IN-DEPTH

Executive Remuneration

EDITION 12

Contributing editor
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Cleary Gottlieb Steen & Hamilton LLP

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
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www.thelawreviews.co.uk

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ISBN 978-1-80449-217-8

Acknowledgements

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADSUAR MUÑIZ GOYCO SEDA & PÉREZ-OCHOA

BAKER MCKENZIE

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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MACHADO MEYER

URÍA MENÉNDEZ ABOGADOS

WOLF THEISS

Chapter 9

SPAIN

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I INTRODUCTION

The Spanish market combines the discipline and stability brought about by EU legislation and the expertise and innovation of its players. It is a competitive and open market populated by national and international service providers who are driven by harmonised regulations and the diversity of demand.

The Spanish tax code is competitive for entities incorporated or domiciled in Spain, for non-Spanish investors in Spanish-resident entities and for employees moving to Spain to provide services to Spanish-resident entities.

In addition, companies that decide to set up in Spain will find a very competitive country in relation to:

a employment costs;
b increasingly flexible regulations;
c a fully professionalised judicial system; and
d a reasonable role for employee representatives and trade unions in a context without industrial disputes.

In addition, Spanish immigration regulations facilitate obtaining work and residence permits in a short time for highly qualified professionals, large companies and intra-group employee transfers.

From a corporate standpoint, there is harmonised and EU-based regulation on directors' remuneration in listed companies, aimed at promoting transparency and enhancing the protection to shareholders. Although inspired by regulations in good governance, the legislation applicable to executive directors' remuneration in non-listed companies has been in the spotlight of the Spanish Supreme Court, which issued a groundbreaking ruling with the aim of unifying the applicable regimes.

This chapter reviews the main advantages of the Spanish systems in terms of tax, labour and corporate law associated with the remuneration of executives and directors. In recent years, this area has undergone multiple statutory amendments, and the courts and administrative authorities have set important precedents and doctrine. With this in mind, this chapter seeks to provide a practical guide to the main issues and the latest developments.

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II TAXATION

i Income tax for employees

Tax residency

When analysing Spanish taxation for employees, including executives and directors, we should first determine whether the natural person is tax resident in Spain.

The rules for determining tax residency in Spain establish that a natural person is deemed to be resident in the country for tax purposes if either:

a they remain in the Spanish territory for more than 183 days during a calendar year; or
b the main centre or base of their activities or economic interests is, direct or indirectly, located in Spain.

In addition, Spanish tax authorities may presume *iuris tantum* that an individual is resident in Spain when their spouse and underage children are resident in Spain under any of the criteria laid down in (a) and (b) above.

Regarding occasional absences from Spain, they will be calculated as days spent in the country unless there is evidence that the natural person is tax resident in another country. However, if the person states that they are tax resident in a country considered a tax haven by Spain, the tax authorities could request that they prove that they have remained in the country for more than 183 days.

The above domestic rules must be complied with along with the rules contained in the tax treaties signed by Spain when each signatory country considers that the natural person is tax resident in that respective country.

General taxation on employment income

Spanish tax residents

If an executive or a director is deemed to be a tax resident in Spain, they will be subject to personal income tax (PIT), net wealth tax and, from 2022 onwards, temporary solidarity tax on large fortunes on a worldwide basis. PIT has two different taxable bases: general, which includes employment income, and savings.

The general taxable base rates vary in the different Spanish autonomous regions. For instance, for 2022, the maximum tax rate is 45 per cent in Madrid, 50 per cent in Barcelona and 54 per cent in Valencia.

However, the savings taxable base is taxed at up to 26 per cent in the entire Spanish territory (except the Basque Country and Navarre, which follow their own rules).

Regarding net wealth tax, rates vary in the different Spanish autonomous regions as well as the minimum amount of wealth that is exempt. For instance, tax residents in Madrid are exempt from wealth tax, while, for 2022, the net wealth of tax residents in Valencia in excess of €500,000 is taxed at up to 3.5 per cent.

