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Directors’ liability for Social Security arrears of companies that have entered into insolvency proceedings

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When there are company debts with the Social Security and the latter attributes liability to the company directors, problems arise both in relation to possible time-barring of the debts and, above all, the position of the Social Security as creditor in the insolvency proceedings and its standing and authority to request the aforementioned liability.

1. The judicial review branch has recently addressed a complex case in which three regulatory sources are intertwined, that related to the Social Security, to companies limited by shares and to insolvency proceedings. In the Judgment of the Supreme Court (Judicial Review Division) of 26 October 2020, Ar. 309024, a case is analysed wherein the company has had debts outstanding for years with the Social Security, being under the presumption of insolvency. The appellants were appointed directors at the plenary general meeting of shareholders, closing the financial year in question with losses as in subsequent financial years, which also included negative equity. The Labour and Social Security Inspectorate issued a report acknowledging that the company was affected by a winding-up event, whereby the directors are to be held liable in accordance with Art. 367(1) of the Companies (Recast) Act (hereinafter LSC). Subsequently, the company files for and is the subject of no-fault insolvency proceedings, with the company going into liquidation. The Social Security Agency (hereinafter TGSS) initiates proceedings to attribute joint and several liability to the company’s directors.

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At the court a quo, the appellants raised two litigious matters. The first is that the right of the TGSS to claim payment of contributions is time-barred. The appellants consider that more than four years have passed between the date on which the Labour and Social Security Inspectorate issued its report and the date on which the Social Security Administration initiated proceedings to attribute liability. The appellants also maintain that such a right would have been time-barred from the time of the assessment of the debts until their notification. And the second question raised is the inappropriateness of the attribution of liability as directors, with the appellants claiming the application of the Single Additional Provision of Royal Decree-Law 10/2008 of 12 December [*"For the sole purpose of determining the losses for the compulsory reduction of capital regulated in Article 327 of the Recast Version of the Companies Act…and for the winding-up provided for in Article 363(1)(e) of the aforementioned Recast Version, as well as with respect to meeting the objective requirement of the insolvency proceedings under Article 2 of the Insolvency Proceedings Act 22/2003, of 9 July, the impairment losses recorded in the annual accounts, derived from Property, Plant and Equipment, Real Estate Investments and Inventories or from loans and receivables, shall not be computed"*], and consequently Art. 363(1) LSC would not be applicable.

As regards time-barring, the contested judgment rejects the claim on two main grounds. First, because with respect to the calculation of the four-year period provided for in the Social Security Act (hereinafter LGSS) and in the Social Security Collection Regulations (hereinafter RGRSS), Art.60 of the Insolvency Act 22/2003 of 9 July is applicable (hereinafter 2003/LC). The aforementioned article provides that, from the opening to the closing of the insolvency proceedings, the limitation period of actions against shareholders and against directors, liquidators and auditors of the debtor will be interrupted, a period that will be restarted, if appropriate, at the time of the closing of the insolvency proceedings (nowadays, Art. 155 of the 2020 Insolvency Act). And, secondly, because, in this case, four years have not elapsed since the assessments of the debts (2009 and 2010, respectively) and their notification in September 2011, when the commercial company enters insolvency proceedings; and nor between February 2013 - the liquidation of the company - and August 2016 - the date when the directors are held jointly and severally liable. As regards the attribution of liability to the directors, the court a quo rejects the claim, confirming their joint and several liability for not having instigated the winding-up and liquidation of the company that was affected by a winding-up event.

2. In the appeal to the Supreme Court, the arguments used by the parties were quite disparate. The appellants understood, on the one hand, that the action brought to determine the debt and demand payment of Social Security contributions had lapsed under Art. 24 LGSS and Arts. 42(1) and 43 RGRSS, respectively. In their opinion, the contested judgment is wrong in holding that the limitation period is interrupted by Art. 60 2003/LC, which is erroneous since it applies that article in isolation; so much so that neither the TGSS nor the contested judgment consider that this Act is applicable to consider whether or not to attribute liability to the company's directorship and that, for this purpose, the provisions of the Companies Act should be followed. Furthermore, Art. 60 2003/LC is a consequence of its Article 50, so that if, during the conduct

of the insolvency proceedings, actions cannot be taken against the directors, the limitation period of these actions is interrupted (Art. 60). Otherwise, in many cases, once the insolvency proceedings have ended, these actions could not be taken because they would be time-barred. For this reason they understand that, if both the TGSS and the judge a quo consider the aforementioned Art. 60 2003/LC to be applicable, only when the insolvency proceedings end could the proceedings to attribute liability to the directors be initiated, as set out in Art. 50 2003/LC. However, the judgment applies specific provisions in matters of Social Security that grant the TGSS the power of self-help. Well, if this is so, it will also be necessary to turn to the LGSS and the RGRSS and not to the Insolvency Act, so the interruption provided for in Art. 60 2003/LC is not applicable.

