SQUIRE PATTON BOGGS

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Supreme Court Ruling on Unlisted Company Executive and Non-executive Officer Remuneration

Supreme Court Ruling 98/2018 Section I of 26 February 2018

This ruling issued by the Supreme Court is based on a case submitted concerning a negative classification by a companies' registry registrar regarding a clause of its bylaws and, in particular, the clause that regulates the company executive officer remuneration. The aforementioned clause reads:

"The position of company executive officer shall not be remunerated, without prejudice to the fact that, if there is a board meeting, this shall establish the remuneration it sees fit for company executive officers in the exercise of the executive functions entrusted them, without agreement of the meeting of shareholders or the need for any greater specification in the by-laws concerning the remunerative concept or concepts, the foregoing in accordance with that which is provided for in Section 249(2) of the Capital Companies Act."

According to the registrar, this clause infringed the principle of statutory reserve regarding the remuneration of company executive officers that establishes that, in the case of the officer's position being remunerated, this must be reflected in the articles of corporation and, therefore, it is the shareholders and not the board of management that determines the remuneration of the executive officer position.

The company appealed the registrar's decision in the Commercial Court, which dismissed the appeal.

In the second instance, the Provincial Court of Barcelona, in keeping with the General Directorate of Notaries (DGRN), opposed its decision on the grounds that the Capital Companies Act provides for a twin executive officer remuneration system:

1. Remuneration for the condition as such, which is subject to the bylaws as provided for in Section 217 of the Capital Companies Act.
2. Executive officer remuneration, which is regulated under Section 249 of the Capital Companies Act and not Section 217 thereof. Accordingly, it establishes the remuneration system in the contract signed between the company and the executive officer.

After this Provincial Court judgment, the registrar lodged an appeal with the Supreme Court.

The latter, in its ruling on 26 February 2018, generalised the concept of executive officer and did not distinguish between those that exercise executive functions and those that do not. In its reasoning, the Supreme Court held that all executive officers have deliberative, representative and executive powers.

Accordingly, the Supreme Court held that the statutory provisions concerning executive officer remuneration must cover the meaning of executive officer, thus opposing the distinction made by the DGRN and defending a unitary meaning of the term and a broad concept of remuneration, subject to the meeting of shareholders.

In its conclusion, the Supreme Court pointed out that the Capital Companies Act remuneration system for executive officers is structured into three levels:

1. Level one: the **bylaws** must necessarily determine if the officer position (executive or non-executive) **is to be remunerated**
2. Level two: a **shareholders' meeting agreement** establishing the **maximum** annual remuneration for executives
3. Level three: unless otherwise agreed by the shareholders' meeting, the **board of directors** has the power **to distribute the maximum annual amount** established by the shareholders' meeting among the executive officers.

Lastly, there are two practical consequences of the Supreme Court ruling. Firstly, if a company does not regulate executive officer remuneration in its by-laws, the shareholders' meeting should modify them in order to include the remuneration system of both the executive and non-executive directors. . Secondly, the shareholders' meetings must establish the maximum annual amount of remuneration of all executive officers.

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