In 2022, the Spanish government approved a new tax, the temporary solidarity tax on large fortunes, which is very similar to net wealth tax already in force. It taxes individual net wealth exceeding €3 million. To avoid double taxation, individuals may deduct the net wealth tax quota from the solidarity tax quota. Solidarity tax is levied throughout Spain, except in the Basque Country and Navarra. The tax rates are progressive, starting from 1.7 per cent for a net wealth between €3 million and €5,347,998.03 and going up to 3.5 per cent

for a net wealth of more than €10,695,996.06. However, the first €700,000 of net wealth is exempt from this tax. Finally, the solidarity tax has been appealed to the Constitutional Court, which may rule on its constitutionality.

Non-Spanish tax residents

If an executive or a director is not deemed to be tax resident in Spain, their employment income may be subject to non-resident income tax (NRIT). In principle, income derived directly or indirectly from a personal activity carried out in Spain is subject to taxation. In addition, payments to directors or members of a board of directors of Spanish resident entities are taxed.

This rule must be complied with along with the regulations contained in the relevant tax treaties Spain has signed with other countries. Although the regulations in the corresponding treaty signed by Spain and the country of residence of the employee or director should be checked, the general rules set out in the OECD's Model Convention are the following:

a employment income can only be taxed in the worker's country of residence unless their work is carried out in a different country. If so, this income can be taxed in the country in which the work is actually carried out. However, according to the Model Convention, if certain requirements are met, the employment income derived from this work will not be taxable in the country in which the work is actually carried out. Therefore, the general rules contained in the Spanish NRIT law will not apply; and

b for directors, the Model Convention establishes the same rules as the Spanish NRIT law; that is, remuneration received as a director of a company resident in one country can be taxed by this country (regardless of the location of the director's tax residence).

If the employment or director income is subject to NRIT, it will be taxed at a flat rate of 19 per cent for residents in the European Union, Norway and Iceland, and 24 per cent for residents in the rest of the world.

ii Social taxes for employees[2]

Spanish social security covers all Spanish nationals who reside and perform their activities in the country, as well as foreigners with work permits. The social security system is mainly financed through contributions made by employers and employees based on the salary received by the employee.[3]

Each year, the government establishes the maximum and minimum amounts used to calculate social security contributions and the percentage payments to be made by employers and employees (the monthly cap for 2023 is €4,495.50). As a general rule, employers must contribute at a rate of 30.4 per cent (plus an amount to cover accidents) and employees at a rate of 6.45 per cent. These rates apply to both Spanish and foreign employees.

2 Spanish social security provisions are applied based on a territoriality principle, meaning that any person performing an activity or working in Spain falls under the scope of the Spanish social security. However, there are exceptions to this rule for transferred employees in EU regulations and international treaties.

3 As a rule, social security contributions are not deducted from statutory payments for death, relocation or temporary or permanent lay-off.

Executives must be registered under the General Social Security Regime, which entitles those who fall under its scope to unemployment benefits and protection from the Wage Guarantee Fund.

Directors who do not control the company (i.e., do not hold a specific percentage of the company's share capital) and are paid to carry out management or executive functions must be registered under the social security regime for assimilated employees, which does not entitle those who fall under its scope to unemployment benefits and the protection from the Wage Guarantee Fund. In contrast, directors who control the company, even if they are not paid to carry out management or executive functions, must be registered under the social security regime for self-employed workers. In this case, only the director makes social security contributions.

iii Tax deductibility for employers

In principle, to the extent that the remuneration paid is duly justified and accounted for, these payments are tax-deductible for corporate income tax (CIT) purposes generally in the period in which they are accrued.

Notwithstanding, there are two issues regarding tax deductibility of payments to employees and directors that are explored below.

Deductibility of payments to directors

The Spanish tax authorities have been very strict regarding the deductibility of payments to directors. These discrepancies between the tax authorities and taxpayers are due to two issues:

a according to the Spanish Supreme Court case law, executives who are also members of the board of directors cannot have both an employment and a corporate relationship with the company at the same time. If they do, the corporate relationship prevails over the employment one; and

b according to the Spanish Companies Law (SCL),[4] the position of director is not remunerated unless the company's articles of association state otherwise. In addition, the SCL provides some strict requirements for the approval of directors' remuneration.

