

# CONTROLLED REMUNERATION. ABOUT THE REMUNERATION OF SENIOR OFFICIALS AND DIRECTORS IN STATE-OWNED COMPANIES

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## SUMMARY

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<sup>1</sup>This paper is framed within the research projects DER2015-67918-P, The Simplification of Company Law (III). Remuneration of directors in the framework of improving Corporate Governance. by Professor Santiago Hierro Anibarro, University of Alcalá and funded by the Ministry of Economy and Competitiveness (Government Plan for Scientific and Technical Research of Excellence); DER2017-84775-C2-1-P Analysis, Development and Perspective of Corporate and Bankruptcy Institutions eligible for Treatment and Solution of Business Crises. by Alberto Díaz Moreno and Josefa Brenes Cortés, funded by the Ministry of Economy and Competitiveness; and The Transparency in the Local, Autonomic and State-Owned companies: controlled remuneration of public companies (i) and the right to access public information, funded by Consellería de Participación, Transparencia, Cooperación y Calidad Democrática of the Generalitat Valenciana (2020).

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## I. TRANSPARENCY AND GOOD CORPORATE GOVERNANCE. A MATTER OF SENSITIVITY AND A CONTROLLING TOOL

Controlled remuneration in state-owned companies, or those assisted by the state - giving them grant-in-aids -, is a matter that raises a certain sensibility. Therefore, there's a need to combine - particularly in the corporate scope - the concept of transparency and good corporate governance. This sensitivity, which is increasingly demanded within private companies, shall be even more pronounced within the public business sector. The worldwide-known concept of Corporate Governance has been developing an essential leading role for years, which is directly linked to the desire of having companies with better functioning. In this sense, and as an example, the most recent expression of this can be found in the Law of Spain, exclusively with regard to the private sector, in the Act 21/2014, of 3rd December, by which the Spanish Capital Company Act is consolidated for the amelioration of corporate governance. Among the introduced amends, the most highlighted ones are notably those affecting the governing body. For instance, the duties of diligence and loyalty are specified and there's a more detailed regulation of the liability regime of administration members regarding management, organization and functioning of the board of directors, enhancing its supervising role in terms of performance of directors with executive functions and, more specifically, establishing stricter con-

trols on remuneration of senior official positions.

On this, it must be remembered that corporate governance and transparency are intrinsically entwined realities since corporate governance includes theories, concepts, initiatives, legislative developments and regulations always aimed at the amelioration of the internal and external functioning of companies. Corporate governance also seeks to comply with efficiency, transparency and liability after the company and its members <sup>2</sup>. And, as aforementioned, in the frame of state-owned companies, the concept of transparency shall not be separated from the more comprehensive concept of corporate governance; the first is part of the latter: without it, it has no *raison d'être* <sup>3</sup>. The concept of transparency, understood as the provision of available, accessible, usable and verifiable information to the user, constitutes a "key aspect in the development and amelioration of an adequate corporate governance system for state-owned companies, making it one of its cornerstones, and which has been and increasingly continues to be [...] the subject of the most varied regulatory developments in public law in general, and specifically including in its scope of application those companies depending on public institutions" <sup>4</sup>.

As a result, this sensitivity has given rise to a series of regulatory provisions of different levels within the public sector. All of them are part of the progressive trend towards greater information and better access to public management matters,

<sup>2</sup> Vid., «Prácticas de Buen Gobierno Corporativo en el Sector Financiero Latinoamericano», Federación Latinoamericana de Bancos (FELABAN), Colombia, 2007. Muy ilustrativas son las reflexiones de Jiménez Sánchez, G. J., «Evolución del tratamiento del buen gobierno corporativo de las sociedades anónimas en el Derecho español», Revista Lex Mercatoria, núm. 2, 2016, pp. 58-62.

<sup>3</sup> Vid. Serrano Romera, A., «La aplicación de la Ley de Transparencia a la empresa pública», en Pérez-Serrabona, J. L. (dir.), Reformas en Derecho de sociedades, Madrid, 2017, p. 174.

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seeking greater transparency in the management and administration of public resources.

### **1. Act 19/2013, of 9th December, on transparency and scope of application: state-owned companies or those receiving grant-in-aids**

In terms of state-owned companies, particular attention shall be paid to Act 19/2013, of 9th De-

ember, on Transparency and Access to Public Information and Good Governance, as it should be noted that this transparency regulation includes, in its scope of application, those public commercial companies already receiving certain public aid. In terms of transparency of public activity, Article 2 outlines the subjective scope of application of Title I, where public and commercial companies - the ones with a share capital and direct or indirect participation of more than 50% - are included<sup>5</sup>.

<sup>4</sup> Vid. Serrano Romera, A., «La aplicación de la Ley de Transparencia a la empresa pública», *Reformas en Derecho de sociedades*, op. cit., p. 176.

<sup>5</sup> V Article 2. Subjective scope of application. The provisions of this title shall be applied to:

- a) The General State Administration, the Administrations of the Autonomous Communities and of the Cities of Ceuta and Melilla, and the entities making up the Local Administration.
- b) The management entities and common services of the Social Security System as well as its connected mutual societies for work-related accidents and occupational diseases.
- c) The self-governing bodies, State agencies, publicly-owned business entities and public-law entities which, either functionally independent or with special autonomy recognized by Law, have been granted external regulatory or supervisory functions over a certain sector or activity.
- d) The public-law entities with their own legal personality, linked or reporting to any of the Public Administrations, including public Universities.
- e) Public-law corporations, as regards their activities under Administrative Law
- f) The Household of His Majesty The King, the Congress of Deputies, the Senate, the Constitutional Court and the General Council of the Judiciary, as well as the Bank of Spain, the 10 Council of State, the Ombudsman, the Court of Accounts, the Economic and Social Council, and the equivalent institutions in the Autonomous Communities, as regards their activities under Administrative Law
- g) Commercial companies in whose share capital the entities set forth in this Article hold a direct or indirect stake of more than fifty percent.
- h) Public-sector foundations set forth in legislation on foundations.
- i) Associations constituted by the Administrations, bodies and entities set forth in this Article. Also included are the cooperation bodies set forth in Article 5 of Act 30/1992, of 26 November, on the Legal System of the Public Administrations and Common Administrative Procedure, to the extent that, given their specific nature and absence of an administrative structure of their own, the provisions of this Title are applicable thereto. In these cases, compliance with the obligations deriving from the present Act shall be the responsibility of the Administration holding the position of Secretariat of the cooperation body.

2. For the purposes of the provisions of this Title, Public Administrations shall be understood as the bodies and entities included in items a) to d) of the previous Section.

#### Article 3. Other obliged subjects

The provisions of Chapter II of this Title shall also be applicable to:

- a) Political parties, trade unions and business associations.
- b) Private entities that receive, during a period of one year, public grants or subsidies totalling more than €100,000, or when at least 40% of their annual revenue comes from public grants or subsidies, provided that the amount is at least €5,000.

Article 4. Obligation to provide information. Individuals and legal persons other than those listed in the Articles above, performing public duties or exercising administrative powers, shall be required to provide to the Administration, body or entity among those set forth in Article 2.1 to which they report, upon request, any information necessary for compliance with the obligations set forth in this Title. This obligation is equally applicable to awardees of public-sector contracts, in the terms set forth in the respective contract.

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The obligations on information transparency provided for in Chapter II shall also apply to "Private entities that receive, during a period of one year, public grants or subsidies totalling more than €100,000, or when at least 40% of their annual revenue comes from public grants or subsidies, provided that the amount is at least €5,000 (Article 3, Section B). Article 25, Section 1, further stipulates that Title II provisions - in terms of good governance - shall apply to the General State Administration; that is, members of the Government, Secretaries of State and other senior officials that work under the General State Administration or public or private-law entities belonging to the State public sector, either linked to or reporting to the General State Administration. The implementation of the Transparency Act in state-owned companies - with the principles of good governance (Article 26), with provisions on Active Publicity (Article 5) and with the right of access to public information and its limits (Article 12 and following) - clearly means, according to Serrano Romera, "going one step further in a globalized process of creating a system of corporate governance for these companies in which, in addition to effectiveness, efficiency, honesty and ethics in management, other aspects such as transparency, closeness to the ordinary citizen, and global and accurate information must be sought. In other words, the aim is to further democratize the governance and the functioning of the economic system as a whole."<sup>6</sup> Such progress is part of the general purpose provided by the Act: to extend and strengthen the transparency of public activity, to regulate and guarantee the right of access to information about said activity, and to establish the good governance obligations that must be complied with by public officials as well

as the consequences resulting from non-compliance.

## 2. Remuneration and Transparency duties: content and format

Nonetheless, the Transparency Act does not only formulate general principles. In this sense, the lawmaker does not delay the concrete application of the duties of transparency that it formulates. In fact, this detail brings us to a more vivid approach in the particular subject whose legal regime we are dealing with. Thus, the public information obligation provided (Article 5, Section 1) extends to institutional, organizational and planning information (Article 6); to information of legal relevance (Article 7); and financial, budgetary and statistical information (Article 8). And particularly interesting, in what we are concerned about, is the necessary publicity of the information on the remunerations received annually by senior officials and directors of the mentioned entities. We should not forget that, likewise, if a post is relinquished, the severance pay received shall be made public, when applicable. The same goes for the obligation to publish information about the duties they perform, their applicable regulations and their organizational structure. For this purpose, they shall include an updated organizational chart that identifies the heads of the different bodies, as well as their profile and career. (Article 6, Section 1).

Another extraordinarily remarkable aspect is that the financial, budgetary and statistical information stipulated in Article 8 are conceived of by the lawmaker in its most basic form. In this sense, the parties included in the scope of application

<sup>6</sup> Vid. Serrano Romera, A., «La aplicación de la Ley de Transparencia a la empresa pública», *Reformas en Derecho de sociedades*, op. cit., p. 183.

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of this Title must make public, at a minimum, information regarding the following administrative actions that have a financial or budget impact (Article 8, Section 1). Despite this, interpreting “at a minimum” can’t be done without applying the obligation to publish “regular and updated information, knowledge of which is relevant in guaranteeing the transparency of their activity related to the functioning and monitoring of public activity” (Article 5, Section 1).

The obligation of information equally defines the format it has to be published with. Hence, information shall be published in the corresponding electronic portals or websites (Article 5, Section 4), be published regularly and provide updated information (Article 5, Section 1); be easily accessible and free of charge. The appropriate mechanisms shall be established to enable the accessibility, interoperability, quality and reuse of the information published, as well as its identification and location (Article 5, Section 4 )<sup>7</sup>. All information shall be available in accordance with the principle of universal accessibility and design for all (Article 5, Section 5)<sup>8</sup>.

### 3. Remuneration and Transparency duties: content and format

Finally, other two considerations of different nature shall be taken into account. Firstly, the transparency obligations contained in the Act are to be applied without prejudice to the application of the regulations of the corresponding Autonomous Community or of other specific provisions setting forth a broader publicity system (Article 5,

Section 2. Secondly, and when appropriate, the limits to the right of access to public information set forth in Article 14 shall also be applicable - especially those limits deriving from the protection of personal data, regulated in Article 15. This Article specifies, namely, the case where the information contains data that is especially protected. Therefore, publicity shall only take place after the removal of such data (Article 5, Section 3). This limitation, which is subject to interesting debate, will always be subject to an assessment in terms of the potential harm that may occur, as well as a weighting of interests worthy of protection. In terms of the latter, that is the public interest protection disclosure and the rights and interests protected under the provisions of Article 14. In some cases, the solution will even be a partial access to information - as specified in Article 16. Nonetheless, it must be beared in mind that the application of limits shall be justified by and proportional to the level of protection required, and shall take into account the circumstances of each specific case, especially the confluence of a higher public or private interest justifying access (Article 14, Section 2).

This conflict between the publicity of certain information and its limitations can also be found in the sphere of private companies. In fact, in common business practice, to expressly mention a reservation of partial information can usually be seen. However, in the public corporate sphere, this matter assumes a special significance. In the field of state-owned companies, particularly applied are all the potential limitations arising from serious harm to economic and commercial

<sup>7</sup> In the case of non-profit-making entities with exclusively social or cultural interest purposes, with a budget of less than €50,000, compliance with the obligations deriving from this Act may be carried out by electronic means made available to them by the Public Administration that is the source of most of the public grants or subsidies received thereby. (Article 5.4)

<sup>8</sup> As set forth, it shall be available to persons with disabilities through appropriate means or formats, so that they are accessible and comprehensible. (Article 5.5)

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interests (Article 14 paragraph f); professional secrecy and intellectual and industrial property (Article 14, paragraph k); as well as safeguarding confidentiality or secrecy required in decision-making processes (Article 14, Section 1, paragraph k). In any case, remuneration is an aspect on which the information limitation shall be forgotten. Later on, we will address the specific regulations governing the remuneration regime applied to senior officials and directors within the public business sector, with special mention to transparency.

