

Directors' "toxic remunerations"

Madrid, December 2022

Following Spanish Supreme Court's doctrine on the matter, the Barcelona Court of Appeal (BCA) has rendered a judgment¹ declaring the liability of a sole director who set his own remuneration (disproportionately high) after its prior approval by the shareholders' general meeting (SGM).

In the BCA's view, by setting such remuneration the sole director had acted against the company's interests, breached his duty of loyalty and violated article 217.4 of the Spanish Companies Act (SCA), which provides that directors' remunerations should be reasonably proportionate to the importance of the company, its economic situation and market standards of comparable companies.

The BCA found that, while courts are not entitled to determine the amount of directors' remunerations, they can verify whether those remunerations are disproportionate and violate article 217.4 of SCA.

In the case at hand, the BCA considered the sole director's remuneration excessive and abusive ("toxic") since it represented more than 20% of the company's annual turnover, it had been approved by the SGM only with the favourable vote of the majority shareholder (who was precisely the sole director) and there were no reasons that justified an increase in his previous remuneration, as he had not carried out any additional tasks or assumed further responsibilities and the company's financial situation was similar to that of previous years.

Therefore, the BCA ordered the director to repay the company what he had received in excess of his previous remuneration plus legal interest.

Although the case adjudicated in this judgement seems to be quite conspicuous, the principle behind it indicates that directors should be wary about their own remunerations even when they are approved by a majority of shareholders.

¹ Judgment 1387/2022 dated 28 September 2022.