Very different opinion to the one held by the TGSS. The latter argues that the joint interpretation of the articles determines the interruption in accordance with the Insolvency Act, since if claims are filed against the directors under Art. 367 LSC, the opening of insolvency proceedings entails a stay of such actions and the companies court judges must not identify as suitable for consideration the claims in which these actions are brought (Art. 50(2) 2003/LC), staying the pending proceedings (Art. 51 bis(1) 2003/LC). According to the TGSS, the procedural provision does not provide for the effects of the opening of insolvency proceedings with respect to the non-corporate liability claim of Art. 241 LSC, so it could be filed by the aggrieved third parties, before the companies court judge, outside of the insolvency proceedings. The fact that the filing of this liability claim is not stayed by the opening of insolvency proceedings does not mean that it is not subject to the interruption of the limitation period, since the interruption is not necessarily linked to the staying or halting of the action. In these cases, what justifies the interruption is related to the convenience of the aggrieved third party creditors of the company waiting for what may happen in the insolvency proceedings. Consequently, although this claim can be filed after the opening of the insolvency proceedings, the limitation period is interrupted (Judgment of the Supreme Court (Civil Division) of 22 December 2014, Ar. 6885). Therefore, when the TGSS initiates proceedings for the attribution of liability it does so on the basis of the non-corporate liability claim (Art. 241 LSC), but exercising the power of self-help conferred to it by the LGSS and the RGRSS, so Art. 60 2003/LC is applicable because, otherwise, it would be in a worse position as a creditor.

3. Interesting conflict, to which this Judgment of the Supreme Court (Judicial Review Division) of 26 October 2020, Ar. 309024, subject of analysis, responds. In accordance with the arguments of the TGSS, the judgment considers that, on the same lines as the contested ruling, the TGSS has the power, through the privilege of self-help and in respect of debts to the Social Security, to hold the directors jointly and severally liable under Arts. 363 to 367 LSC (Arts. 12(2) and 13 RGRSS, in relation to Art. 15 LGSS). The exercise of such power must be understood against the logic involved by the subsequent opening of insolvency proceedings, the legislation of which will thus be applicable.

For this reason, three sets of rules apply: those of the Social Security regarding this power; the Companies Act regarding the appropriateness of the attribution and its requirements (Judgment of the Supreme Court (Judicial Review Division) of 6 March 2020, Ar. 936) and, finally, the 2003 Insolvency Act regarding the exercise of this privilege when the commercial company enters insolvency proceedings. However, in this appeal *"the appropriateness of the attribution of liability to the directors is not discussed, as the identification of this appeal as suitable for consideration is limited to the application of Article 60 of the Insolvency Act"* (Point of Law 4). And, in this sense, from the established facts it can be deduced that the TGSS's claims are prior to the opening of insolvency proceedings of the company of which the appellants were directors, and so they are insolvency claims payable upon distribution, not claims against the insolvent estate payable prior to distribution. This means that Art. 60 2003/LC is applicable because, as indicated by the Judgment of the Supreme Court (Civil Division) of 17 July 2019, Ar. 2837, the reason for the effect of interrupting the limitation period is owing to the convenience of being in line with the outcome of the insolvency proceedings, as it may affect the compensable harm and the knowledge of the directors, which could justify their required liability.

Consequently, the judgment under analysis finds that, in the event of non-payment of contributions generating debt-claims in favour of the TGSS subject to, in general, the rules on limitation periods of the LGSS and the RGRSS, the TGSS can attribute joint and several liability to the directors. However, *"if the debtor company enters insolvency proceedings, the particularities of the Insolvency Act are applicable, so that the TGSS may be subject to the outcome of the insolvency proceedings, and in the case of insolvency claims, the limitation of the action against the directors is interrupted in accordance with Article 60 of the Insolvency Act"* (Point of Law 5).

The above is an important interpretation regarding the effects of limitation periods in Social Security claims since it is understood that, once the debtor company has become the subject of insolvency proceedings, even when the claims are filed against the directors of the insolvent debtor by way of Art. 367 LSC and, therefore, are based on a non-corporate liability claim under Art. 241 LSC, it is necessary to apply the interruption provided in Art. 60 2003/LC to prevent the TGSS from being a worse-off creditor. In this sense, a homogenous application of legislation is not allowed - only the rules related to the Social Security, only the rules related to companies, only the rules related to insolvency proceedings - but, on the contrary, a triple application of rules is chosen; namely, those related to the Social Security to ensure the power of self-help in these proceedings of the TGSS, those related to companies, a regulatory environment that allows for the attribution, if appropriate, of the liability to the directors and the rules related to insolvency proceedings if, subsequently, the company initiates proceedings of this nature.

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