Yet, within the Transparency Act 19/2013 framework, we are to recall now the powers given to the so-called Council on Transparency and Good Governance, since the General State Administration shall be subject to its control in terms of compliance with the information obligations set forth in Article 9. This control has a very relevant role in the Transparency Portal, created by the General State Administration and under the aegis of the Ministry of the Presidency. According to the technical principles of Article 11 and its regulatory development, this Portal shall provide citizens with access to all of the information cited in the previous articles regarding its scope of action (Article 10, Section 1). It will also include access to information about the General State Administration, which is requested most frequently (Article 10, Section 2).

The Council on Transparency and Good Governance may issue decisions establishing the necessary measures in order to put an end to non-compliance and to initiate appropriate disciplinary actions (Article 9, Section 2). Repeated non-compliance with the information obligations (that is, active publicity obligations regulated in the Transparency Act) shall be considered serious infringements and therefore subject to the application of the disciplinary regime stipulated in the

corresponding regulations on perpetrators (Article 9, Section 3). In addition to this, compliance of transparency obligations is not limited to this Transparency Portal; The General State Administration, Administrations of the Autonomous Communities and the Cities of Ceuta and Melilla, and the entities comprising the Local Administration, may all adopt other complementary and cooperative measures in order to comply with the transparency obligations (Article 10, Section 3).

## II. TRANSPARENCY, BUT ALSO AUSTERITY AND EFFECTIVENESS

The above-exposed legal framework on transparency does not exhaust the lawmaker in the matter of giving feedback on it in recent times, and this is mainly because the problem in terms of remuneration under the umbrella of state-owned companies, or those receiving grant-in-aids, shows a reality that seemed scandalous - particularly over the past years. Thus, it has been reported that boards of directors in state-owned companies were too numerous, with an exaggerated number of appointed members, had a significant influence, and received salary supplements difficult to quantify and to inspect. There was even talk of a legion of members who enjoyed salary supplements and compensations in the shape subsistence allowances and attendance meeting fees. Hence, the problem was not just limited to a matter of more or less publicity, since not only could a lack of transparency be observed - or, in other words, the fact of clearly hiding the carried-out activities and received remunerations. There was also a problem in terms of remuneration, and therefore, the payment had to be limited somehow, something that could only be a result of the restructuring of the public business sector

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## **1. From the Additional Provision No. 8 of the Royal Decree-Law 3/2012, of 10th February, on urgent measures to reform the labour market, to the Royal Decree 451/2012, of 5th March, which regulates the remuneration of senior executives in the public business sector and other public entities**

AThis restructuring, regardless of the final outcome, was the result of having the Government comply with the commitments made in terms of austerity and effectiveness for the benefit of the public sector in general, and namely for the sake of public business framework. This is the reason why the Additional Provision No. 8 of the Royal Decree-Law 3/2012, of 10th February, on urgent measures to reform the labour market was included (which would later become Act 3/2012, of 6th July, on urgent measures to reform the labour market). This Royal Decree, which has particular provisions on commercial and senior management employment contracts arising from the state public sector, “not only does it include those principles, but it also introduces new criteria based on logical and objective principles, significantly modifying the remuneration regime of senior officials and directors working within the public business sector” - as expressly stated in the Royal Decree 451/2012, of 5th March, which regulates the remuneration of senior officials and directors in the public business sector and other public entities. This Royal Decree developed the aforementioned Additional Provision No. 8 with the clear intention of contributing to economic stability, the general interest and the common good of the citizens - and such was the need which, in widespread opinion, demanded the situation of economic crisis. Not only did this situation require the adoption of several measures aimed at holding back public

expenditure, but also aimed at reducing budget deficit.

The Royal Decree 451/2012, of 5th March, provides similar provisions in terms of remuneration. Put differently, it extends the remuneration regime stipulated in the Additional Provision No. 8. Thus, besides including state-owned companies in the frame of institutions falling within this scope of application, it also includes other public sector entities. It shall not be forgotten either, and as it is expressly mentioned, the significance that transparency, austerity and effectiveness principles have; and in terms of transparency, this is the minimum requirement demanded both to entities and its senior officials and directors: “good governance criteria shall be applied to listed public limited companies, financial institutions, and those institutions created from international agreements and organizations, always adjusting the needed changes to the very nature of the public sector”. Article 1 clearly defines the purpose of its regulation: “Royal Decree-Law 3/2012 significantly modifies the remuneration regime for senior executives in the public business sector, introducing new criteria based on logical and objective principles. The new regime is intended to encourage austerity, efficiency and transparency”.

However, and before analyzing the remuneration regime stipulated for senior officials and directors within the public business sector and other public entities, a couple of aspects should be highlighted.

Firstly, as it's a question of significant importance, it shall be noted that this Royal Decree 451/2012 does not include or it does not apply to Autonomous-owned nor Local-owned companies. This means that these companies do not fall within the scope of application of the Royal

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Decree, being state-owned companies the only ones included in its framework. This observation leads us to recall the lack of a complete regulation - and in our opinion, necessary - on public companies (regulations which would, at least, try to regulate public corporations, no matter what the competence complications are). Even the State Law on commercial companies shows a general possibility allowing the General State Administration to incorporate commercial companies. Article 17 of the Consolidated Text of the Act on Capital Companies refers in particular to limited liability companies or sole proprietorships whose capital is owned by the State, by autonomous communities or local corporations, bodies or entities dependent on them. But the scenario is somewhat disheartening, since the regulatory dispersion is extreme. It should be noted that specific acts demand legal authorization for the various administrations to incorporate public companies; these acts relate to the State, the Autonomous Communities or the local corporations. In this regard, there's a potential existence of special acts regulating certain public companies with particular features in their legal framework; and by particular features we refer to the application of Private Law on these companies.

Secondly, we need to keep an eye out for credit institutions, and specifically to its remuneration policies. For our purposes, special attention will be paid to the remuneration limitations and control that credit institutions with public financial support are legally subject to. In other words, those credit institutions which receive public grants for their remediation and restructuring. In this sense, an analysis of the Royal Decree-Law, of 3rd February on reorganization of the financial sector will be essential. The content of this Royal Decree is complemented, precisely, with the the Additional Provision No. 8 of the Royal De-

cree-Law 3/2012, of 10th February, on urgent measures to reform the labour market. Some parts of this provision deal with the establishment of a specific regime applicable to senior officials and directors of credit institutions, like for example, compensation limitations - given in the event of termination of their contracts with credit institutions holding a majority stake or financially supported by the Spanish Fund for Orderly Bank Restructuring (hereinafter FROB). In addition to this, there must be added certain regulations that address cancellation and termination of officials or directors' contracts with credit institutions in the event of imposition of disciplinary penalties and certain cases of provisional replacement.

## **2. Scope of application of the different types of commercial and senior management contracts within the state public sector**

Consequently, we are to analyze in a first place the Added Provision No. 8 of the Royal Decree-Law 3/2012, of 10th February, on urgent measures to reform the labour market (Act 3/2012, of 6th July), as well as its subsequent development in terms of the remuneration regime under the Royal Decree 451/2012, of 5th March, which regulates the remuneration of senior managers and directors in the public business sector and other public entities. In any case, let us remember that the Added Provision No. 8 establishes three different kinds of commercial and senior management contracts within the state public sector. We may find provisions on severance in case of termination of contract due to resignation (Additional Provision No. 2); a remuneration classification for senior officers and directors of state-owned companies (Additional Provision No. 3); and law enforcement of the aforementioned contracts (Additional Provision No. 4).

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The scope of application of this set of specialities is the state public sector formed by the entities provided for in Article 2, Section 1 of the General Budgetary Law 47/2003, of 26 November, with the sole exception of the the management entities and common services of the Social Security System and its connected mutual societies for work-related accidents and occupational diseases, as well as its centers and joint entities referred to in paragraph D of the same Article (Additional Provision No. 8). However, the exception under the provision itself should be taken into account, since it expressly states that this shall be applied to state-owned companies: "the rest of entities subject to the scope of this provision will depend on the Government approach on this, according to Section 6" (Additional Provision No. 3). The Government, in accordance with this regulatory authorization - following the proposal of the Minister of Finance and Public Administration and depending on the economic situation and economic policy measures - could modify the amounts and limitations of the compensations established in the provision, as well as develop the provisions of its paragraph 3 on remuneration. It also stipulated that the Minister of Finance and Public Administration would set the system of compensation for expenses in terms of subsistence allowances, travelling expenses and other similar expenses arising from the performance of the duties as senior officers, executives, staff working under commercial or senior management contracts. And from there, as we will review hereinafter, OM HAP/1741/2015, of July 31st, also sets a compensation regime in terms of expenses for subsistence allowances, travelling expenses and other similar expenses of senior officers, executives or staff working under commercial or senior management contracts.

From the block of specialties foreseen in the Additional Disposition No. 8 of the Royal Decree-Law 3/2012, of February 10, on urgent measures for the reform of the labor market (Act 3/2012, of July 6), we are primarily interested in the remuneration regime of senior officials and directors of the public business sector and other public entities, also taking into account the development of the Royal Decree 451/2012, of March 5.

The scope of application of Royal Decree 451/2012, of 5 March, corresponds to the state public sector made up of the entities provided for in Section 1 of Article 2 of the General Budgetary Law 47/2003, of 26 November, with the exception of letter D of the same Section of the aforementioned article. But for the legal purposes set forth in this Royal Decree, and under Article 2, the state public sector is classified in different categories: state-owned companies; the rest of state public entities provided for in Act 47/2003, of 26th November, namely in Sections 1 and 3 of Article 3; and the General State Administration.

The public business sector is made up of the entities referred to in Article 3, Section 2, of the General Budgetary Law 47/2003, of 26 November. These are: a) public business entities are; b) state-owned commercial companies; c) and any public-law bodies and entities linked to or dependent on the General State Administration, consortia and funds without legal personality not included in the administrative public sector<sup>9</sup>.

### **3. Particular reference to state-owned companies**

State-owned companies are defined and regulated in Act 40/2015, of 1st October, on the Legal Regime of the Public Sector. These institutions

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are equally defined and regulated in specific provisions in Act 33/2003, of 3rd November, on Public Administration Property.

These bodies, as defined in Chapter V (named "About the state-owned companies") of Title II (named "Organization and functioning of the institutional public sector") of Act 40/2015, are subject to State control. It specifies, particularly, the meaning of state-owned companies, which is a commercial company over which the State control is exercised. This control is exercised in two different cases. Firstly, when the state has a direct participation in the company, having a share capital of more than 50%, no matter if this participation comes from the General State Administration or any other entity provided for in Article 84<sup>10</sup> and is part of the institutional public sector, including state-owned companies. It is also contemplated in the case in which several of these entities share the capital stock of the company, and thus, the corresponding participations must

be added together to determine this percentage (Article 111, Section 1, paragraph a). The second envisaged case is when the commercial company falls within the definition provided by Article 4 of the Act 24/1988, of 28th July, on the Securities Market, with respect to the Administrative Public Sector or its public bodies linked or subordinate to it (Article 111, Section 1, paragraph b) - in other words, when a direct control is produced, and it determines the existence of a group of companies set forth in Article 42 of the Spanish CCo.

It has already been stated that state-owned companies - whose name must necessarily be used literally as "state commercial companies" or with its Spanish abbreviation "SME" (Article 111, Section 2) - are subject to the regime provided for in Act 40/2015. Nonetheless, this regime shall be completed, essentially, with the provisions of Act 33/2003, of 3rd November, on Public Administration Property, namely the ones under Title VII (named, "Capital Wealth of

<sup>9</sup> We can't forget that the State Public Sector is composed of the Administrative, Commercial and Foundation under the General Budgetary Law, Act 47/2003, of 26th November. Its Article 3, drafted by paragraph 2 of final provision No. 8 of Law 40/2015, of October 1, on the Legal Framework of the Public Sector, establishes that:

For the purposes of this law, the following shall constitute the state sector:

1. The administrative public sector, composed of

a) The General State Administration, Autonomous bodies, independent public entities, non-transferred public universities and the Social Security management entities, common services and the Mutual Societies for Industrial Accidents and Occupational Diseases in their public function of cooperation in the management of the Social Security, as well as their associated centres and entities.

b) State entities of public law dependent or linked to The General State Administration, consortia bearing a legal personality and foundations without a legal personality that meet any of the two following requirements:

1. Main activity does not consist in the production under market conditions of goods and services for individual or collective consumption, or that engage in operations of redistribution of income or national wealth, in any case, not for profit.

2. It is not funded mainly through commercial revenue, where said income shall be understood for the purposes of this law as income, whatever its nature may be gained in return for the delivery of goods or the provision of services.