In view of the above, particularly in cases in which an executive had an employment relationship with the company before becoming a member of its board of directors, companies considered that remunerating executives was justified by their employment agreement and the articles of association contained no provision on director remuneration. In this scenario, the tax authorities considered that this type of remuneration was unlawful and therefore the payments were gifts, which are not deductible for CIT purposes but are subject to PIT.

Similarly, the tax authorities have adopted the same reasoning in cases in which the requirements set out in the SCL are not strictly met.

The Spanish Parliament has tried to remedy this situation and since 2015 the CIT Law[5] states that payments to directors for their role as executives or for performing their functions under other employment agreement with the company cannot be considered a gift.

4 Royal Legislative Decree 1/2010 of 2 July, which approves the consolidated text of the SCL.

5 Law 27/2014 of 27 November on corporate income tax (CIT Law).

However, this clarification does not completely solve the situation, and it is still necessary to analyse whether remuneration paid to executives and directors complies with both employment and corporate law requirements to be considered tax-deductible.

Deductibility of severance payments

The CIT Law contains a special rule that states that severance payments are not deductible in the amount exceeding the greater of the following two amounts:

a €1 million; or
b the mandatory amount stated in the employment law for redundancies.

This rule applies to amounts paid in one or several years by the company or a group company.

iv Other special rules

In addition, there are other special rules on taxation of remuneration in kind for employees that offer tax benefits. The following rules only apply to employees who have an employment relationship with the company. Therefore, in principle, directors cannot benefit from the tax benefits listed below.

The following remuneration in kind is not subject to PIT:

a amounts paid by companies for professional training, retraining or upskilling to the extent that it relates to the relevant employee's job position; and
b amounts paid by the company for occupational accident insurance or civil liability insurance, or both.

The following remuneration in kind is exempt from PIT:

a food and drink for employees at the company canteen and meal vouchers worth up to €11 per day for use in restaurants;
b social or cultural services at the company, such as childcare services. These services can be outsourced. If the employer is an educational institution, free or discounted education for employees' children is also exempt from PIT;
c health insurance for employees, their spouses and children. This exemption is capped at €500 per person (or €1,500 for disabled persons);
d up to €1,500 per year for employees' public transport costs; and
e shares in the company or in the company's group for free or at a discounted price. This exemption is capped at €12,000 per year. In this regard, the conditions offered should be the same for all employees of the company or group or subgroup of companies. However, since 2023, this exemption has been increased to €50,000 if the shares handed to the employees are shares in a start-up company.[6]

Finally, special valuation rules apply to other remuneration in kind. In principle, remuneration in kind must be valued at an arm's-length basis. However, the PIT Law contains special rules for some type of remuneration such as houses, cars or loans.

6 Emerging companies are defined in Law 28/2022, of 21 December, for the promotion of the ecosystem of start-up companies (Law 28/2022).

III TAX PLANNING AND OTHER CONSIDERATIONS

The PIT Law provides special tax benefits or regimes that apply to the remuneration of executives.

i Severance pay exemption

Severance payments paid to employees are exempt from PIT when they do not exceed the amount legally established by labour law. However, this exemption is capped at €180,000.

In this regard, the tax authorities have traditionally considered that this exemption does not apply to executives who were subject to a special employment relationship. However, in 2019, the Spanish Supreme Court held that executives can apply this exemption for the minimum severance payment amount established by labour law; that is, seven days of salary per year of service.

ii Exemption on remuneration for work performed abroad

The PIT Law provides an exemption on remuneration for work performed abroad. Employees can apply the exemption up to €60,100 per year when the following requirements are met:

a the employee must perform work for a non-resident company or for a permanent establishment abroad. If the company that receives the service is related to the Spanish company, other requirements apply;

b the country in which the work is performed must have a similar tax to PIT and cannot be a tax haven. This requirement is fulfilled if that country has signed a tax treaty with Spain and the treaty includes an exchange of information clause. However, the employment income need not be effectively taxed in that country; and

c this exemption is not compatible with the 'surplus regime', as explained below.

