusively to the remuneration for performing executive functions, or if to the contrary, it is possible to extend their content with respect to other aspects of the relations between companies and directors.

In the matter of the regime of non-delegable powers, regulated in article 249 *bis*, the powers stipulated previous to the reform are maintained and others, which have been suggested by the doctrine and jurisprudence, are included. The le-

gislator's stance in this respect certainly deserves a positive appraisal. Legal certainty is strengthened by explicitly establishing which are the powers that are not subject to delegation. In this point, the reform also affects listed companies and particularly their management body. Mandatory rules are established which to date were simply recommendations under the Unified Code of Good Governance, and the catalogue of non-delegable powers is also extended for these companies in view of their singularity.

Within this study, we have made some appraisals about these issues and we have presented the usual uncertainties that any reform implies. Nevertheless, the appraisal that can currently be given is highly positive because recent experience has allowed us to verify the inadequacy of the regulatory framework existing up to now and the need for its reform in the interest of good corporate governance.

PRACTICAL APPLICABILITY OF THE DELEGATION OF POWERS IN CAPITAL COMPANIES
(An approach to the questions raised in Spanish Law)
M^a Carmen Ortiz del Valle

⁸³From the middle of the nineteenth century onwards the University of Barcelona was the great driving force of the Catalan bourgeoisie. More specifically, between 1847 and 1857 what came to be known as the first 'hornada' (literally 'batch') of jurists that were fully aware of their belonging to the true Catalan bourgeoisie was formed. This circle was basically made up of the set of jurists that Duran groups into what was called the Catalan Legal School.

⁸⁴ Cf. Juan José GIL CREMADES: *El reformismo español: krausismo, escuela histórica, neotomismo*, Barcelona, 1969; también, *Krausistas y liberales*, Madrid, 1975.

⁸⁵In that era 'centre' must be understood to mean the political position that was equidistant between individualist liberalism and the aristocratic positions that inclined towards maintaining the privileges of the Old Regime and the revolutionary postulates of a socialist nature. Certainly, Spanish political life in the XIX was always propelled by one of three postulates: socialism, liberalism and moderatism. Neither the projects of krausism, nor those of the Catholic liberals or of Catalanism, managed to take enough hold in Spanish society to constitute viable political alternatives (for reasons that go beyond the scope of this paper).

⁸⁶Political Catalanism had an essential legal component, and not only because of the need to oppose the codification process that was being orchestrated from Madrid. Awareness of the fact that the Civil Code had enormous potential to create a single national space meant that opposition to Spanish civil codification was a foregone conclusion. Apart from this, we must also remember that together with the Catalan language, Catalan law was considered to be one of the two pillars of the nation. In this regard, Valentí ALMIRALLI's article: 'Address in defence of the civil law of Catalonia', *Diari Català*, 30th January 1881; the publication by Lluís Maria de Llauder in *El Correo Catalán* of 3rd January 1881, entitled 'Catalan civil law'; and the article 'The first victory of Catalanism' by Narcís Verdaguer, published in the newspaper of the town of Vic, *La Veu de Montserrat*, in August 1889.

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⁸⁷In this regard, the unpublished thesis of Albert GARCÍ I BALASANÀ: *Ordre jurídic liberal i trajectòria de l'Acadèmia de Jurisprudència i Legislació de Barcelona, 1840-1931 (A propòsit de la formació i els límits de la política burgesa a Catalunya)*, Autònoma University of Barcelona, 1993.

The studies of institutions central to Catalan legal and political life of the XIX century are of enormous interest on this point. Cf., in this regard, Enric JARDÍ: *Història del Col·legi d'Advocats de Barcelona*, 2 vols., Barcelona, 1989. Laureà PAGAROLAS I SABATÉ: *Història de l'Acadèmia de Jurisprudència i Legislació de Catalunya*, Barcelona, 2000. Jordi CASASSAS YMBERT: *L'Ateneu Barcelonès: Dels seus orígens als nostres dies*, Barcelona, 1986.

⁸⁸Cf. Terence C. HALLIDAY y Lucien KARPIK: 'Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism', in *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*, Oxford, 1997. Richard L. ABEL y Philip S. C. LEWIS (eds.): *Lawyers in Society*, vol. 2, The Civil Law World, Berkeley, 1988.

⁸⁹This is the edition that I have used, even though there is a previous one: *Curso de filosofía elemental comprendiendo la teoría de las ideas, la gramática general y la lógica*, Barcelona, 1841.

⁹⁰Francesc CAMBÓ's stance in *Por la Concordia*, Madrid (1927) is usually used as a political example of seny. Cf. the influence of the Scottish School of Common Sense and the traditional Catalan political attitude in the work of Josep LLOBERA: 'The formation of Catalan nationalist ideology. The idea of Volkgeist as a defining element', in *L'Avenç*, no. 63, Septiembre 1983, pp. 24-35. Also: Norbert BILBENY: *La ideologia nacionalista a Catalunya*, Barcelona, 1988, pp. 99-107. Lastly, Stephen JACOBSON: 'Law and Nationalism in Nineteenth-Century Europe: The Case of Catalonia in Comparative Perspective', in *Law and History Review*, vol. 20, no. 2, 2002. I have consulted the digital version of the article. The citation corresponds to paragraph 45: http://www.historycooperative.org/journals/lhr/20.2/forum_jacobson.html.