2. Commercial public sector, composed of:

a) Commercial public enterprises.

b) State-owned companies

c) Any state entities of public law dependent or linked to The General State Administration, consortia and foundations without a legal personality not included in the administrative public sector.

3. The public foundation sector, composed of foundations in the state sector.

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the General State Administration"). In terms of the conceptual and regulatory delimitation of the state-owned companies, the contribution of the aforementioned Title is essential since it includes a set of special provisions applicable to commercial public companies in the shape of public limited companies and fully owned - in terms of share stock - by the State, as well as an expressly clarifying provision on the regime framework applicable to it. It is hereby stated, as a relevant mandatory rule, that "state-owned companies in the shape of public limited companies<sup>11</sup>, whose share stock is fully owned, directly or indirectly, by the General State Administration or any of its public bodies, shall be governed by the present Title and by private legislation, except in the case where budgetary legislation, accounting legis-

lation, regulations on financial reporting and on contracting are to be applied". And for the rest of state-owned companies, the management of its assets will be adjusted according to Private Law, subject to the provisions set forth in this Act that are expressly applicable to them (Article 167.2). The same happens, in terms of state-owned companies, with the provisions of Article 113 of Act 40/2015, insofar as these companies "shall be governed by the provisions of this Act, by the provisions of Act 33/2003, of 3rd November, and by the private legal system, except in the cases where legislation on budgets, accounting, personnel, economic-financial reporting, and contracting are to be applied".

It should be noted that our aim in this pa-

<sup>10</sup> The institutional public sector is made of the following entities:

a) Public bodies linked to or subordinate to the General State Administration, which are:

1. Autonomous organisations
  2. Commercial public enterprises
- b) Independent administrative authorities
- c) state-owned companies
- d) Consortia
- e) Public sector foundations
- c) Foundations without legal personality
- d) Non-transferred public universities

2. The General State Administration or any entity that is of the institutional public sector may not, by itself nor in collaboration with other public or private entities, create or exercise effective control, directly or indirectly, over any entity different other than those listed in this Article, regardless of its nature and legal framework.

The provisions of this Section shall not apply to the participation of the State in international organizations or supranational entities, nor to the participation in national standardization and accreditation bodies or in companies created under Law 27/1984, of July 26, on reconversion and reindustrialization.

3. Non-transferred public universities will be governed by the provisions of Law 47/2003, of 26 November, which is applicable to them and by the provisions of this law insofar as it is not provided for in their specific regulations.

<sup>11</sup> Certainly, the intervention of the Administration as an economic agent is produced by having them act under Public law or by using Private law institutions. Within the Public law framework, the Administration may perform by using an administrative service without legal personality, or by setting up an autonomous body subject to Public Law. In the second case, it will enjoy privileges, as for example, an own legal personality, which will give it quickness when exercising its functions. Nonetheless, and within the Private law legal framework, the company is used as a tool, conceptually justifying the existence of public companies. And, in this sense, the company normally used in these cases is the public limited company, whether being fully owned by the State (or any other public body) or in the shape of mixed-capital companies (in which private and public capital is involved). Vid. Madrid Parra, A., «La sociedad anónima pública. Otras sociedades anónimas especiales», Derecho Mercantil, vol. 3, Las sociedades mercantiles, Madrid, 2013, pp. 931-932

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per is different from analyzing the particular features that state-owned companies have in their legal regime. In any case, it should be noted that Act 40/2015 contains provisions of great interest regarding the creation and termination of these companies (Article 114), as well as the liability regime applicable to the members of the boards of directors of state-owned commercial companies appointed by the General State Administration (Article 115). However, and from the controlled remuneration point of view - even if it's superficially -, special attention shall be paid to the guiding principles formulated by the lawmaker. It is thus foreseen that, notwithstanding the general supervision that the shareholder will exercise over the functioning of the state-owned companies (in accordance with the provisions of Act 33/2003), the General State Administration and the entities that make up the institutional public sector - and as holders of the capital stock of these state-owned companies - shall promote efficiency, transparency and good governance in the management of such enterprises, for which they shall foster good practices and codes of conduct appropriate to the nature of each entity (Article 112). A clear expression of these guiding principles can be found in the budgetary, accounting, economic-financial reporting and personnel system, in addition to in the specific remuneration regime for the senior officials and directors - which we will analyse immediately. In this regard, state-owned companies shall formulate and submit their accounts in accordance with the accounting principles and standards set forth in the Chart of Accounts and the General Accounting Plan, as well as the provisions implementing them (Article 117, Section 2). However, the economic-financial management will be pursuant to a reinforced control depending on the nature of these entities. This management will hence be subject to a double check, since such management - notwithstanding the

jurisdiction of the Court of Auditors - will equally be pursuant to the State General Administration control (Article 117, Section 3). We may not forget either that these companies are under the obligation of drafting up an annual operating and capital budget, as well as an action plan that will be integrated in a multi-annual programming that falls within the State Budget (Article 117, Section 1)<sup>12</sup>. Finally, and in accordance with the recruitment pool provided for in the Royal Decree 451/2012, of 5th March, which regulates the remuneration of senior executives in the public business sector and other public entities, it must be noted that company staff, including senior officers and directors, will be pursuant to Labour Law and to all those regulations applicable to them depending on the state public sector they are ascribed to. Budgetary regulations must always be included among these, especially those established in the General State Budget Acts (Article 117, Section 4).

There are other provisions within Act 33/2003 that complete, as mentioned before, the legal framework of state-owned companies. These are provisions related to its asset management and which affect to several aspects: the restructuring of the public business sector (Article 168); the Council of Ministers competencies (Article 169); the Minister of Finance competencies (Article 170); the acquisition of securities (Article 171); creation and termination of companies (Article 172); the administration of securities (Article 173); and the competence and procedure for the disposal of securities representing capital (Articles 174 and 175). Other special provisions on state-owned companies shall be added to the previous ones, namely to the companies provided for in Article 166, Section 2 (on companies fully owned by the state, directly or indirectly, with the shape of public limited company); in this case, it refers to the effectiveness control to be performed by the ministry in charge (Article 176)<sup>13</sup> ,

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to the relationships of the General State Administration with these companies (Article 177), to the system of instructions that the ministry in charge may deliver (Article 178), to provisions on the administrators and their responsibilities (Article 179 and 180), as well as a particular reference to the director and chief executive officer (Article 181) and specifications on possible non-monetary contributions made by the General State Administration or any of its public bodies to the companies provided for in Article 166, Section 2 of this Act (Article 182)<sup>14</sup>.

### III. REMUNERATION REGIME OF SENIOR OFFICIALS AND DIRECTORS IN STATE-OWNED COMPANIES

#### 1. Senior officials and directors

The remuneration regime stipulated in Royal Decree 451/2012 is applicable to senior officials and directors of the aforementioned entities. Particularly, and for the purposes of this paper, it's applicable to state-owned commercial com-

panies. In this case, the lawmaker's contribution is suggestive, to say the least, as there is a well-known uncertainty in this matter when it comes to classifying the different ways of participation in the management and representation of a company, as well as in terms of the contracting regime of the different members.

For the purposes of this Royal Decree, a distinction is made between the senior officials and directors. In this sense, senior officials are considered to be the executive directors, chief executive officers or CEO, having executive powers, and representing the board of directors or higher governing bodies or administrations of the entities provided for in Article 2, Section 2, Paragraph A of the Royal Decree. They are alternatively named as Director-General or with an equivalent name within those companies or entities. Note also that in state-owned companies whose administration is not delegated on a board of directors, the chief executive has the highest responsibility position within the company (Article 3, Section 1, paragraph a).

Managers or directors are part of the

<sup>12</sup> As indicated, this programme will include a revision of the creation plan referred to in Article 85, which is to be carried out every three years.

Article 85. Effectiveness control and continuous supervision:

1. Entities integrated in the state institutional public sector will be subject to the effectiveness control and continuous supervision, notwithstanding the provisions of Article 110.

To this end, all the entities integrated in the state institutional public sector will have, at the time of their creation, an action plan that will contain the strategic points around which the entity's activity will be developed, which will be reviewed every three years, and which will be completed with annual plans that will develop the creation plan for the following year.

2. The control of effectiveness shall be exercised by the department to which they are ascribed, and it will be exercised through service inspections. This shall aim to evaluate the fulfilment of the objectives of the entity's specific activities, as well as the appropriate use of resources, which should be in accordance with its action plan and its annual updates. This control shall be exercised without prejudice to the control that, under Act 47/2003, of 26 November, is exercised by the intervention of the General State Administration

3. All entities integrated in the state institutional public sector are pursuant to - from their creation until their termination - to the continuous supervision exercised by the Ministry of Finance and Public Administrations, through the General State Intervention, which shall monitor compliance of the requirements provided for in this Act. It will specifically verify the following requirements:

- a) The prevalence of the circumstances that justified its creation
- b) Its financial sustainability

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board of directors or higher governing bodies or administrations. They act under the dependence of the board of directors or under the maximum responsible person of the board. They exercise separate functions with their autonomy and responsibility, only limited by the criteria and instructions emanating from the maximum responsibility position, or the aforementioned bodies or entities provided for in paragraphs A and B of Section 2 of Article 2 of this Royal Decree (Article 3, Section 1, paragraph b).

The controversial question of dependency is also clarified in some way. For this purpose, it is stated that when the functions of both the President and the General-Director or equivalent are exercised by two different people, the dependency may take place either with respect to the president or the general manager or equivalent.

Finally, and as a closing point, doubts are dispelled as to whom this remuneration regime should be applied. In any case, those who are assigned a directive position under their regulatory legislation will be considered as such (Article 3,

) The existence of the reasons for its termination foreseen in this Act, referred to the noncompliance of the purposes that justified its creation, or that its prevalence is not the most suitable means to achieve them.

The planning, execution and evaluation actions corresponding to the continuous supervision will be legally determined.

4. Actions on effectiveness control and continuous supervision will take into account:

- a) The economic and financial information available.
- b) The submission of information by public bodies and entities subject to the System of control of effectiveness and continuous supervision.
- c) Service inspections' proposals by the ministerial department.

The results of the evaluation performed by both the assigned Ministry and the Ministry of Finance and Public Administration shall be set out in a report subject to an adversarial proceeding which, depending on the conclusions reached, could offer amelioration, transformation or elimination proposals of the public body or entity.

<sup>13</sup> The relations between the Council of Ministers, the Ministry in charge, the general intervention of the State Public Administration and the Directorate General for State Assets are defined in articles 176 and 177. In fact, the Council of Ministers, when authorizing the incorporation of these companies, may grant the functional tutelage of the company to a ministry whose powers are specifically related to the corporate purpose of the company. However, in the absence of this express tutelage grant, the Ministry of Finance will fully exercise the powers for the supervision of the company's activity under this Act. The powers of control that are incumbent on the general intervention of the State Administration are maintained, although the ministry in charge will exercise the functioning and effectiveness supervision on companies and shall be accountable for its actions before the Spanish Parliament "General Courts within the scope of its competencies. The ministry in charge will equally instruct the company on the strategy points and will set the priorities in their execution. The Directorate General for State Assets will approve the financial points and will set the supervision systems allowing adequate financial control over these societies. For those companies needing to define a medium-term budgetary, financial and action framework, the relations with the General State Administration will preferably be established on the basis of an agreement or program-contract under the terms of Article 176.4. Therefore, it is observed that, although formally the legal regime applicable to these public companies is that of private law, "in its functioning, the company is in fact subject to the administrative body to which it is ascribed, which exercises external control over it" and that "likewise, in the functioning of the company's bodies, dysfunctions are produced due to its public nature, even if it is an entity subject to the private law of public limited companies." Vid. Madrid Parra, A., «La sociedad anónima pública. Otras sociedades anónimas especiales», op. cit., p. 935.

<sup>14</sup> All these provisions take into account the nature of state-owned companies. It is worth remembering, with Madrid Parra, that state-owned companies are a tool allowing the creation of a differentiated and autonomous legal entity: "From a formal point of view, a public limited company is a legal entity autonomous from the Administration. However, such independence must be understood in a formal legal sense, since it has its own legal status, but not in so far as it falls outside the mandate of the administrative decision-making bodies on which it depends. The distinctive point that must be emphasized is not so much this formal independence as the operational autonomy that allows it to be subject to private law, thus avoiding the rigidity of administrative law." Regarding dependency, we will refer to it in the immediately preceding note.

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Section 1). And, in an excluding sense, those who are linked to the entity by an official relationship will not dispose of the highest position or directive one (Article 3, Section 2).

One last consideration may be appropriate in terms of the conceptual definition of the maximum responsible and directors, since it seems like some figures with positions of chief executives and directors which are part of the board of directors, or are in charge of management, direction or control, lacking executive added responsibilities to those inherent to their position, don't enjoy of or have that condition; we are referring to, for example, simple executives or consultants. And the same would be true for ordinary officers or experts who, although they hold a high position, are not qualified as the maximum responsible figure in application of the Royal Decree 451/2012 and the Order of the Minister of Finance and Public Administration<sup>15</sup>.

