Liability of a subsidiary company's director, a group's best interest and offsetting benefits

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Following the transfer of its customer base to another company in the same group, the transferor company suffered financial losses. Both the incorporation of the transferee company and the aforementioned transfer were carried out by the directors of a subsidiary company on the instructions of the group's parent company and under the unitary administration of the same. In these circumstances, a minority shareholder of the aggrieved company filed a derivative claim against its directors.

The judgment of the Supreme Court of 11 December 2015 has addressed this issue (ultimately, the liability that lies with the directors of a subsidiary company when acting on the controlling company's instructions) and, in short, it has come to say that:

1) *The fiduciary duties of directors exclusively refer to the company they administer*.- The duty to act as a loyal representative defending the best interest of the company means that in any situation of conflict, a director must make reasonable efforts to ensure the best interest of the company and direct its management towards the optimum achievement of the company's object and purpose, refraining from acting in a manner that is prejudicial to the company's interests. This duty of loyalty refers to the best interest of the company being administered, not that of others, even if they belong to the same group, even if it is the controlling company, or other formally outside interests, such as that which has been called "group's best interest".

2) *Reliance on the group's best interest does not, per se, release from liability*.- The group's best interest alone does not justify the losses suffered by a subsidiary company. Such losses may adversely affect its outsider shareholders (defined by the Supreme Court as minority shareholders outside the subsidiary's administration and the group's circle of control), who will see the value of their shareholding unjustifiably reduced, and also its creditors (for whom satisfaction of their claims may be placed in jeopardy by the undue reduction of the subsidiary company's equity). The group's best interest is not a stand-alone card that justifies the losses caused to the subsidiary company and cannot, therefore, *per se* provide grounds of exoneration. Obviously, the subsidiary company's best interest is tempered by the group's best interest (with which it must be coordinated). But such individual best interest is not diluted in that of the group to the point of disappearing. An action that is prejudicial to the subsidiary company's interests cannot be justified, no matter what, by the mere fact that such action is to the advantage of the subsidiary company's group.

3) *A director of a subsidiary company cannot plead the existence of instructions from the controlling company to disclaim liability*.- A director of a subsidiary company has his or her own scope of liability that does not melt away because of the company's integration into a group of companies. Indeed, such integration does not repeal a director's duties of orderly management, loyal representation, fidelity to the company's best interest and loyalty incumbent upon him or her as a company director and referring to the company of which he or she is a director, not the group of companies or other companies belonging to the group. A director of a subsidiary company who performs

an action that is detrimental to the company under his or her directorship is not released from liability by the simple fact that such action was decided by whoever directs the group of companies. A director cannot wield the instructions from the unitary administration of the group - to which the company he or she administers belongs - as a shield. A director of a subsidiary company has his or her own sphere of decisional autonomy that must remain unaffected by a kind of "owed obedience" to the instructions of the group's directorship where unreasonably prejudicial to the interests of the company he or she administers and which he or she must make reasonable efforts to ensure.

4) *The relevance of actual "offsetting benefits"*.- The above is not to deny that the existence of a group of companies means that, when conflicts arise between the group's best interest and that of one of the group's companies, a reasonable balance should be sought between these two that allows for an efficient and flexible operation of the whole business. But this composition of interests must prevent, in turn, the plundering of subsidiary companies and the unnecessary postponement of their own interests; in short, the best interest of the outsider shareholders and (public administration, trade or employee) creditors must be safeguarded. Such balance can be sought in the existence of "offsetting benefits" which justify that an action, considered in isolation, should harm a company. Such benefits do not necessarily have to be simultaneous or subsequent to the action that is prejudicial to the subsidiary company's interests, but may have been previously obtained (for example, because prior to the detrimental action a significant profit was generated by the group, in favour of its subsidiary company or deriving from the company's membership of the group). It involves, after all, balancing out the benefits and consideration given in both directions (from the company to the group and from the group to the company) to determine whether there is a negative result for the subsidiary company. In any case, the benefits or consideration obtained by the subsidiary company must be verifiable; mere hypotheses, rhetorical appeals to "synergies" or other benefits, devoid of specificity or consistency, will not suffice. Pleading the group's best interest and claiming benefits from the integration into a group of companies, unless accompanied by a reasonable and adequate justification of the benefits obtained "to offset" the prejudice suffered, does not exclude the director's liability for losses caused.

5) *Limit to the possible relevance of the group's best interest*.- The survival of a subsidiary company is, in the last instance, a definite limit to the group's best interest, insofar as an action to the advantage of the group that means jeopardising the viability and solvency of a subsidiary company, along with the prejudice that this could mean for outsider shareholders and creditors, could never be justified.