Regarding the exemption on remuneration for work performed abroad, tax authorities have traditionally considered that it does not apply to executives who are directors. The Spanish Supreme Court, in a ruling from 22 March 2021, has confirmed the criteria of the tax authorities and has concluded that the exemption is not applicable to those amounts perceived for managing and controlling entities as a participant in the board of directors of a subsidiary located abroad.

iii Surplus regime for work performed abroad

Another option when performing work abroad is to apply the surplus regime. As mentioned above, this regime is not compatible with the exemption on remuneration for work performed abroad.

The surplus regime establishes that any surplus received for performing work abroad is exempt from PIT. In other words, additional remuneration received for performing work abroad in excess of what the employee would have received in Spain would be exempt from PIT.

For this regime to apply, the employee would need to move to another 'workplace' as this term is defined under labour law. According to the GDT (e.g., Resolution V4107-16), the employee would also have to remain abroad for over nine months, but still be tax resident in Spain.

iv Special tax regime for executives transferred to Spain (the Beckham Regime[7])

This special tax regime was amended at the end of 2022 to make it more attractive for individuals coming to work in Spain and to include new circumstances under which an individual can opt for this regime. According to the special tax regime for individuals who are transferred to Spain, an individual who becomes a Spanish tax resident as a consequence of moving to Spain for work reasons may choose to be taxed under a regime similar to that applicable to non-residents in Spain when the following requirements are met:

a the individual has not been tax resident in Spain during the past 5 tax years prior to their transfer to Spain;

b the individual does not receive any business or professional income that could be considered obtained through a Spanish permanent establishment for tax purposes (except in the last two circumstances explained hereunder that qualify as a reason for the transfer to Spain); and

c the reason for the transfer to Spain is one of the following circumstances:
- to enter into an employment relationship with a Spanish employer;
- the individual's employer decides to transfer them to Spain, which must be duly set out in a transfer letter;
- to become a company director – if the company is a mere asset holding company and the individual is a shareholder, their stake does not mean that they are a 'related party' for corporate income tax purposes;[8]
- to become a teleworker in Spain – this circumstance occurs when the individual obtains a visa for international teleworkers according to Law 14/2013;[9]
- to carry out an economic activity in Spain that qualifies as an entrepreneurial activity, in accordance with the terms of Law 14/2013;
- to perform in Spain an economic activity by a highly qualified professional who provides services to start-ups within the meaning of Law 28/2022 and who carries out training, research, development and innovation activities, receiving remuneration that represents in total more than 40 per cent of the total business, professional and personal work income. The regulations determine how to accredit the status of highly qualified professionals, as well as the requirements for classifying activities as training, research, development and innovation.

The taxpayer would need to expressly choose this tax regime upon being transferred to Spain, and the tax regime will start to apply in the year in which they obtain their Spanish tax residence status and for five years after that.

This special tax regime may appeal to executives as income obtained in Spain will be taxed by applying the NRIT regulations for non-residents without a permanent establishment in Spain, subject to specific rules, which can be summarised as:

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7 This regime is known as the Beckham Regime as it was approved by the Spanish government originally in 2003 to attract talent to Spain. In this year, David Beckham was also hired by Real Madrid and became one of the first beneficiaries of the regime. Therefore, this tax regime for impatriates popularly began being known as the Beckham Regime.

8 An individual and an entity are deemed to be related parties when the shareholder holds a minimum share of 25 per cent in the company.

9 Law 14/2013, of 27 September, for supporting entrepreneurs and their internationalisation (Law 14/2013).

a all worldwide employment income or income derived from economic activities that qualify as entrepreneurial activities obtained by the individual would be taxed in Spain;
b income will be subject to taxation on an accumulated basis and losses cannot be offset;
c the first €600,000 of income will be taxed at a tax rate of 24 per cent, and income exceeding that amount at a tax rate of 47 per cent; and
d only Spanish-source dividends, interest and capital gains would be taxed.

As a novelty of the new tax regime, it is also applicable to the spouse and children of the worker coming to Spain under some circumstances.

This special tax regime also applies to net wealth tax and the temporary solidarity tax on large fortunes, and even though the executive would be considered tax resident in Spain, they would only be taxed on assets located in Spain and not on their worldwide assets.

v Reduction for irregular income

Remuneration generated during a period exceeding two years and that is generated irregularly as established by law and paid in one tax period can apply a 30 per cent reduction on the amount paid. In other words, the executive will only have to pay PIT on 70 per cent of the income received.