## **2. About the contracting regime applicable to the following cases: commercial contracts or special industrial relations**

We shall highlight the provisions of the Royal Decree 451/2012 on the contracting regime applicable to the following cases. For this purpose, this Royal Decree differentiates between the professional connection by commercial contract and the connection arising from special industrial relations.

This regime is clearly imperative, and should be as follows. Those who assume the highest responsibility functions within state-owned companies, integrate their board of directors or hold positions of chiefs due to the absence of a board of directors, will be professionally bound

with these societies by commercial contract. The arising questions will be governed by the Additional Provision No. 8 of Royal Decree-Law 3/2012, of February 10, on urgent measures to reform the labor market as well as by the provisions of the Royal Decree 451/2012, of 5 March; by the provisions of the Articles of Association; by the guidelines approved by the governing board and, if applicable, by the General Meeting members or equivalent body; by the applicable civil and commercial legislation; and by the will of the parties. (Article 4, Section 1 of the Royal Decree 451/2012, of 5 March).

Any other maximum responsible person different from the ones mentioned above, and those who are considered directors under the Royal Decree 451/2012, will be professionally bound by a senior management contract pursuant to the Additional Provision No. 8 of the Royal Decree-Law 3/2012, of 10th February, on urgent measures to reform the labor market as well as to the provisions of the Royal Decree 1382/1985, of 1st August, which regulate the special industrial relation of senior managers, as long as it complies with the Royal Decree 417/2012, and with the will of the parties (Article 4, Section 2 of the Royal Decree 451/2012, of 5th March)<sup>16</sup>.

## **3. Review on lawfulness: the control prior to absolute nullity**

Contracts, either in the shape of commercial or special industrial relations, are subject to an important review on their lawfulness in accordance to the Additional Provision No. 8 of the Royal Decree-Law 3/2012, of 10th February, on urgent measures to reform the labour market (Act 3/2012, of 6th July). This control or review is something specifically applied to commercial and senior management contracts of the public business sector,

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which is a particularly interesting aspect in terms of the remuneration control that shall be applicable. We shall not forget that, well beyond the remuneration limits that we will examine further on - and which have to be respected since they represent a cornerstone in the new remuneration scheme of state-owned companies -, there is an ultimate referral to the will of the parties that could have special significance.

Review on lawfulness is required to take place in three different cases; firstly, prior to the execution and formalisation of the mentioned contracts; secondly, during the execution and signing of the same; and finally, after the contract formalisation.

In this sense, before execution and formalisation, signed contracts are required to be submitted to the Spanish Government Attorneys Office or any other body which could offer legal advice on the entity exercising financial control over the public sector entity or, when needed, on the shareholder willing to hire a director (Additional Disposition No. 8, fourth 1)<sup>17</sup>. And the bodies exercising control or financial supervision of these entities shall take the necessary measures to ensure compliance with the terms of

this provision in the execution and formalisation of the aforementioned contracts and as advised, notwithstanding the possible civil, administrative, accounting or any other type of liability that may arise in the event of non-compliance (Additional Disposition No. 8, fourth 3). Finally, and as an unequivocal statement, absolute nullity will be declared when contract clauses - either commercial or senior management - which do not comply with the provisions of the aforementioned Act are found (Additional Disposition No. 8, fourth 3), that is, when contract clauses do not comply with the mandatory remuneration scheme. This represents the most stringent control, and the most conclusive consequences. This absolute nullity shall also be applied, as a logical consequence, to the potential Articles of Association or agreements reached in the General Meeting.

In this regard, it should be noted that Royal Decree 451/2012 of March 5, stipulated the obligation to adapt contracts, Articles of Association or internal operating rules of the various entities to its provisions. Thus, and under the Additional Provision No. 4 on Adaptation of Contracts, the content of contracts signed with senior managers and directors drafted prior to the implementation of Royal Decree-Law 3/2012, of 10th

<sup>15</sup> Vid. Martín Jiménez, R., «Directivos del sector público estatal: contratación, retribuciones, extinción e indemnizaciones», Gómez-Acebo & Pombo, abril de 2012, p. 4.

<sup>16</sup> This provision is consistent with the dispositions of its Additional Provision No. 1 on the Modification of Royal Decree 1382/1985, of August 1, which regulates the special industrial relation of senior managers. Paragraph 4 is added to Article 1 of the Royal Decree 1382/1985, of 1st August, which regulates the special industrial relation of senior managers. It states as follows: "4. The present Royal Decree shall be applicable to the people holding maximum responsibility and directors referred to in Royal Decree 451/2012, of 5th March, on the remuneration regime of senior officers and directors within the public business sector and other entities, who do not have any commercial vinculation, insofar as it complies with the same Act and the Royal Decree 3/2012, of 10th February, on urgent measures to reform the labour market".

<sup>17</sup> Which seems to be a double control if we take into account the Additional Provision No. 1 on Types of Contracts. It is stipulated that: "The Minister of Finance and Public Administration will approve the types of commercial and senior management contracts referred to in this Royal Decree, which will have a prior report from the Spanish Government Attorneys Office corresponding department. Direction 1/2012, from 28th March, issued by the Directorate for State Legal Services, provides guidelines for State attorneys involved in commercial and senior management contracts within the state public sector.

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February, had to be adapted to the Royal Decree before 13th April 2012. In addition, this modification expressly specified that the adaptation could not produce any increase in remuneration for the senior managers or directors in relation to their previous situation.

In terms of Articles of Association of state-owned companies, and in accordance to the final provision No. 3 on Adaptation of Articles of Association and Operating Rules, companies should adopt the needed measures to their Articles of Association or internal operating rules within a maximum period of three months from the date of notification of the classification provided for in Articles 5 and 6 of the Royal Decree. We will further on make referral to this classification, which represents a cornerstone in terms of remuneration controls.

#### **4. Review on lawfulness: the control prior to absolute nullity**

But what does the remuneration regime envisaged by the lawmaker consist of?

The new remarkable feature is the one introduced in the Additional Provision No. 8 of the Royal Decree-Law 2/2012, of 10th February, on urgent measures to reform the labour market (Act 3/2012, of 6th July). A classification on fixed remunerations in the framework of commercial or senior management contracts within the state public sector is provided (Additional Provision No. 8, part 3). This classification makes a clear distinction between basic and complementary remunerations, without the possibility of adding any other remuneration concept to this contracts, in the most stringent sense (the provision indicates, and not accidentally, that remunerations are "classified, exclusively in basic and complementary" - Additional Provision No. 8, part three,

paragraph 1).

##### **4.1. Classification groups: criteria and effects (remuneration limits and organizational structure)**

The different entities are classified by the minister itself in three groups (group 1, group 2, and group 3) according to their nature, characteristics and set of criteria provided for in Article 5. These classification criteria, in turn, differ depending on the nature of the entity under review. Thus, entities that fall within the public business sector, including state-owned companies, will be classified in different groups depending on their characteristics and pursuant to the following set of criteria (Article 3, Section 1): a) total sales revenue or business turnover, b) headcount or number of employees, c) the need or lack of need of public funding, d) characteristics of the sector in which it operates - complexity, strategic sector, internationalization, e) volume of investment. The rest of entities operating within the state public business sector (the entities of the so-called administrative public sector and the foundational public sector - the latter consisting of the foundations of the state public sector - as provided in Sections 1 and 3 of Act 47/2003, of 26th November, of the General Budgetary Law) will equally be grouped depending on their characteristics and pursuant to a set of criteria that happen to be quite different from the aforementioned ones: a) need or lack of public funding, b) volume of activity, c) headcount or number of employees.

These entities, as stated before, will be classified in three groups, and their effective allocation to one of these three groups will determine the level at which they will be positioned, helping us decide different aspects of transcendental importance. In the first place, we shall specify the

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maximum number of members within the board of directors and other higher governing boards or administrative bodies (Article 6, Section 1, paragraph). In that specific case, and unless otherwise provided in the mentioned Act, the maximum number of members shall not be more than 15, 12 or 9 in those entities classified in groups 1, 2 and 3, respectively (Article 2, Section 2, paragraphs a, b and c)<sup>18</sup>.

Secondly, the classification in groups also has implications in terms of the organizational structure of the company since this classification also sets the maximum number of directors, the maximum amount of total remuneration and the maximum percentage of supplemental bonus as per job title and variable pay (Article 6, Section 1, paragraph b). Nonetheless, it must be noted that, in this case, the Royal Decree 451/2012 does not determine that maximum and minimum number of directors, nor the maximum amount of total remuneration, nor the maximum percentage of supplemental bonus as per job title and variable pay. We will thus have to pay attention to the maximum percentage fixed for the group to which the company shall be allocated (Article 7,

Section 3, paragraphs a and b). This matter is partially regulated in Order IET/1635/2012, of 20th July, delegating powers to set the remuneration established in Royal Decree 451/2012 of 5 March. This resulted in Order of 30 March 2012 of the Minister of Finance and Public Administration, which passed the classification of State-Owned companies in accordance with Royal Decree 451/2012 of 5 March<sup>19</sup>.

Finally, the group to which the company is attached also determines the minimum mandatory remuneration, which is the basic remuneration (Article 7, Section 2) (also set by the Minister according to the group to which the company is allocated).

Nonetheless, this basic remuneration is subject to a maximum limit under Royal Decree 451/2012, whose Article 7, Section 2, stipulates that the basic remuneration may not exceed, in a year-to-year basis, the following amounts:

- a) Companies of Group 1: 105,000 Euro
- b) Companies of Group 2: 80,000 Euro
- c) Companies of Group 3: 55,000 Euro

<sup>18</sup> The legal framework of state-owned companies, which are partially regulated by Act 33/2003, of 3rd November, on Public Administration Property, does not include provisions relating to the number of members in governing bodies (and neither can we find provisions on remuneration limits). Nonetheless, this Act does foreseen - even if it's just for the purposes of fully state-owned companies and in the shape of public limited companies - that the Minister in charge of the company will propose to the Minister of Finance (or any other public body representing the General Meeting of the company) the appointment of a certain number of chiefs or member that represent, - maximum, and within the number of chiefs or members determined by the company's Articles of Association - the amount of chiefs that the Council of Ministers sets when awarding the tutelage of those companies to a certain Ministry or when changing the Ministry in charge. (Article 180, Section 1). It is likewise foreseen that chiefs or members will not be subject to the restriction established in the second paragraph of Article 213 of the Royal Legislative Decree 1/2010, of 2nd July, passing the consolidated text of the Capital Company Act (Article 180, Section 2). Particularly interesting is the fact that companies are obliged to submit their accounts to audit, as well as having to create an Audit and Control Committee, dependent on the Board, having a determined composition and functions. (Article 180, Section 3). In terms of chairman appointment, it is equally stipulated that the managing director or any other equivalent position that holds the highest executive power within the company shall appoint the chairman in collaboration with the Board of Directors and at the behest of the Minister in charge. (Article 181, Section 1).

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#### 4.2. Basic remuneration

Basic remuneration is associated with the minimum mandatory remunerations that shall be assigned to each member of the board, director, or hired staff. The amount of the remuneration will depend on the characteristics of the company, according to the classification group in which it is categorized, done by the person exercising the financial control or supervision of the company or, where appropriate, by the shareholder (Additional Provision No. 3, Section 3, paragraph 2). As we have just checked, there is a remuneration scheme of extraordinary significance. This remuneration delimitation represents the maximum limitation of the basic remuneration to be obtained (as well as the maximum amount of total remuneration and the maximum percentage of supplemental bonus as per job title and variable pay determined).

In this sense, Royal Decree 451/2012 gives the Minister of Finance and Public Administration the power to set the minimum mandatory remuneration according to the group in which the company is classified, pursuant to Articles 6 and

7<sup>20</sup>.

#### 4.3. Complementary remuneration: Supplemental bonus as per job title and variable pay

As already pointed out before, the Additional Provision No. 8 of the Royal Decree-Law 3/2012, of 10th February, on urgent measures to reform the labour market (Act 3/2012, of 6th July), classifies the remunerations to be set for commercial and senior management contracts within the public business sector, making a clear distinction between basic and complementary remuneration (Additional Provision No. 8, Section 3). The latter includes supplemental bonus as per job title and variable pay.

