ANALYSIS

White-Collar Crime

Are company directors directly liable for torts attributable to the company?

Ultimately, and contrary to the myth of separate legal personality, the aim is also to apply a rule such as Article 31 of the Criminal Code to corporate civil liability not arising from a criminal offence.

ÁNGEL CARRASCO PERERA
Professor of Civil Law, University of Castilla-La Mancha
Academic counsel, Gómez-Acebo & Pombo

July 2026

§ 1. When the concept of a *legal person* was developed in classical law, it was not conceived that the entity would have *the legal capacity to commit crimes or quasi-crimes*; therefore, the unlawful act was attributed directly to its directors. One might think that this is the system followed by Article 31 of the Criminal Code (CP). The provision establishes that (de facto or de jure) directors "shall be held personally liable" in criminal proceedings and, consequently, for any damage or loss caused (civil liability, Arts. 109(1), 113, and 116(1) CP); furthermore, pursuant to Article 31 *bis* of that same code, the company as such *may* also be joint principal for the criminal offence.

§ 2. With regard to tortious harm not arising from a criminal offence, Article 38 of the Civil Code (CC) should theoretically lead to the opposite conclusion. In the absence of a rule directly assigning liability to directors, companies and other legal persons *have the capacity to cause tortious harm* and may be held liable for such harm — or, at the very least, the latter, which is beyond doubt in Spanish law. However, it does not follow from Article 38 CC that, alongside the company, other natural persons holding a duty of care — or, quite simply, as "principals in the commission of the criminal act or omission" — are not liable. However, it should be noted that, in this case too, companies would be liable under Article 1903 CC and Article 120(4) CP.

§ 3. Nor does any unambiguous rule emerge from company law. According to Article 236 of the Companies Act (LSC), "[t]he directors shall be liable to the company, the shareholders, and the company's creditors for any harm they cause through acts or omissions contrary to the law or the articles of association, or through acts or omissions in breach of the duties attached to the office held, provided that there was wilful misconduct or negligence". However, it remains silent on what matters to us here, namely, whether "harm to the company" consists of having taken on a liability *to be borne by the company*; can the person to whom the company is liable take direct legal action against the directors? For, as explained in Article 31 CP, the director is the actual perpetrator of the harmful act or omission, and this cannot be denied by the fact that the company is also liable. If this were the case, company directors would not be liable to third parties because of holding a duty of care to their company; on the contrary, it is the company that holds a duty of care to third parties for the harmful acts or omissions of its directors, who are the persons who actually caused third-party harm (Arts. 1903 and 1904 of the Civil Code).

§ 4. Article 237(1) LSC is also inconclusive. First, because it mentions only (apart from the company itself) the shareholders and third parties who are company creditors; *consequently,* directors would not be liable to other third parties. Second, because the fault-based liability rule — "through acts or omissions in breach of the duties attached to the office held" — would impose a duty of care when holding the office of director only in respect of the company; in other words, directors would not be held liable for breaches of duties of care that are not corporate duties, including duties of care incumbent on the legal person (for example, ensuring that third-party trade secrets are not disclosed or that personal data is not improperly processed). But this initial impression would be misleading: third parties who have suffered harm and who might eventually take civil action against the directors who were the actual cause of the harm would not do so as parties with standing to file a director liability to company claim, but rather as parties with standing to file their own civil

liability claim. And they could always do so — which is precisely what Article 241 LSC would be stating when it refers to the *director liability to shareholder or third-party claim.* The fact is that Article 241 *is not a company law provision but a provision of tort law;* thus, its connecting factor is not the *lex societatis* but the *lex loci delicti comissi*, under which directors are held liable primarily as principals rather than as duty of care holders. This is a crucial distinction because, under the Brussels I Regulation, when directors are sued directly, jurisdiction lies with the courts for the place where the damage occurred or where the causal event took place — at the claimant's discretion — rather than with the courts for the place where the company is domiciled.

> *Debt from liability in tort for third-party damage or loss arises directly against the directors*

§ 5. Lastly, Article 367 LSC would not be decisive either. It is true that the provision explicitly establishes that directors *are jointly and severally liable for company debts* if they have not taken measures to cover them in the event of a corporate shortfall. But this does not mean that there are no other cases in which they are also liable in the same manner. Furthermore, Article 367 only makes full sense when the company debt is a contractual or statutory debt. However, the provision could imply that, in non-contractual matters, the "company" debt arises directly against the directors.

§ 6. In my opinion, the legal situation is as set out in Article 31 CP. Debt from liability in tort for third-party damage or loss *arises directly against the directors,* without prejudice to the fact that, pursuant to Article 38 CC, it also arises simultaneously against the company, to which the non-contractual acts or omissions of its directors are also *attributed*. This is so true that the *liable* company (in debt, for example, with the tax authorities as the *person liable* for the surcharge and the tax penalty owed) may bring an action for contribution *against its directors* after settling the debt. This is the doctrine laid down in the recent judgment of the Supreme Court (First Chamber) no. 3406/2025 of 9 July. Note that said action *is not a liability claim under Articles 236 through 240 LSC*, which would require a company resolution.

§ 7. It is clear that the director must be the perpetrator, a joint perpetrator, an aider, or an accessory before the fact of the harmful act or omission. If a company delivery vehicle strikes an elderly woman, liability lies with the driver and the company, but not with the directors, who do not meet the requirements for a causal connection. Nor can it be argued, therefore, that they are also liable for *culpa in vigilando* (liability for negligent supervision) or any other vicarious fault. This is because company directors are not duty of care holders in respect of harm caused by the delivery driver; it is the company that holds that duty of care, in accordance with Article 1903 CC. For a director to fall within the scope of this liability, it is clear that one must be able to find him or her at fault beyond the generic *culpa in supervision.* By this, the intention is also to assert that company directors are not duty of care holders for the company when the company itself is, in turn, liable as a duty of care holder — in

other words, when the company is liable for "offences of commission by omission"

§ 8. Other consequences follow from this argument, even if they seem paradoxical. For example: the business judgment rule under Article 226 LSC *does not apply to liability to third parties*, nor does it apply when, under the terms we have described, the payor liable company brings an action for contribution against the directors. It is irrelevant to the third party whether the director exercised the care, skill and diligence of a reasonably diligent person — that is, *whether the director acted in good faith, without a personal interest in the matter under consideration, with sufficient information, and in accordance with an appropriate decision-making process.*

§ 9. Sector-specific legislation has confirmed that company directors are included on the list of joint and several or vicarious debtors for civil (and non-civil) breaches attributable to the company (see Arts. 38 and 104 of the Securities Market Act, Arts. 42 and 43 of the Taxation Act, Art. 13 of Act 26/2007, etc.). It is also very tempting to consider company directors as principals or joint principals *(in commitendo, in vigilando)* alongside the company in wrongs that are not strictly corporate in nature but cause harm to third parties, as in the case of the Supreme Court judgment of 22 January 2004, so that, while rejecting in principle the existence of a duty of care holder status for the director, we arrive at the same outcome by identifying the actual principals, thereby piercing the corporate veil. This is precisely what Articles 42(1)(a) and 43(1)(a) of the Taxation Act do, under which the director is vicariously liable in this respect but jointly and severally liable for being a "perpetrator or aider".

Disclaimer: This paper is provided for general information purposes only and nothing expressed herein should be construed as legal advice or recommendation.