This reduction only applies when the taxpayer has not applied it in the preceding five years. In addition, it is capped at €300,000. However, when applied to severance payments between €700,000 and €1 million, the limit for applying the reduction (i.e., €300,000) will be reduced by the difference between the payment received and €700,000. Therefore, no reduction applies to severance payments of €1 million or higher.

IV EMPLOYMENT LAW

i Non-compete obligations

Under Spanish employment law, non-compete obligations differ depending on whether they apply while the employment relationship is in force or after its termination. These obligations are as follows.

Non-compete during the term of the employment contract

Ordinary employees can work for other companies unless to do so qualifies as unfair competition, or the parties have reached an exclusivity arrangement. Therefore, if exclusivity has not been agreed to in the employment contract, an ordinary employee may work for another company provided that in doing so they would not be unfairly competing with the work performed for their employer.

In relation to executives, unless the company has stated otherwise in writing, they have a total exclusivity obligation and cannot work for other companies, regardless of whether this would amount to unfair competition.

An executive does not have to be compensated financially for an exclusivity obligation. However, if the employee with an exclusivity obligation is an ordinary employee, they must be financially compensated for it to be valid. The amount paid to the employee as compensation must be 'adequate'. There is no express provision under Spanish law that clarifies when compensation is 'adequate'; however, 10 per cent of the fixed remuneration received by the employee is normally considered sufficient.

Post-contractual non-compete obligation

The employer must have an effective industrial or commercial interest in the employee not competing with it after the termination of their employment contract: this could be defined as the interest that an employer has in preventing a well-trained ex-employee (often at its expense) from taking advantage of the know-how acquired while working for it to perform competing activities. This industrial or commercial interest is also defined as an interest in protecting information about sensitive corporate matters, such as methods of production, commercialisation and organisation systems and, in general, information that is useful for the correct performance of the business (relationships with clients, suppliers, etc.).

Therefore, to determine whether a company has an effective industrial or commercial interest in an employee not competing with it, the specific functions and duties of the employee must be analysed. If during their employment, the employee has performed duties that are closely related to, for example, the business's strategy, clients, suppliers or know-how, the company would have an effective industrial or commercial interest in the employee not competing with it. If the employee has not performed any activities or duties related to these aspects of the company (e.g., if the employee has only performed general administrative tasks), imposing a non-compete obligation on that employee would probably be considered unenforceable because the company lacks an effective interest in it.

The employee must receive a financial compensation from the employer that is adequate; however, the Statute of Workers does not define 'adequate compensation'. Whether the compensation agreed is adequate for the purposes of the Statute of Workers is again analysed on a case-by-case basis, in terms of factors such as:

a the employee's chances of finding a new non-competing job;
b the geographical scope of the prohibition; and
c the length of the obligation.

There is no general rule regarding the method of payment of compensation for non-compete obligations. The most common methods of payments are:

a a monthly payment during the term of the non-compete obligation beginning at the end of the employment relationship;
b a lump sum at the end of the employment relationship that compensates the entire non-compete period; or
c a monthly payment during the employment relationship.

A post-contractual non-compete obligation cannot last longer than two years for technical employees or executives and six months for other employees. To determine whether an employee can be considered a technical employee, the following issues would have to be taken into account:

a the company's professional categories;
b the specific duties performed by the employee in question; and
c the employee's specific knowledge of the company's know-how, strategy, clientele and techniques.

Although damages are not specifically regulated for this purpose, penalty clauses linked to the breach of a non-compete obligation are acceptable. It is advisable that the penalty to be paid for a breach does not exceed the financial compensation agreed for the non-compete obligation. Otherwise, evidence of the harm suffered is required to make a penalty clause enforceable.

Unlike other jurisdictions, unilateral waivers of non-compete obligations are generally not acceptable when their terms have been agreed by both parties. Therefore, clauses that allow the employer or the employee to unilaterally waive the fulfilment of the obligation once it has been entered into are frequently considered null and void.[10]

It should not be forgotten that this non-compete obligation is linked to the termination of the employment relationship, and consequently it is not triggered:

a during garden leave, where the commitments of non-compete during the term of the employment contract still apply; or

b after a transaction affecting the ownership of the company, where a different non-compete obligation might be agreed for the sellers.