Supplemental bonus as per job title rewards the specific activities carried out by governing positions (Additional Provision No. 8, Section 3 and Article 7, Section 3 of Royal Decree 451/2012). Its allocation must always meet the assessed criteria under Royal Decree 451/2012 (Article 7, Section 3, paragraph a). These are criteria that adhere to different aspects:

<sup>19</sup> This order sets a classification for state-owned companies, grouping them in three Sections under Royal Decree 451/2012, of 5th March. On the one hand, it sets the number of directors for each of the three groups; on the other hand, it sets the maximum remunerations of commercial and senior management contracts; and finally, maximum amount of total remuneration and the maximum percentage of supplemental bonus as per job title and variable pay. In terms of minimum and maximum number of directors, it states as follows:

The minimum numbers of directors within each state-owned company shall be:

- a) 4 members in state-owned companies of Group 1
- b) 2 members in state-owned companies of Group 2
- c) 0 members in state-owned companies of Group 3

The maximum number of directors within each state-owned company shall be:

- a) 10 members in state-owned companies of Group 1
- b) 6 members in state-owned companies of Group 2
- c) 4 members in state-owned companies of Group 3

<sup>20</sup> The pertinent Order has set the basic remuneration in compliance with the maximum amounts set forth in Royal Decree 451/2012.

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- a) External competitiveness, understood as the directors' salary situation in comparison with similar positions in the relevant market.
- b) The organizational structure of the company in which the position falls within.
- c) The relative importance given to the position within the organization.
- d) The degree of responsibility

In the case of supplemental bonuses, they are designed to reward the achievement of previously established objectives according to evaluable parameters. Thus, these bonuses are paid when such objectives are met (Additional Provision No. 8, Section 3; Article 7, Section 3, paragraph b of the Royal Decree 451/2012).

These bonuses, whether they are given depending on the job title or they are a variable pay, will be granted in state-owned companies by the subject exercising the financial control or supervision of the entity, or when applicable, by the shareholder. In the case of other entities, this grant shall be assigned or taken into consideration by the Ministry in charge (Additional Provision No. 8, Section 3; Article 7, Section 3, paragraph b of the Royal Decree 451/2012). Nor should we forget that in both cases, this grant in the shape of bonuses shall not exceed the maximum amount set for the group in which the company is classified. In that sense, the Order of March 30, 2012 of the Minister of Finance provides that the supplemental bonus as per job title will represent a maximum of 40% of the basic remuneration corresponding to each group. On the other hand, variable pay will represent a maximum of 60% of the basic remuneration corresponding to each group. Ultimately, in no case may the total remuneration exceed twice the basic remuneration.

#### **4.4. Payment in kind and potential acceptan-**

#### **ce of higher positions in the Spanish Public General Administration**

There are still two more provisions which are of particular interest in terms of remuneration - strictly speaking - and this goes far beyond the essential distinction between complementary and basic remuneration. We refer to the fact that payments in kind, when received, shall be estimated in such a way as to comply with the limits of the maximum amount of the total remuneration (Article 7, Section 4). Similarly, special attention should be paid to the potential acceptance of higher positions within the Public General Administration and the remuneration which this acceptance involves. This is because the type and amount of the remunerations received by senior officials and directors under the guise of these high positions shall be subject to the legislation regulating this matters, regardless of the commercial or senior management contract that vintulates them with the company (Article 7, Section 5)

#### **4.5 Attendance fees and "bonuses": incompatibility**

In recent times, a controversial social debate has arisen regarding the remuneration of directors in state-owned companies. We're specially talking about bonuses, which have received special attention. This is one of the issues which have had the most impact in our society, and that is the reason why Royal Decree 451/2012 aims at expressly clarifying the incompatibility found between remunerations and attendance fees, provided for in paragraph A of Section 1 of Article 27 in Royal Decree 462/2002, of 24th May - which deals with compensations for service, attendance fees at meetings of the governing or administrative bodies in state-owned entities and boards of directors of state-owned companies (Article 8,

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Section 1).

Nonetheless, it must be noted that such statements on incompatibility present, at least on paper, very relevant doubts, since the Act does not offer a clear explanation on this matter. In other words, "The Minister of Finance and Public administration shall take into account the classification of entities in groups pursuant to the different criteria set forth in Article 5 of Royal Decree 451/2012 so as to set the maximum amounts to be given in terms of attendance fees - in compliance with Sections 1 and 2 of Article 28 of Royal Decree 462/2002, of 24th May" (Article 8, Section 2). Unless it is understood that, in a particular case - and which does not seem to be usual - one can choose to receive attendance fees instead of any of the regular remunerations. Another possibility that we can imagine is a free-cost position, despite the fact that the Royal Decree gives the meaning to the basic remuneration as the minimum mandatory remuneration to be assigned. We shall not forget that in terms of capital companies, the positions given within the board of directors are cost-free, unless corporate Articles of Association state otherwise and determine the remuneration regime to be followed (Article 217,

Section 1 on Legislation of the Capital Company Act).

Royal Decree 462/2002, of 24th May, on compensations for services, defines "assistance fees" as the regulatory compensation to be paid in any of the following cases (Article 27, Section 1): assistance to meetings of collegiate bodies, public entities or boards of directors of state-owned or state-owned companies (Article 27, Section 1, paragraph A)<sup>21</sup>. Pursuant to Royal Decree 462/2002, capital or state-owned companies shall set the amount of economic compensation as for assistance to meetings of board of directors in compliance with the general criteria established in their own rules or regulations, as long as it is consistent with the maximum amounts set forth by the Minister of Finance - and depending on the group the companies are classified in and its own relevance (Article 27, Section 2). However, there is also an economic limitation stipulated in terms of meetings assistance fees: in no case may the annual amount exceed the 40% of the total amount corresponding, on a yearly basis, to the main job title, excluding the case of seniority bonuses (Article 28, Section 3)<sup>22</sup>.

<sup>21</sup> Paragraph A of Title 1 of Article 27, as well as the first Section of the final provision of the 1st Royal Decree 228/2014, of 4th April, approves the offer of public employment for 2014 (Official Spanish Gazette, 10th April). The other items are: "b) Participation in "Civil Service Board of Examiners and Civil Service Examinations in charge of staff hiring and recruitment or tests the passing of which is necessary for the exercise of professions or for the performance of activities"; c) Non-permanent collaboration with highschools, schools or training centers for the professional improvement of staff working under Public Administration institutions".

<sup>22</sup> This limitation is consistent with Section 3 of Article 27, which provides that in no case shall the three kinds of assistance exceed the total and annual amount of a 50% of the total annual remuneration, excluding the case of seniority bonuses depending on the exercised profession. Article 27, when establishing the general rules on assistance, also provides that: "The ministries, agencies, companies and other entities that pay the assistance fees referred to in this article shall communicate every six months to the Ministry of Finance and Public Administration the details of the amounts paid for the concepts referred to in the previous Section" (Article 27, Section 2); "The amounts accrued which exceed the limits set for the receipt of assistance fees in the previous paragraph of this Section and in articles 28.3, 32 and 33 of this Royal Decree shall be paid directly to the Treasury by the paying centers referred to in the previous Section" (article 27.3, paragraph 2); and that: "The paying centers shall make the corresponding withholdings for income tax purposes in accordance with the regulations in force in each case for said tax" (article 27.5).

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In the case of chief executives and directors which are part of the board of directors, or those who are in charge of management, direction or control, lacking executive added responsibilities to those inherent to their position (for example, managers or consultants), we could think that their remunerations shall be set in compliance with the maximum amounts established by the Minister of Finance and Public Administrations, and in compliance with the attendance fees set forth in Articles 27 (Section 1, paragraph A) and 28 of Royal Decree 462/2002, of 24th May, although such solution doesn't seem reasonable.

#### **4.6 Subsistence allowances, travelling expenses and others**

Subsistence allowances are another essential matter within the remuneration scheme of senior officials and directors of the state public sector. Royal Decree 456/2002, of 24th May, on compensation for services, considers that there's compatibility between these allowances and attendance fees: "subsistence allowances and attendance fees can both be paid as long as the assistance to meetings involves travelling from the primary residence" (Article 27, Section 4). And in this particular case, we should take into account Order HAP/1741/2015, of 31st July, regulating the compensation regime on subsistence allowances, travelling expenses and others of senior officials and directors of the state public sector which have a vinculation with the state-owned company in the shape of commercial contracts or senior management. Let us recall that this order is a consequence of the mandatory regulation of paragraph 6 of Additional Provision 8 of Royal Decree-Law 3/2012, of February 10, which established that the Minister of Finance and Public Administration would set the system of compensation for expenses under such concepts. There-

fore, the aforementioned order introduces this regime: it limits the amount of expenses subject to the compensation (Article 2) and establishes criteria for a good management of such amount (Article 4). Within the introductory Section of this order we may find a definition of the compensation regime of the expenses incurred in terms of subsistence allowances and travelling expenses. This definition "on the one hand, ensures the application of homogeneous criteria for similar situations and, on the other hand, adjusts this type of costs to criteria of austerity and rationality in public expenditure". The concepts that give rise to these compensations, resulting from the performance of senior officials and directors' duties, will be those defined for this purpose in paragraphs A and B of Article 1 of Royal Decree 462/2002 of 24 May on compensation for services, stated as follows: a) Cases in which there is a right to receive a compensation per service; b) When the displacements for such service are produced within the municipal area. They will always be so under the circumstances, conditions and limits contained in this Royal Decree 462/2002, but also taking into account the provisions of the order of reference. A distinction must be made, as far as the right for compensation for services is concerned, between the different types of compensation provided for in Royal Decree 462/2002 (Article 9): per diem, eventual residence compensation and travel expenses <sup>23</sup>.

In terms of travelling expenses for the purpose of the service, there are also general provisions for such displacements (Article 20) <sup>24</sup>, as well as provisions on payment of the corresponding compensation (Article 21) <sup>25</sup>.

There is also a provision in Royal Decree 462/2002, of 24th May, which determines the amount of compensation for the purposes of ser-

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vice. However, on this, the Order distinguishes, for the purpose of determining the maximum amounts of compensation for these expenses (travelling, accommodation, allowance ones and others), between companies classified in Group 1 and those classified in Group 2 and 3. This provision makes clear reference to the classification provided by the Minister of Finance and Public Administrations in terms of the different entities of the public business sector in application of the provisions of Royal Decree 451/2012, of 5th March, of 5th March, which regulates the remuneration of senior officers and directors of the public business sector and other public entities.

This remuneration control in terms of maximum amounts to be given for such cases takes into account the classification of companies, and it distinguishes between the entities of Group 1 and those of Group 2 and 3. It also takes

into account the conditions of senior officers and directors pursuant to Royal Decree 451/2012.

In this sense, for those entities integrating Group 1, there is a clear distinction between senior officers with commercial or senior management contracts and the rest of directors. In the first case, senior officers will be compensated as per the exact amount of the expenses incurred and needed for the performance of their duties, as set forth in Article 8, Section 1, of Royal Decree 461/2002, of 24th May, on compensation for services<sup>26</sup>. Despite this, the company shall choose to be governed by the compensation regime indicated, or the general one provided for in the Royal Decree 462/2002, in terms of staff included for Group 1, in Annex 1 of such Decree<sup>27</sup>. The other directors will always be compensated according to the general compensation regime pursuant to Royal Decree 462/2002, namely on

<sup>23</sup> Art. 9. Different types of compensation:

1. Compensation per diem: amount that is paid on a daily basis to satisfy the expenses caused by the outside stay of official residence in the cases foreseen in the Article 5 of the present Royal Decree. If the service is carried out by personnel of the Armed Forces or of the State Security Forces and Corps, forming a unit, this payment will be called "plus".
2. Residence compensation: amount that is paid on a daily basis to satisfy the expenses caused by the outside stay of official residence in the cases foreseen in the Articles 6 and 7 of this Royal Decree.
3. Travelling expenses: amount that is paid because of the use of transport means for service purposes.

<sup>24</sup> Art. 20. General regulation on displacement within the municipal area by reason of the service:

1. The personnel included in the scope of application of the present Royal Decree have the right to be compensated for the travelling expenses arising from the reason of service within the municipal area where the personnel is destined, needing the express conformity of the head of the corresponding administrative unit.
2. The displacements referred to in the previous Section will be carried out preferably in collective public transport and in vehicles with more than nine seats authorized for individual payment and, unless the head of the unit referred to in the previous Section of this article authorizes another means of transport, within the budgetary availability assigned to each center.
3. In the event that the use of private vehicles or other special means of transport is authorized, the amount of compensation

<sup>24</sup> Article 21. Payment of compensations for displacement within the municipal area.

1. The compensations referred to in the previous article shall be claimed from the paying agencies, paymasters' offices, or similar bodies, accompanied in all cases by the corresponding supporting documentation.
2. In order for the payment of these compensations to be equal to that of the expenses incurred, payment must be made from the fixed cash advance or, where applicable, the existence of funds to be justified, in the bodies or units referred to in the previous Section, all subject to the regulations in force.
3. The provisions of this chapter shall be also applicable to displacements that, due to the service, have to be made by civil judicial officers within the judicial district in which the corresponding body exercises its jurisdiction, without prejudice to other compensation that might be given when the displacement has actually taken place outside the municipal area and the person is entitled to it in accordance with the general provisions of this Royal Decree.

