

# ***PwC International Business Reorganisations Network – Monthly Legal Update***

## ***Edition 1, January 2017***

### ***Contents***

Landwell PricewaterhouseCoopers Tax & Legal Services S.L. (Spain) – Directors' liability reaches business decisions adopted at a group stage

1

### ***Welcome***

Welcome to the first edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2017.

The PwC IBR Network provides legal services to assist multinational organisations with their cross-border reorganisations. We focus on post-deal integration, pre-transaction separation and carve outs, single entity projects, and legal entity rationalisation and simplification as well as general business and corporate and commercial structuring.

Each month our global legal network brings you insights and updates on key legal issues and developments relevant to multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

### ***In this issue***

In our January 2017 issue Landwell PricewaterhouseCoopers Tax & Legal Services S.L. (Spain) considers a recent judgement of the Spanish Supreme Court concerning directors' liability.

### ***Contact us***

For your global contact and more information on PwC's IBR services, please contact:



***Richard Edmundson***

***Partner and Head of International Business Reorganisations, London***

+44 (0) 20 7212 1512

[richard.j.edmundson@pwclegal.co.uk](mailto:richard.j.edmundson@pwclegal.co.uk)

# ***Landwell PricewaterhouseCoopers Tax & Legal Services S.L. (Spain) – Directors' liability reaches business decisions adopted at a group stage***

## ***At a glance***

The most recent corporate legislative initiatives and jurisprudence in Spain are putting the stress on corporate governance and are tending to put the spotlight on companies' directors, in particular with reference to their duties as such and their liability regime.

A recent judgment of the Spanish Supreme Court considers that business decisions taken under the wing of a group of companies do not exclude the liability of directors of a Spanish company belonging to such group if such decisions, even if taken in the best interest of the group of companies as a whole, affect the former adversely.

## ***In detail***

### **The judgment put into context**

The Spanish legal context and jurisprudence, aligned with the international tendency, are putting the stress on corporate governance and put companies' directors even more into the spotlight.

An example of the above is the latest amendment on the Spanish Capital Corporations Act. Such amendment gives more importance to the duties of directors of Spanish companies, defining their due diligence duty ("*deber general de diligencia*") more accurately and reinforcing their duty of loyalty ("*deber de lealtad*"), as well as broadening their liability regime.

Regarding the due diligence, the amendment specifies some of its implications, such as the obligation for adequate dedication and the right/obligation of directors to be duly informed in order to comply with their duties. It also includes a business judgment rule, according to which strategic business decisions shall be understood to have been taken with due diligence, regardless of their outcome, if several requirements are met.

This amendment of the Spanish Capital Corporations Act has also extended the directors' liability regime, which prior to the amendment only affected to *de jure* and *de facto* directors, by extending it to other individuals as senior managers or the individual appointed to perform the duties of the director in case the director is a legal person.

This liability regime, supporting the enforcement of the duties of directors, deploys when:

- a the directors breach their duties as such; and
- b such breach entails a damage.

If these requirements are met, the directors may be held liable before the company itself, corporate creditors, shareholders and other stakeholders and liability cannot be excluded by their claim that instructions to take certain actions were given to them, even if instructions were given by the General Shareholders' Meeting.

In a group of companies, where instructions from the parent affect all subsidiaries, the directors of such may find it difficult to align their duties as directors of a Spanish company and the interests of the group. In particular, they may find themselves in a difficult position to take their own decisions, considering the best interest of the company they manage, mainly when the interests of the group is not fully aligned with the interests of the subsidiary.

This issue adds up to the lack of specific regulations in the Spanish legal system regarding groups of companies other than accounting or tax provisions. This lack of regulation leaves unanswered the main issues that the existence and functioning of groups of companies entail from a corporate perspective, such as the publicity of their existence, the relationships among their members, the role of a unified direction and management, the protection of minority shareholders and creditors, etc.

### **Judgment of the Spanish Supreme Court 695/2015 of December 11**

This judgment issued by the Spanish Supreme Court goes further into the trend described above about putting the stress on the duties of directors and the liability for their actions taken as such.

This judgment deals with the issue of transactions decided upon at a corporate level or by the parent company of the group of companies in the best interest of such group as a whole, such as the acquisition of a new business, the restructuring of the group, the execution of loans or granting of warranties, etc.

