

ANALYSIS



Banking and Finance

The business judgment rule
in a cooperative's purchase of a financial
product that ultimately fails

(Supreme Court Judgment no. 1315/2026 of 24 July)

The first ruling to actually apply the business judgment
rule in the determination of a claim in relation to liability.

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1. Supreme Court Judgment no. 1315/2026 of 24 July

The unlawful conduct alleged in the claim against the members of the cooperative's Board of Directors — which forms the basis for the liability being claimed — is the purchase of forty-two Banco Popular bonds in October 2015, “which supposedly offered a high return — there is no doubt about that — but also a very high risk, and terms that did not allow for early redemption or trading on the secondary market of the Irish Stock Exchange. Even so, and despite being aware of the high risk involved in this investment, the Board of Directors proceeded with the risky purchase of a highly speculative — not to say toxic — financial product, which represented an outflow of approximately one-third of the funds then held in the credit section, which, let us not forget, constituted the money of all the members of that section”. And the damages claimed in the claim as a result of that action — which led to the loss of the investment following Banco Popular's resolution — consist of the claimants' (members of the cooperative) inability to recover the full amount of the deposits they had made in the credit section, since the board had decided to limit the availability of the funds.

The unlawful conduct that the appealed judgment attributes to the members of the Board of Directors is the acquisition of the product on account of the risks involved in the investment. This is not an absolute obligation, but rather one of best endeavours. It is, therefore, a duty of reasonable care and skill; if, despite exercising diligence, the outcome is negative for the cooperative, liability cannot be imposed. The Andalusian Cooperative Societies

Act (LSCA) requires members of the Board of Directors to perform their duties “with the care befitting a prudent manager of cooperative societies” (Art. 50(1)). The definition of the duty of care is very similar to that in Article 225(1) of the Companies Act (LSC) for directors of companies limited by shares, who must “perform their duties and fulfil the obligations imposed by law and the articles of association *with the diligence of a prudent businessperson*, taking into account the nature of the position and the functions assigned to each of them; and, in all cases, subordinate their personal interests to the interests of the company” (emphasis in italics added). Like the directors of companies limited by shares, members of a cooperative's board of directors are not required to guarantee the success of the business.

The appellants seek the application of the business judgment rule, which was not explicitly recognised in our legal system until the new wording of Article 226 LSC, introduced by Act 31/2014 of 3 December. The aforementioned Article 226, under the heading “Protection of the business judgment rule”, provides in paragraph 1 as follows:

In the context of strategic and business decisions, which are subject to business judgment, the standard of care expected of a prudent businessperson shall be deemed to have been met when the director has acted in good faith, without any personal interest in the matter under consideration, with sufficient information, and in accordance with an appropriate decision-making procedure.

From the wording of Article 226 LSC, it can be inferred that, in order to meet the standard of care expected of a prudent businessperson in the context of strategic and business decisions subject to corporate discretion, a director must act in good faith, without a personal interest in the matter, with sufficient information, and in accordance with an appropriate decision-making process. The business judgment rule originating in U.S. case law, aims to limit the liability of directors for their business decisions, such that courts will not review business decisions made by company directors if the director has been properly informed prior to making the decision, if the action is not illegal or contrary to the articles of association, and if the director has no personal interest in the matter that conflicts with that of the company.

Although the 2011 Andalusian Cooperatives Act has not incorporated this rule into the liability regime for members of cooperatives' boards of directors — predating the codification of the business judgment rule in our law —, it is nonetheless applicable to cooperatives, including those in Andalusia. Pursuant to the final clause of Article 149(3) of the Constitution, “[s]tate law shall, in all cases, be supplementary to the law of the autonomous regions”. As stated in Judgment no. 64/2009 of 17 February, state law remains applicable in cases where there is no regional legislation addressing the specific issue at hand. It is not, therefore, a matter of legislative hierarchy, but rather of the supplementary nature of state law in matters not regulated by regional law. In the absence of specific provisions in Andalusian legislation — which establishes a regime of liability for members of a cooperative's board

of directors that is very similar to the corporate liability regime for company directors — the supplementary application of state legislation (Supreme Court Judgment no. 103/2015 of 10 March) determines that Article 226 LSC applies to this case. Although the Cooperatives Act 27/1999 of 16 July does not contain a provision similar to Article 226 in respect of the legal regime governing the liability of members of a cooperative's board of directors, it is applicable by virtue of the reference in Article 43 of the Cooperatives Act 27/1999 of 16 July to public limited company legislation, as it provides that “the liability of board members for harm caused shall be governed by the provisions applicable to directors of public limited companies”.