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employees included in Group 1 within Annex 1 of such Royal Decree (Article 2, paragraph A, of the Order HAP/1741/2015, of 31 July).

In the case of those entities classified in Groups 2 and 3, both senior officials and directors with commercial or senior management contracts will be compensated according to what is set forth in the general compensation regime pursuant to Royal Decree 462/2002, namely on employees included in Group 1 within Annex 1 of such Royal Decree (Article 2, paragraph A, of the Order HAP/1741/2015, of 31 July).

Another example that proves the fact that controlled remuneration takes place is the need of justifying the expenses incurred for these concepts of allowances, travelling expenses and others (Article 3 of Order HAP/1741/2015 July 31st). In order to proceed to payment of the aforementioned amounts (referred to in Article 2), the expense incurred must be evidenced in compliance with its nature and by presenting the corresponding invoice or receipt, except for the subsistence allowance when the compensation regime of Group 1 of Annex I of Royal Decree 462/2002 is to be applied.

<sup>26</sup> Art. 8. System of compensation for senior officials and members of offices presided over by them, and compensation for those acting in other official offices.

1. In accordance with the applicable regulations, the members of the Government of the Nation, secretaries of State, heads of mission given the status of residents before a foreign State or international organization, undersecretaries, generals and admirals in charge of military air and maritime regions, and other positions equivalent to the above, shall have the right to compensation when performing their duties. They will be compensated with the exact amount of expenses necessary to fulfill their functions, as long as they have documentary justification to prove it. This compensation regime may be expressly authorized on each occasion by the ministers in relation to the management staff under their functional dependence with the rank of general directors or similar.

However, when the service is carried out by staff under the functional dependence of the Minister of the Presidency, the compensation for service provided for in the previous paragraph will be governed by the specific regulation to be agreed upon in the form provided for in Additional Provision 6 of this Royal Decree.

The positions referred to in the previous paragraphs will freely choose to be governed by the general compensation regime pursuant to this Royal Decree and the classification provided in its Annex 1, without prejudice to the fact that the authority that orders such compensation - and in certain cases of extraordinary character - can arrange that one or another regime is applied in a forced way, without possibility of option.

<sup>27</sup> Classification of positions:

Group 1: Senior positions included in Articles 25, 26 and 31 (Section 2) of Act 13/2000, of 28th December. These are as follows: general officials, justices of the Spanish Supreme Court, Presidents of the High Court of Justice, ambassadors, First-class plenipotentiary ministers, university deans, assistant general managers, associate general managers, as well as any other position similar to the aforementioned ones.

In the case of associate general managers, the appointment shall be jointly agreed upon by the Minister of Finance and the State Public Administration.

Group 2: the members of the Spanish Armed Forces, Civil Guard and National Police bodies, as well as the of members the Judicial and Prosecutorial bodies, forensic doctors, authorised experts, officials working under Professions and Grades of Spanish Public Administration, and any other public position similar to the aforementioned ones, classified in groups A and B in terms of remuneration.

Group 3: the members of the Spanish Armed Forces, Civil Guard and National Police bodies classified in groups C and D in terms of remuneration; officials, auxiliary personnel, and other positions with similar functions working under the Administration of Justice; officials working under Professions and Grades of the Public Administration classified in Groups C, D and E, as well as any other employee having a similar position to the aforementioned ones.

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The compensation regime for expenses incurred due to subsistence allowances and travelling expenses is also subject to certain good management criteria (Article 4 Order HAP/1741/2015 of 31 July). The legally stated objective is to ensure that there are homogeneous conditions applicable to the senior officials and directors of the state public sector in these commercial and senior management contracts. For this reason, and in compliance with the general criteria of austerity, effectiveness and transparency within the public sector, the duty is established to take into account, at least, the listed guidelines. Thus, this is again a matter of "minimum requirements", always trying to take into account any other cases which could favour the listed guidelines.

In order to ensure those homogeneous applicable conditions to senior officials and directors (as referred to in the aforementioned Order), and paying special attention to the current general criteria, the following guidelines shall be borne in mind:

- a) Priority use of alternative technological means in meetings and trips such as audio and video conferences, among others.
- b) Application of restrictive criteria in terms of the number of people to be displaced, trying to avoid the unnecessary displacement of work teams.
- c) Establishment of strict schedules for the commencement and termination of the service, avoiding unjustified delays or extensions of stay at the destination.
- d) General use of the hotels included in the pertinent contract established by the General State Administration, or when applicable, by the pertinent ministry.
- e) General use of public transport for trips, unless transportation with a private vehicle is the

most economical alternative.

- f) General use of the economy class for both plane and train tickets, except in special cases justified by the distance of the destination, the duration of the trip or similar cases.
- g) Planning and advance management of tickets, allowing to obtain better prices, or trying to get tickets by procedures that allow to optimize costs.
- h) Any other guidelines which, when applied to the management of subsistence allowances and travelling expenses, optimize the costs for the best functioning of the company.

#### **4.7. Compensation for termination of commercial and senior management contracts due to employee's resignation**

Another interesting remuneration concept is the one that relates to the termination of commercial and senior management contracts regulated in paragraph 2 of the Additional Provision No. 8 of Royal Decree-Law 3/2012, of 10th February, on urgent measures to reform the labour market<sup>28</sup>. It should be noted that we have already mentioned the termination of such contracts caused by the employee's resignation. In addition, the economic compensations legally established for the incompatibility linked to the termination of the position are not considered as compensation for termination (Article 0 of Royal Decree 451/2012, of 5th March). This objective or conceptual exclusion is accompanied by a subjective exclusion, since the right for compensation is also excluded ("the employee will not have any right for compensation") to individuals whose contract is terminated by the resignation and having the status of career civil servants of the State, autonomous communities or local entities, or is an employee of an entity belonging to the State, autonomous community or local public sector with a reserved

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position (Additional Provision No. 8, Section 2 paragraph 3). There are also requirements in terms of the procedure and time of resignation. As such, resignation must be noticed by letter, in advance, prior to a maximum period of fifteen calendar days; in case of failure to observe this notice period, the entity shall compensate the employee with the remuneration corresponding to the unfulfilled notice period. (Additional Provision No. 8, Section 2 part 4).

When the compensation is applicable, the control of remuneration is applied specifying the maximum amount to be given in terms of compensation. In this way, and when officials who work under the public business sector see their contracts terminate, the termination of such contracts will only give rise to a compensation not exceeding seven days per year of service of the annual cash remuneration, with a maximum of six monthly payments. This limitation affects the mentioned contracts, regardless of its date of execution (Additional Provision No. 8, Section 2, Part 1). The calculation of the compensation will be made taking into account the annual cash remuneration that at the time of termination was being received as full and total fixed remuneration, excluding incentives or supplement rates if any (Additional Provision No. 8, Section 2, Part 2).

#### **4.8. Publicity of information regarding the remuneration received**

We have previously discussed the necessary publicity of information regarding the re-

muneration received on a yearly basis by senior officials and directors, regulated by Act 19/2013, of 9th December, on Transparency, Access to Public Information, and Good Governance. Certainly, this obligation to provide information - and which must be provided through electronic means or websites of the various institutions - shall be jointly understood with the provisions on transparency set forth in Royal Decree 451/2012, of 5th March. According to this Royal Decree, and notwithstanding the legal obligations on publicity later provided for in the Transparency Act, the entities included in its scope of application shall provide information on its board of directors, as well as its management, direction and control bodies, on their websites; they are also bound to include information about their senior officials and representatives (Article 10, Section 1). However, and as for the received by senior officials and directors, this information must be specifically stated on the annual activity report of the entity (in compliance with Article 10, Section 2). The Transparency Act clears matters up, as shown before, in terms of necessary publicity of information regarding the remuneration received - directly or indirectly - through the website of the company. The necessary publicity regarding compensations for services - if possible - and subsistence allowances is a matter arousing suspicion. In our judgment, be that as it may, the necessary publicity of the same is undoubted, because publicity is not limited to a remuneration concept in its strict sense<sup>29</sup>. The comprehensiveness in which the Transparency Act is written does not give room to contrary interpretation. Nor should we forget that the obliga-

<sup>28</sup> On this issue, and in particular on the interpretative doubts it raises, the following work deserves special attention: Ramo Herrando, M. J., «El cese por desistimiento en la alta dirección del sector público tras la reforma de 2012», RTSS, CEF, núm. 368, noviembre de 2013, pp. 1-31.

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tion of information, as stated before, is conceived at its lowest ebb by the lawmaker and it is also conditioned by the relevance of the information to guarantee transparency.

#### **IV. REGIME OF LOCAL COMPANIES AND THOSE OWNED BY AUTONOMOUS COMMUNITIES**

We have already mentioned that a substantial part of the Additional Provision No. 8 of the Royal Decree 451/2012 (which later became Act 3/2012, of 6th July, on urgent measures to reform the labour market) is not applied to the so-called regional and local companies. The only applicable provisions are those that relate to compensation on contract terminations (Section 2), review on lawfulness (Section 2, No. 2), and the necessary content adaptation of commercial and senior management contracts signed prior to its implementation (Section 5). It is so provided in Section 7 of Additional Provision No. 8, extending the application of such Sections to the entities, consortia, companies, bodies and foundations that make up the regional and local public sector. Thus, the review on lawfulness shall be understood with all due reservations. Put differently, and within the

regional and local companies framework, clauses of commercial and senior management contracts which do not comply with the pertinent Sections will be declared null and void - but only as far as the regime of the compensation on contract terminations is concerned, the only applicable case. The same should be understood in terms of the needed adaptation of contracts <sup>30</sup>.

##### **1. Companies owned by autonomous communities, a plethora of rules**

For this reason, this paper on controlled remuneration of state-owned companies forces us to proceed beyond this point and analyze the regime of local companies and those owned by autonomous communities. In terms of the latter, its analysis is far from being simple, since the existing plethora of rules in the autonomous communities' framework makes the analysis extraordinarily difficult. According to Menéndez García, "the general recognition given to the economic public initiative provided for in Article 128, paragraph 2, of the Spanish Constitution, may also be applied to autonomous communities. Thus, these regions are allowed to make up a public sector consistent

<sup>29</sup> The Royal Legislative Decree 1/2012, of 2nd July, passing the consolidated text on the Capital Company Act, provides itself a remuneration regime of open access in terms of the remunerations to be received by administrators; the subsistence allowances are expressly included in it. Thus, it is provided that the established remuneration regime, which must be provided for in the company Articles of Association, "shall determine the amount or amounts of the remuneration to be received by the directors in under that position. These amounts, among others, state as follows: a) fixed allowances, b) subsistence allowances, c) profit participation, d) variable pay with general indicators and parameters of reference, e) remuneration in shares or linked to their price evolution; f) compensation for dismissal, as long as this dismissal is not based on the non-fulfillment of the member's duties; and g) systems of savings or protection that may be deemed appropriate."

<sup>30</sup> The Additional Provision No. 8, in its 7th Section, and under the title "Application to autonomous communities and local entities"; expressly states that: "Section 2, Section 4 (No. 2) and Section 7 shall be applicable to the entities, consortia, companies, bodies and foundations that make up the regional and local public sector." Section 4 No. 2, to which it makes reference, states: "Within the regional and local companies framework, clauses on commercial and senior management contracts which do not comply with the pertinent Section of the present provision will be declared null and void."

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with the private one, being the first integrated and created by the latter. This is uniformly acknowledged by the Statutes of Autonomy as a whole, providing statutory provisions developed by all the Spanish autonomous communities. We can see it materialized in the creation of several companies under Private Law, which ended up delivering a wide range of public services, as for example, transportation and audiovisual means, agricultural and fishing development, sanitary services, among many others". However, and after the analysis of such legislation, the concept of state-owned company, its typology and legal framework do not differ so much from those created under State legislation<sup>31</sup>. Nonetheless, we cannot hide certain differences highlighted by the legal literature. For instance, and according to Madrid Parra, "since we are dealing with many and varied regional laws, we find diversity and the lack of a concept of an homogenous legal regime of the different public (limited) companies that may exist in each Spanish region".<sup>32</sup> And not always are there specific provisions on remuneration. Thus, the strict and uniform control and remuneration limitation regime to which state-owned companies are subject to is not easily found within the regional legal framework.