### ***Background of the judgment***

Alphaspray, S.L., a Spanish company devoted to the sale and purchase of materials for the surface treatment and painting mainly in the French market, was part of Cofipague, an international group of companies, also having minority shareholders. Two of those minority shareholders were also joint and several directors of Alphaspray.

Cofipague and one of the minority shareholders and director of Alphaspray later incorporated a French company, Actispray, S.R.L., in order to carry out the same activity as Alphaspray. Following the instructions of Cofipague (the majority shareholder), the directors of Alphaspray had the French clientele transferred to Actispray, which caused the former a great decrease in sales, resulting in losses.

As a consequence to the above, one of the minority shareholders of Alphaspray sued the two joint and several directors, one of whom was also shareholder of Actispray, claiming liability for the damaged caused to Alphaspray due to the transfer of clientele to Actispray.

### ***Court reasoning and decision***

The Supreme Court sets forth that the duties of directors refer exclusively to the company they manage and, therefore, it is their obligation to look after its interests in case of conflict and to promote its corporate purpose and aims.

Taking the above into account, the Court does not deem the “interest of the group of companies” by itself to justify the damage that decisions taken at a group level may cause to the Spanish company.

The above does not disregard the fact that, in case of conflicts of interests between the Spanish company and the group it belongs to, there should be a reasonable balance between both positions allowing the functioning of the group as a whole.

The Court interprets that the balance of the interests may be achieved through “countervailing benefits”. These countervailing benefits may justify a certain action which, considered individually, would be deemed damaging for the Spanish company. In any case, these countervailing benefits shall have an economical value and be proportionate to the damage suffered by the harmful action taken in the benefit of the group.

However, this balancing of interests cannot entail the plundering of the Spanish company and the deferral of the pursuit of its social interest.

In the case at hand, the Court understood that the interest of Alphaspray had been impaired for the benefit of the group of companies it belonged to, not existing countervailing benefits which may have justified the clientele transfer in favour of Actispray. Therefore, the Court concluded that the directors of the Spanish company who took the decision with damaging effects were liable and that they cannot uniquely argue that they received instructions from a corporate level in the group of companies.

### **Safeguarding the liability of directors of a Spanish subsidiary**

The fact that directors of a Spanish company may be deemed liable for their actions taken in their role as such, even if instructions were received from a parent company, gives rise to concerns about the options they may have in order to mitigate such liability to the extent possible.

In any case, in order to safeguard their liability, the directors should be in a position to be able to attest that they acted with due diligence and loyalty towards the company they manage; in particular, that they have taken an informed decision, counting on sufficient information, in good faith, acting under the business judgement rule and acting without external interference.

Some possible actions to support the above that may be considered, are the following:

- a o request a report including all aspects of the instructed transaction, including the expected benefits and disadvantages with regards to the Spanish subsidiary, in order to assess the harmful effects and the benefits attained and, in particular, to assess whether the compensation to be received by the Spanish subsidiary is deemed to be fair;

- b to request a previous approval by the General Shareholders' Meeting: according to Spanish legislation, the agreement of the shareholders does not exclude by itself the directors' liability. However, it may reduce the risk that the shareholders would take legal action in order to claim directors' liability if they all gave their consent to the transaction. Nevertheless, it is important to bear in mind that other stakeholders are entitled to hold directors accountable for their actions; and
- c to have a clear view of the financial solvency of the company and how the instructed transaction may affect the viability of the company: as explained, the shareholders are not the only stakeholders who may claim responsibility for actions damaging the company, being the corporate creditors other of the groups of stakeholders which may be the most interested in it. Therefore, other issue that the directors may want to consider is whether the instructed transaction affects the ability of the company to face its obligations when due.

To sum up, in the absence of particular corporate regulations applicable to group of companies, the balance of interests between those and their subsidiaries' is an issue that shall be considered on a case-by-case basis, being on directors to prove that they acted in accordance with their duties as such and considering the purpose and aims of the company they manage.

### **Who to contact**

For more information, please contact:

**Carmen Millán Cruz**

*Partner, Madrid*

(+34) 915 684 344

carmen.millan.cruz@es.pwc.com

**Milagros Molina López**

*Senior Manager, Madrid*

(+34) 915 684 537

milagros.molina.lopez@es.pwc.com

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication and, to the extent permitted by law, PwC does not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

© 2017 PwC. All rights reserved. "PwC" refers to the PricewaterhouseCoopers global network and/or one or more of its member firms, each of which is a separate legal entity. Please see [www.pwc.com/structure](http://www.pwc.com/structure) for further details.