Finally, although non-solicitation covenants are not specifically regulated in Spanish employment law, the above-mentioned rules for non-compete obligations are applicable.

Terminations

An employment contract may be terminated on the following grounds:

a mutual agreement of the parties;

b valid reasons previously identified in the employment contract;

c upon the expiration date or completion date for the contracted job or service;

d the employee's resignation;

e death or permanent disability of the employee;

f the employee's retirement;

g death, retirement or permanent disability of the employer;

h *force majeure*;

i collective redundancy based on economic, technical, organisational or production reasons;

j by the employee because of a breach of contract by the employer;

k disciplinary dismissal;

l dismissal for objective reasons; and

m by a female employee who is forced to leave her job because she has been a victim of domestic violence.

Collective redundancies must be based on economic, technical, organisation or production reasons. A collective redundancy process must be followed with the employee representatives if certain thresholds are achieved. In addition, companies must make a six months' prior notice to both the competent labour authorities and the Ministry of Labour and Social Economy of their decision of undertaking a collective redundancy if certain requirements are met.

An individual dismissal for objective reasons may be based on:

a the employee's incapacity to perform the job;

b the employee's failure to adapt to technical changes to their job; or

c economic, technical, production or organisational grounds.

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10 Although they are not final (i.e., if appealed, they could be revoked), some recent isolated court rulings (e.g., court ruling issued by Social Court of Madrid on 17 April 2023) have declared enforceable such employer unilateral waivers when certain particular circumstances are met.

Employees whose employment contracts are terminated as part of a collective redundancy or as a result of an individual dismissal for objective reasons have the right to a statutory severance payment equivalent to at least 20 days of salary per year of service, up to a maximum limit of 12 months of salary.

Employees may be dismissed as a result of a serious and wilful breach of their duties (disciplinary dismissal) (e.g., a lack of discipline or insubordination towards the employer or other employees, or a continuous and voluntary decrease in efficiency).

An employee dismissed for objective or disciplinary reasons may file a claim before the labour courts, which must then determine whether the dismissal was fair, unfair or null. If the dismissal is declared unfair, the employer may choose between:

a reinstating the employee; or

b paying the statutory compensation for unfair dismissal, which is 33 days of salary per year of service up to a maximum of 20 months of salary.

The employer must also pay the employee the salaries accrued between the date of the dismissal and the notification of the judgment if it the employee in question is an employee representative. If the dismissal is declared null and void, the employer must reinstate the employee and pay the backdated salary from the date of dismissal until the date of reinstatement.

A company transaction itself is not a valid ground for dismissal and the purpose of the transfer of undertakings regulations is to guarantee the stability of employment relationships in the framework of the transfer of a business. However, it is possible and common that, after a transfer, there are grounds to carry out a collective redundancy (e.g., duplicate posts after a merger).

In addition, the grounds for terminating ordinary employment relationships also apply to executive employment contracts, and the severance payment corresponding to unfair dismissals is 20 days of gross salary in cash per year of service, up to a maximum of 12 months of salary.

In the case of executive relationships, the contract may also be terminated by both parties by giving a minimum of three months' prior written notice. This minimum period may be extended up to six months, if so agreed by the parties, in the case of executive employment contracts of indefinite duration or with a fixed duration of more than five years. The company may also withdraw from the contract by paying the executive the contractual severance payment or, failing that, the equivalent of seven days of gross salary in cash per year of service, up to a maximum of six months of salary. The same severance payment is payable to an executive who terminates their employment contract in the event of a transfer of undertaking or significant changes in the company's ownership that bring about changes in its governing bodies or main activity.

V SECURITIES LAW

According to Spanish legislation, a prospectus is not required for private offerings (e.g., when shares are offered to fewer than 150 investors per EU Member State, other than qualified investors, or when the face value of the securities is at least €100,000).