A commercial company can be considered a regional-owned company as long as the Regional Administration has an effective control over it, and this control may not be limited to the only case in which the public regional institution holds a majority of shares or partnership interest in the capital stock of the company<sup>33</sup>. A good example of it is Act 3/2003, of 3rd March, on the Organization of the Public Sector of the Autonomous Community of La Rioja (Article 48, Section 1), since it defines regional-owned companies as those "in which the Government of La Rioja has a majority of shares in the capital stock of the company, whether direct or indirect, or whose effective control corresponds, directly or indirectly, to the Government of La Rioja or any other (regional) public body dependent on it". Palá<sup>34</sup> also agrees with this provision, further stating that the determining factor in these companies is the dominant influence derived from the majority ownership of the capital stock, the financial participation or the administrative rules governing its functioning<sup>35</sup>.

But as Palá suggests, and taking into account the Article 133 of the Legislative Decree 4/2013, of 17th December, of the Government of Aragon, by which the consolidated Act on the Administration Property of Aragon is approved, that the le-

<sup>31</sup> Vid. Menéndez García, P., «Las Fundaciones y las sociedades públicas», en Cano Campos (coord.), *Lecciones y materiales para el estudio del Derecho Administrativo*, t. II, La organización de las administraciones públicas, Madrid, 2009, pp. 303-309.

<sup>32</sup> Vid. «La sociedad anónima pública. Otras sociedades anónimas especiales», op. cit., p. 936.

<sup>33</sup> Act 7/2004, of 28th December, on the Organization and Legal System of the Public Administration of the Autonomous Community of the Region of Murcia (Additional Provision No. 2). However, it limits the concept to this majority of shareholding: "Regional-owned companies are those whose capital is fully participated or in which the Public Administration of the Autonomous Community has a majority shareholding, either directly or indirectly". It is also provided that: "4. Regional-owned companies shall be fully governed, whatever their legal form is, by its private legal system, except in matters to which the budgetary, accounting, financial control and contracting regulations apply. In no case may they have powers which involve public authority intervention".

<sup>34</sup> Vid. Palá Laguna, R., «Algunas cuestiones sobre el régimen jurídico de las sociedades mercantiles autonómicas», *Revista Aragonesa de Administración Pública*, núms. 39-40, 2012, pp. 49 y ss.

<sup>35</sup> *Administraciones públicas*, Madrid, 2009, pp. 303-309. <sup>31</sup> Vid. «La sociedad anónima pública. Otras sociedades anónimas especiales», op. cit., p. 936.

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gal concept established thereof is valid for all: “a regional-owned company is defined as an entity subject to the dominant influence, either direct or indirect, of the Regional Administrations, its public bodies or other affiliated companies, as long as this influence is exercised, jointly or separately, over the entity, its financial participation, or administrative rules governing its functioning”. It also highlights public capital companies, defined as “regional-owned companies fully based on public capital, companies whose capital stock belongs jointly or separately to Regional Administrations, its public bodies or other regional-owned companies whose capital is completely public” (Article 133, Section 2). A similar definition can be found in the regional legal framework as a whole<sup>36</sup>.

However, the case of Catalonia is particularly striking. Legislative Decree 2/2002, of December 24th, of the Generalitat de Catalunya, which passes the consolidated text of Act 4/1985, of March 29th, of the Statute of the Catalan Public Company, distinguishes between the autonomous entities of the Generalitat (which conduct operations or provide services of a mainly commercial, industrial or financial nature) and the companies of the Generalitat. These companies would include the so-called public-law entities with their own legal personality (subject to the Generalitat, but which must adjust their activity to the private legal system) and the civil or commercial compa-

nies in which the Generalitat, its autonomous entities or the companies in which the Generalitat or the mentioned entities also hold the majority ownership of their capital stock. However, this Act would also apply to civil or commercial companies linked to the Generalitat: that is, those managing public services, being Generalitat-owned; or those that have signed agreements with it, and in which the Generalitat has the power to appoint all or some of the management bodies or has a direct or indirect stake in them of at least 5% of the total shareholding (Article 1(b)(2) and (c)).

Be that as it may, and in terms of remuneration, the regulation on regional public companies is the most varied, and it does not respond to a unique pattern. In this sense, it should not be forgotten that the different Statutes of Autonomy frequently address aspects related to the staff working within administrative bodies, as well as their training. The ATC 55/2016 of 1 March can be highlighted for this purpose, since it considers legislation on remuneration and staff working under the regional public service as a regulation that organizes the staff-related aspects of the autonomous community itself.

In many cases, the remuneration limits set by various autonomous communities are usually linked, in the final resort, to the respective budgetary regulations. In the other cases, regulations

<sup>36</sup> Act 7/2010 of July 21, on the Instrumental Public Sector of the Autonomous Community of Illes Balears (Art. 51); Act 16/2010 of 17 December, on the Organization and Functioning of the General Administration and of the Autonomous Public Sector of Galicia (Art. 102.1); Act 1/2015, 6th February, from the Generalitat Valenciana on Public Treasury and the Instrumental Public Sector and Subsidies (Art. 156.2); Legislative Decree 4/2013, December 17, of the Government of Aragon, by which the revised text of the Aragon Heritage Law is approved (Art. 133); Act 6/2006, of 7 July, on the Heritage of the Autonomous Community of the Canary Islands (Art. 117); Act 3/2006, of 18 April, on the Heritage of the Autonomous Community of Cantabria [Art. 151.b)]; Act 2/2008, of 16 June, on the Heritage of the Autonomous Community of Extremadura [Art. 160.3.2.d)]; Regional Law 14/2007, of 4 April, on the Heritage of Navarre [Art. 103.b)], and Act 6/1985, of 13 November, of the Heritage of the Autonomous Community of Castilla-La Mancha (art. 4.4).

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similar to the ones provided for in the Royal Decree 451/2012, of 5th May, on the remuneration regime of senior executives in the public business sector and other public entities, are applied. Some of the most relevant ones are: Decree 119/2013, of 3rd May, which regulates remunerations and economic perceptions applicable to Boards of Directors and its members within the regional public sector of Galicia <sup>37</sup> ; Act 1/2017, of 8th February, on measures to rationalize the remuneration re-

<sup>37</sup> The regulation of Galicia is very detailed in this case. There is a guideline classifying the Instrumental Entities in groups, as well as guidelines classifying the different governing positions, limiting their maximum remunerations to be paid subject to this classification. There's a reorganization of the remuneration regime that, as indicated in the Autonomous Decree itself, looks for an equivalence between the job done and the remuneration deserved, under the general austerity criteria - with a mandatory application in the administrative public sector framework. These guidelines are basically a copy-paste of the state regulations.

<sup>38</sup> In the case of Aragon, a rule with a rank of an act was deemed necessary in order to rationalize both the remuneration regime and the professional classification of staff working under the institutional public sector of the autonomous community. The commercial regional companies are included among those public institutions. It also adopts a scheme similar to the one applicable to governing positions: senior officials and directors. Thus, the first classification that takes place is the one on senior officials and directors. The following shall be considered the highest ranks: a) the Chief Executive Officer of the Board of Directors in the regional companies. When the administration is not entrusted to a board of directors, the administrator will be considered the person bearing the maximum responsibility of the company; and b) the managing director or equivalent of public-law entities or of the higher governing bodies or administration of the other entities included in the scope of application of this Act, performing executive functions at the highest level (Article 2.2). Directors are those who, acting under the authority of either the higher governing bodies or the administration of the entities included in the scope of application of this act or their senior officials, exercise executive functions at a higher level with autonomy and responsibility, only limited by the criteria, instructions or guidelines emanating from such entities. For the purposes of this act, civil servants working under the Administration of the Autonomous Community of Aragon, that is, allocated to a public-law entity of the Autonomous Community of Aragon, (art. 2.3 and 4) shall not be considered as directors. A distinction is made between the remuneration of senior officials and directors (Article 5) and the remuneration of the other staff in the service of these entities (Article 6). In the latter case, they are classified into basic and supplementary remuneration. In both cases, other types of remuneration are also contemplated (Article 7).

Article 5. Remuneration of senior officials and directors.

1. The limit of the total amount of remuneration that, for any reason, must be received by the persons holding the maximum positions of responsibility, excluding seniority or similar amounts to be paid, cannot exceed the total annual remuneration established for the general directors of the Government of Aragon in the pertinent annual budgetary regulations of the Autonomous Community.
2. The limit of the total amount of remuneration that, for any reason, must be received by the directors, excluding seniority or similar amounts to be paid and variable remuneration linked to objectives, may not exceed the remuneration laid down in the corresponding budget laws of the Autonomous Community for each financial year for a position in the Administration of the Autonomous Community of Aragon in group A, subgroup A1, level 30 and a specific complement of special dedication.
3. Directors may receive variable remuneration linked to objectives, under the terms laid down for the productivity bonus in the corresponding annual budgetary regulations of the Autonomous Community of Aragon, where, among other issues, the guidelines for evaluating the objectives system will be specified. Under no circumstances may the receipt of such remuneration mean that the total amount of the directors' remuneration exceeds the total amount of the remuneration to be received by the positions holding the maximum responsibility of the company. The receipt of these remunerations shall be possible only if the contracting entity hasn't dismissed employees for economic reasons, collective dismissal procedures or generalised salary reductions in the previous year.
4. The remuneration of directors shall be subject to the conditions and remuneration limitations provided for, where applicable, in the annual budgetary regulations of the Autonomous Community of Aragon.
5. The receipt of the remuneration established in this article is incompatible with the receipt of compensation for attendance at meetings of the governing or administrative bodies of the entities included in the scope of application of this law.
6. The remuneration of the executive staff will be set by the Government of Aragon at the proposal of the corresponding higher governing or administrative bodies of each entity, reporting to the Cortes of Aragon. Previously, such results will have been incorporated into the transparency portal, in compliance with the provisions of the regulations on data protection.
7. The compensation for expenses produced for subsistence allowances, displacements and other analogous due to the fulfillment of duties of the directors will be the established one in the Royal Decree 462/2002, of May 24, on compensations by reason of the service.

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gime and the professional classification of governing positions and the rest of staff at the service of the institutional public sector of the Autonomous Community of Aragon<sup>38</sup>; Decree 95/2016, of 29th July, of the Consell, on regulation, limitation and transparency of the regime of senior officials and directors of the instrumental public sector of the Generalitat (Valencian Community<sup>39</sup>); Act 14/1988, of 28th October, on the remuneration of senior officials, and Decree 156/2016, of 15th November, on obligations and rights for civil servants (País Vasco)<sup>40</sup>; Decree 1/2009, of 28th May, regulating certain remuneration aspects of personnel working under the Administration of Principado de Asturias); Act 3/2003, of 3rd March, on the Organization of the Public Sector of La Rio-

<sup>39</sup> There's an interesting close connection between these autonomous regulations and transparency. For this reason, there's an application of the guidelines on performance, good governance and all the obligations set forth in the Act 2/2015, of 2nd April, on Transparency, Good Governance and Citizen Participation of the Valencian Autonomous Community, as well as Decree 56/2016 of the Consell, of 6th May, by which the Code of Good Governance passed by Generalitat Valenciana. Directors are considered, as long as they do not hold a high position in the Administration of the Generalitat, those persons who exercise the maximum responsibility of the entities and who, for these purposes, are not considered civil servants (art. 2.1). The maximum responsibility is understood to be the exercise of the executive presidency, delegated board with executive functions, general direction, management, intendancy or persons exercising the executive function at the highest level directly subject to the superior organs of government or administration. And by governing personnel who, acting under the dependence either of the superior organs of government or administration of the entities, or of the persons who carry out their maximum responsibility, exercise separate functions with autonomy and responsibility, only limited by the criteria and instructions emanating from them (art. 2.2 and 3). The regional lawmaker, in accordance with the state scheme of the Royal Decree 451/2012, not only regulates strictly remuneration issues (Art. 6), but also deals with the regime of dismissal by withdrawal of the company (Art. 7), the choice and hiring of staff (Art. 3), the maximum number of executive officers (Art. 5) and, as we have indicated above, issues of transparency and good governance (Art. 8).

This regime, in a certain manner, is also completed in its case with the provisions established in the Act 10/2010 of 9th July, of the Generalitat, on Ordinance and Management of the Valencian Civil Service on the particularities of the so-called professional public management personnel (art. 20). In these cases the remuneration of the management personnel, which will be determined by the Consell, will be integrated by two percentages, one of 60% with a fixed character, and another of 40% that will be variable and linked to the achievement of the objectives previously established for its management (art. 20.6).

<sup>40</sup> Act 14/1988, of 28 October, on the remuneration of senior officials, stipulates that the fixed and periodic remuneration of the executive positions within public companies of the Autonomous Community shall be determined by its pertinent Board of Directors and shall be listed separately under the corresponding heading of the Budgetary Regulation for each financial year, but under no circumstances may it exceed that established one for the position of vice-director. This does not prevent incentives of a non-guaranteed amount from being established in accordance with the achievement of objectives or management results. These granting criteria must also be reflected in the Budgetary Regulations of each year with the corresponding parliamentary control (Article 4.1 and 2). Decree 156/2016, of November 15, on the obligations and rights of public officials completes the previous regulation. Its chapter 9 is specifically dedicated to the limitations on the remuneration of executive personnel (Article 40): it specifies the procedure and criteria for recognizing economic incentives for the executive personnel of public entities governed by private law, public companies, consortiums, foundations and participated entities (Article 41).