Furthermore, this business judgment rule also has its origins in Spain in case law. The rationale for its application to companies limited by shares prior to Act 31/2014 is no different when it comes to a cooperative. Indeed, as we noted in Judgment no. 443/2023 of 31 March, this rule had already been taken into account by Spanish courts (for example, Supreme Court judgments nos. 377/2007 of 29 March; 569/2010 of 6 October; 991/2011 of 17 January 2012, or 732/2014 of 26 December) “in the sense of preventing the decisions of a business nature from ultimately being superseded by those of the judges when adjudicating challenges to company resolutions passed by the shareholders in general meeting or the existence of liability for negligence on the part of company directors”. We explained that the aim was to limit the scope of judicial control regarding liability for losses “by excluding genuinely business-related decisions from such control”. We also noted

that this is “based on the premise that business management inherently involves a level of risk stemming from the impossible-to-eliminate uncertainty regarding the consequences of the decisions made. Therefore, company directors should not be held liable for harmful consequences that arise when they have remained within that scope of corporate management, even if the decisions taken were later revealed to be mistaken, without resorting to hindsight bias”. And in Judgment no. 1149/2025 of 16 July, the following is added to the statements made in the previous Judgment no. 443/2023 of 31 March: “The court does not apply a statute of limitations retroactively — one that did not exist at the time the acts under review occurred — but rather draws upon prevailing ‘legal tropes’ in the adjudication of corporate disputes (referring to legal tropes as a repertoire or repository of viewpoints or approaches) to guide the resolution of the case”.

The application of the business judgment rule precludes a finding of lack of care on the part of the directors. In the present case, there is no legal violation per se. Article 15(4) of the Andalusian Cooperatives Regulations permits the investment of cash surpluses subject to certain safeguards. And, guided by the requirements arising from the decision-making process, in a case such as this, to assess whether there was gross negligence in the actions taken by the members of the cooperative’s board of directors (the investment in bonds), one must analyse how it was carried out and the precautions that were taken to meet the required standard of care without committing gross negligence. Specifically, these were as follows:

- 1) The investment was made through Banco Santander and with the advice of Santander Private Banking.
- 2) The investment was guaranteed by a financial institution (Banco Popular) which, as such, was supervised by the Bank of Spain, and there is no evidence that, in October 2015, the events of June 2017 were foreseeable.
- 3) This type of bond was common at the time of issuance (2015) as financial institutions sought to raise capital. The return they offered represented a conservative way to invest.
- 4) The risk of insolvency of the institution guaranteeing the investment (Banco Popular), while it existed, was inherent to the investment. Since the investment was guaranteed by a financial institution supervised by the Bank of Spain, there is greater confidence in its solvency.
- 5) Two bond purchases from different institutions took place within a short period of time. One transaction went well, and the other did not.
- 6) The cooperative’s auditor determined that the investment complied with Article 15(4) of the above-mentioned regulations.

For all these reasons, no gross negligence is found in the conduct of the members of the cooperative’s board of directors that would give rise to the liability claimed against them for failing to return the deposits to the respondents. The requirements of Article 226 LSC are met. The members of the board of directors did not

act in bad faith; they sought to maximize returns on the surplus funds rather than pursuing their own interests; they were advised by a reputable investment firm; and

2. Note

I believe there was no need to resort to arguments regarding the suppletory nature of state law because, without needing to invoke Article 226 LSC, the case could have been resolved as it was. It would have sufficed to apply, in conjunction, the ordinary rules of business diligence and fiduciary loyalty — which equally apply to cooperatives — to reach the conclusion, without invoking the business judgment rule, that the directors' conduct was not unlawful.

The case could be resolved by applying together the ordinary rules of business diligence and fiduciary loyalty, without the business judgment rule

they had the guarantee of a financial institution whose solvency was not in question at the time.