In addition, according to EU and Spanish regulations, the obligation to publish a prospectus does not apply to a public offering of securities to existing or former directors or employees by their employer or by a group company, provided that:

a the securities to be granted are of the same class as securities already listed on the same regulated market; and
b a document is made available containing information on the number and nature of the securities offered and the reasons for and details of the offer.

VI DISCLOSURE

i Disclosure in the company's articles of association

The directors' remuneration system must be set out in the company's articles of association, as is further explained in Section VII.

ii Annual public reports in listed companies

In accordance with Articles 540 and 541 of the SCL, listed companies must publish on an annual basis:

a a corporate governance report, to be submitted to the National Securities Market Commission (CNMV) as a relevant fact, that includes, among other information, details of the directors' remuneration and agreements concluded between the company and its senior officers or employees whenever those agreements foresee compensation to be paid upon the termination of the contractual relationship as a result of an unfair dismissal, voluntary resignation or termination caused by a public offering; and
b a directors' remuneration report (DRR) to be prepared by the board of directors and approved by the general meeting as a separate point of the agenda on a consultative basis.

The DRR must be reported to the Spanish Securities Market Authority (CNMV) as a relevant fact simultaneously to the corporate governance report and detail the remuneration received by the directors in their capacity as such and their executive functions, setting out complete and clear information on the directors remuneration policy for the current year, a brief summary of the application of the remuneration policy in the previous year and a breakdown of the individual remuneration received by each director for any and all concepts, as well as the annual variation of the individual remuneration of each director, the performance of the company and the average remuneration on the basis of the remuneration of the non-director employees of the company during the preceding five years.

iii Publication on listed companies' websites

Listed companies must publish on their corporate websites the information and documents to be approved – such as the DRR and the directors' remuneration policy (DRP) – prior to the relevant general meeting. The DRR must be accessible for free on the corporate website for a 10-year period.

The DRR will also be part of the management report, as a separate section, with the purpose to allow shareholders and investors the remuneration of directors.

VII CORPORATE GOVERNANCE

i Non-listed companies

Under Spanish law, the governing body of a non-listed company can be a sole director, a number of joint directors or joint and several directors, or a board of directors.

When the governing body is structured as a board, directors may be vested with executive powers (e.g., a managing director), in which case the SCL differentiates between the remuneration paid to directors in their capacity as such and what they receive for their executive functions.[11]

Remuneration of directors in their capacity as such

These provisions are applicable to sole directors, joint directors, joint and several directors and directors that are members of the board of directors in their capacity as such, that is, for those functions that are inherent to their position as directors (such as deliberative functions), other than executive functions.

There is an *iuris tantum* (rebuttable) presumption that the office of director is not remunerated, which can be rebutted by setting out the remuneration system in the company's articles of association.

The remuneration system must be proportionate to the company's financial situation, market standards and the size of the company, and must be guided by the company's long-term profitability and sustainability.

The SCL sets out an open list of remuneration elements such as fixed and variable remuneration, attendance allowances, remuneration linked to corporate benefits, remuneration systems based on company shares, termination compensation and so on.

Regardless of the remuneration system established, the total maximum annual amount to be paid to the directors in their capacity as such must first be approved by the general meeting and, unless provided otherwise, the distribution of the amounts to the directors (except in the case of a sole director) must then be approved by the directors themselves. As a general rule, when there is a board of directors, it must unanimously approve the distribution of the total amount to all directors, taking into account the functions and duties corresponding to each director.

Whenever the remuneration is linked to corporate benefits, the articles of association determine the specific amount or the maximum percentage of the corporate benefits to be paid as directors' remuneration. If a maximum percentage is established, it is the general meeting that sets the applicable percentage within the permitted maximum.

When the remuneration system includes the delivery of shares or stock options, or remuneration referenced to the value of the shares, express provision in the articles of association and approval by the general meeting are required, including the maximum amount of shares to be allocated to directors each year, the value of the stock options or the calculation method applied, the reference value of the shares and the term of the plan.

Remuneration of members of the board of directors for their executive functions

Whenever a member of the board of directors is vested with executive powers, either as managing director or under a different title, a contract between the executive director and the company must be concluded, with the prior approval of two-thirds of the members of the board of directors (excluding the executive director who is a party to the agreement). The agreement must be consistent with the DRP, if any.

Any amount to be received by the director for executive functions – regardless of whether the office of director is remunerated – must be set out in the agreement, specifying

11 Directors' remuneration in non-listed companies is regulated in Articles 217 to 219 and 249 of the SCL.

the concepts for which the executive director can be remunerated for the performance of executive duties, compensation for early termination, if any, and all other amounts to be paid as insurance premiums or savings systems.

According to a landmark ruling of the Spanish Supreme Court, the remuneration system of directors for their executive functions must comply with the same corporate governance rules as those applicable to the remuneration of directors in their capacity as such, that is, inclusion in the articles of association, approval of the total maximum annual amount that could be paid to the directors for their executive functions and distribution of the total amount to the directors vested with executive powers by the board of directors.

Non-director executives

The remuneration of non-director executives reporting directly to the board of directors must be approved by the board of directors.

ii Listed companies

Under Spanish law, listed companies must always be governed by a board of directors formed by natural persons, except for directors representing public sector entities.[12] There is a *iuris tantum* presumption that the office of director is remunerated, which may be rebutted in the company's articles of association.

As a general rule, the remuneration of executive and non-executive directors, including amounts received upon ceasing to be a director, must comply with the DRP approved on a triannual basis by the company's general meeting, based on a proposal from the board of directors accompanied by a report of its appointment and remuneration committee. These two documents must be available to shareholders on the company's website from the date the general meeting is called.

The SCL distinguishes between:[13]

a remuneration of directors in their capacity as such: the remuneration system must be set out in the company's articles of association and consistent with the DRP. The DRP must set out the maximum total annual amount that can be distributed to the directors in their capacity as such as well as the criteria for its distribution among directors according to their functions and duties. The board of directors distributes the total amount among directors according to the company's articles of association and the DRP, with a prior report of its appointment and remuneration committee; and

b remuneration of directors for their executive functions: the remuneration of directors for their executive functions must be consistent with the articles of association of the company, the DRP and the contract concluded between the company and the executive directors. The DRP must set out the maximum total annual amount that can be distributed to the directors for their executive functions. The board of directors determines the individual remuneration corresponding to each director according to their executive functions, the contract concluded between the company and the executive director, with a prior report of its appointment and remuneration committee.

12 Directors' remuneration in listed companies is regulated in Articles 529 *sexdecies* to *novodecies* of the SCL.

13 New regime applicable from 13 October 2021.

VIII SPECIALISED REGULATORY REGIMES

A reduced number of sectors have specialised remuneration regulations (mainly, credit entities, closed-end investment companies and collective investment institutions).

The Credit Institutions Solvency Law (Law 10/2014) includes provisions of the EU regulations relating to the obligation for credit institutions to put in place remuneration policies that are consistent with their risks. These policies apply to executives, employees who assume responsibilities or have a position of responsibility and any employee whose remuneration is similar to that of an executive.

The main factors to be considered are that:

a the criteria used for setting fixed remuneration and variable remuneration must be clearly stated;

b the remuneration policy applicable to members of the board of directors of a credit institution is subject to the approval of the general meeting or equivalent body under the same terms as those applicable to listed companies;

c specific principles will apply to variable elements of remuneration; and

d credit institutions must form a remuneration committee or, in certain cases, a joint nomination and remuneration committee.[14]

IX DEVELOPMENTS AND CONCLUSIONS

After overcoming the public health crisis caused by the covid-19 pandemic, the Spanish government is facing the challenges of the complicated economic situation derived from the stimulus approved by the European Union in connection with covid-19 pandemic and the war in Ukraine. In particular, the Spanish economy is facing a high level of public and private debt, a booming inflation rate and the rise of interest rates.

As a consequence, the Spanish government has passed regulations, as explained in this chapter, such as the creation of temporary taxes, improvement of special regimes for trying to attract new taxpayers to Spain and the increase in the social security contributions. For the time being it seems that despite these measures the macroeconomic indicators do not show signs of recession for the Spanish economy, so hopefully no further tough measures should be necessary.

14 *The Banking Regulation Review*. Spain. Juan Carlos Machuca and Alfonso Bernar.

ISBN 978-1-80449-217-8