Particularly noteworthy is the system of remuneration of the entities in which the Administration of the Autonomous Community has a stake (art. 42). This refers to commercial companies in whose capital stock the company holds a percentage equal to or less than 50%. In these companies it is provided that, without prejudice to the principle of autonomy of the will of the Commercial Companies, the Government will promote the establishment of a remuneration regime similar to that established for the instrumental entities of its public sector (Article 42.1). Likewise, and in any case, those who represent the interests of the Administration shall vote against the agreements that contradict the prescriptions established in this Decree (Article 42.2). When the agreements to be approved are contrary to the provisions of this Decree regarding remuneration and compensation as a result of the termination of the senior management employment contracts of the management personnel, they shall inform the Personnel Registration Service once the agenda and the date of the session have been communicated (Article 42.3). As for the receipt of allowances or compensation for attendance to the boards of directors or similar bodies of participated companies, for public offices subject to this Decree, the provisions of Article 15 of Law 1/2014, of June 26, regulating the Code of Conduct and Conflicts of Interest of Public Offices, shall apply (Article 42.4).

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ja<sup>41</sup> ; Legislative Decree 2/2002, of 24th December, which passes the consolidated text of Act 4/1984, of 29th May, Statute of the Catalan Public Company<sup>42</sup> ; Act 14/2012, of 27th December, on tax, administrative and regional public sector reorganization measures (Murcia)<sup>43</sup> .

## 2. Local public companies and Act 27/2013, of 27th December, on rationalization and sustainability of Local Administrations

Local-owned companies are a type of entity delivering certain public services under their power. We shall not forget that, in compliance with Article 85, Section 2, of Act 7/1985, public services given by local public companies are subject to efficient and sustainable management. Those local-owned companies, whose capital

<sup>41</sup> Its articles 29, 30, 48.1 and 52 aim at settling this matter. It must be noted that Article 52 states that directors of regional-owned companies will be subject to the remuneration regime provided for in Title II of this Act, in terms of public bodies.

Article 30. Remuneration of directors:

1. The limit of the total amount of remuneration to be received by the directors of public bodies, for all concepts, including incentives, may not exceed the total annual remuneration established in the respective Budgetary Regulations of the Autonomous Community of La Rioja for the directors.
2. For the purposes indicated in the previous Sections, directors shall be deemed to have this consideration in compliance with the regulations governing the system of incompatibilities and prohibitions of Senior Officers in the Autonomous Community of La Rioja.
3. Directors of public entities shall not receive compensation for their resignation, unless otherwise provided in the pertinent legislation. For this purpose, they shall not abide to contract clauses which aim at recognizing compensations, no matter what their nature or amount is.

Article 29. Boards of Directors within public organizations:

1. The highest positions in Boards of Directors within public organizations are:
  - a) President or office holder.
  - b) Board of Directors
  - c) Manager

2. The President holds the maximum representation of the body, as well as the board of directors.

3. The Government is entitled to appoint and dismiss the manager of the company, by Decree. Both appointment and dismissal shall be done under the proposal of the governing body within the regional administration and in compliance with the boards of directors' will.

4. In addition to the highest governing bodies, the Act setting up the body may provide for the existence of other governing bodies.

<sup>42</sup> Its Article 38, Section 4, provides that the limitations established by Articles 18 and 19 apply to companies with a majority shareholding and to companies dependent on them. Thus, and in the first place, senior officials and civil servants of the Generalitat who are part of the boards of directors of the companies set forth in this Act are not entitled to any remuneration, except for the allowances that each company agrees to grant (Article 19). In addition, there are limitations in terms of appointment of CEOs since members of the Parliament of Catalonia cannot be part of the boards of directors of these entities or exercise the functions of director unless expressly authorized by law. If they accept a management position in the company, they will have to resign their parliamentary seat. Senior officials and civil servants working under the Generalitat cannot be appointed to more than two positions within the board of directors in those entities provided for in this Act, unless the Government expressly agrees on that and justifies that this allows a better management of the company. It is equally incompatible to hold a management position in private companies supplying or receiving their production or in service companies dedicated to auxiliary or complementary activities (Article 18).

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stock is fully public, represent a type of direct management contained in the Act <sup>44</sup>.

directors of the company and its highest management positions (Article 83, ter).

Local commercial companies shall adopt one of the forms set forth in the Capital Company Act, and shall be fully governed - no matter what their legal status is - by the private legal system, , except in matters to which the budgetary, accounting, financial control and contracting regulations apply. In any case, Articles of Incorporation will specify the capital that is to be transferred by the public administrations or by the public sector entities that depend on them. Articles of Association shall also define the appointment and functioning of the General Meeting, as well as the boards of

The remuneration regime of senior officials of local public companies is subject to Act 27/2013, of 27th December, on the rationalization and sustainability of local administration. In that sense, Section 27 of Article 1 has modified the Additional Provision No. 12 of Act 7/1985, of 2nd April, which regulates the rules of local government. This resulted in "Remunerations in Commercial and Senior Management contracts of public local companies; maximum number of members in governing bodies". This newly introduced modification is a copy of the State regulations applicable

<sup>43</sup>It establishes a regulation affecting employees who hold management positions of maximum responsibility. This is provided in the rules regulating the structure of the various companies that make up the public sector. Thus, it regulates entities which are basically regional-owned companies, as well as their directors. The legal framework of this Act provides as follows: 1) The choice of management positions will be based on criteria of competence, professionalism and experience in carrying out positions of responsibility in public or private management. 2) They shall be subject to the regime

established in the regional regulations in terms of declaration of assets, property rights and activities of senior officials; 3. Regarding incompatibility, they will be subject to the regional legislation, or in its failure, to the state legislation, when conflicts of interest take place. 4) They shall be subject to assessment according to the criteria of effectiveness and efficiency, responsibility for its management, austerity and cost-reduction measures and control of public expenditure (Art. 23).

Particular attention must be paid to the remuneration limit, since the limited amount of remuneration to be received by staff holding management positions will be the one established annually in the respective budgetary regulations of the Autonomous Community of the Region of Murcia. Nevertheless, when the appointment is made by Decree of the Governing Council, under Article 22.15 of Act 6/2004, of 28th December, on the Statute of the President and the Governing Council of the Region of Murcia, they shall be governed by the applicable remuneration regulations. Compensation for dismissal is equally important: "These members shall not receive any compensation, except for those established by the necessary legal provisions; they shall not agree upon or be subscribed to contractual clauses that recognize economic compensations, whatever their nature or amount is." (Article 23, Sections 5 and 6)." There are other provisions which address contract formalisation and execution, as well as transitional rules: "7. Contracts entered into under the regional public sector for members to hold management positions must be submitted, prior to their formalization, to the general directorate in charge of public service matters. This body will issue a mandatory and binding report on this regard, providing a financial report and justification of the need for recruitment. / 8. From 1st January 2013, public sector entities referred to in this Title shall comply with the provisions of this Article regarding the regulation of management positions - in particular, management contracts entered into before the implementation of this Act, which will need to be adapted from January 1st 2013 to the consolidated provisions of the present act and other regulations deemed applicable."

<sup>45</sup>The omission is specially applied to the definition of senior officials and directors, the particulars related to the regime regulating commercial or labour contracts of high members, the incompatibility with compensation payments for assistance, and the compensation regime related to incompatibility for dismissal. All these questions are already applied to state-owned companies, as set forth in Royal Decree 451/2'12, of 5th March, which regulates the remuneration regime of senior officials and directors in the public business sector and other entities.

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to state-owned companies, with some omissions<sup>45</sup>, that is, Royal Decree 451/2012, of 5th March, which regulates the remuneration regime of senior officials and directors within the public business sector and other entities. However, this Act is adapted to local companies. Thus, the Plenary Meeting of the local company (and not the ministry in charge) is the one classifying the entities linked or dependent on it which make up the public local sector. The classification continues to be made in three different groups, taking into account the following items: a) total sales revenue or business turnover, b) headcount or number of employees, c) the need or lack of need of public funding, d) characteristics of the sector in which it operates - complexity, strategic sector, internationalization, e) volume of investment. In addition to that, termination of commercial and senior management contracts does not entitle to be part of the local administration, specially of the public sector entity providing services. The only way to access the local administration is through the standard access procedure.

## **V. VINCULATION WITH THE SOCIAL REGULATORY STANDARDS ADOPTED TO PRIVATE LAW**

### **1. Referral to Private Law as a source of rules for state-owned companies. Sole proprietorships within Article 17 of the Capital Company Act**

Another extraordinarily interesting aspect that we shall address in our paper is the vinculation between the remuneration regimes of senior officials and directors of state-owned companies - pretty complex and scattered - and the social regulatory standards provided for in private law. This is, put differently, the commercial law applicable after reviewing the private law as a source

of rules for state-owned companies. We shall not forget that, regardless of the endless debate, private law defines the types of companies. Public law, on the other hand, and depending on the nature of public companies - conditioned by the greater or lesser degree of public ownership of capital stock - only adjusts the effects of the commercial law on these public companies.. Therefore, public law addresses aspects such as the transmission of equity securities, the managers' grade of responsibility, audit, accounting, the appointment and limitation in the number of members of Boards of Directors, as well as their remuneration regime - being the last two aspects the ones that we tackle in our paper.

Thus, public law applied to state-owned companies must be consistent with the Royal Legislative Decree 1/2012, of 2nd July, which passes the consolidated text of Capital Company Act (hereinafter, LSC) and other legislation on commercial companies. As we know, we are referring to Commercial Law, Regulations on Trade Registry, passed by Royal Decree 1784/1996, of 19th July (hereinafter, RRM) and Act 3/2009, of 3rd April, on structural modifications of commercial companies.

The only provision set forth in LSC about state-owned companies is Article 17. This Article offers specifications on public sole proprietorships. These are companies with a limited liability or unipersonal corporations with capital owned by the state, autonomous communities or local corporations, or by agencies or entities dependent on them. These companies are not subject to Section 2 of Article 13, Article 14 and Section 2 and 3 of Article 16. These Sections refer, respectively, to the publicity of the sole proprietorship, the supervening sole proprietorship and the contracting of the sole proprietor with the company.

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## **2. Organizational structure: preference for the board of directors. Number of directors and appointment of officers**

However, the organizational structure of public companies <sup>46</sup>, whether sole proprietorships or not, remains initially unchanged and will depend on the type of company chosen. Following a review of the existing public law regulations, we can affirm that the lawmaker shows a clear preference for the board of directors as the optimal formula for managing the public company. And in fact, if we take into account that most of the companies adopt this regime in the corporate Articles of Association, we can affirm that this option is proven to be the most suitable one. However, this does not preclude the adoption of any other way of organizing the company's administration, depending on the type of company chosen (Article 210 LSC).

At least three aspects of the directors' legal framework are directly affected by the public regulations described above: the number of directors, their appointment and the remuneration to be received for holding that position. It should be noted that in non-public companies, the board of directors shall consist of a minimum of three members. The number of members shall be determined in the Articles of Association, and the specific (maximum or minimum) number of members shall be determined in the shareholders meeting. In the case of limited liability companies, the maximum number of board members may not exceed 12 (Article 242 LSC). We have already seen

that, at least in terms of state-owned companies, Decree 451/2012, of 5th March, which regulates the remuneration regime of senior officials and directors within the state public sector, has limited the maximum number of board members. This board members' limitation relies on the classification that, in terms of remuneration, is drafted by the Minister of Finance and Public Administrations.

Another aspect worth mentioning is the competence to appoint senior officials and directors, which is in the power of the shareholders' meeting, with no exceptions other than those established by law (Article 214, Section 1, LSC). Therefore, in order to appoint the directors to the board of directors, the law provides, in the case of public limited companies, the principle of proportional representation (Article 243) and, when applicable, co-optation system (Article 244). The organization and functioning of the board of directors will also be strongly conditioned by the company's Articles of Association. The Articles of Association of limited liability companies will specify this regime and must necessarily address the rules for summoning the board of directors, for constituting the governing body itself, and the manner of deliberating and adopting resolutions by majority vote. Public limited companies, unless otherwise provided for in the Articles of Association, the board of directors may appoint its chairman, regulate its own functioning and accept the resignation of directors. The board of directors must meet, in both types of companies, at least once a quarter (Article 245 LSC).

<sup>46</sup> The doctoral thesis of Matilla Mahiques, from the University of Alicante (2016) offers an extensive and recent study on the organizational structure and legal regime of public companies,

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The regime described above must comply with the applicable public law provisions. For example, this is the case of state-owned limited liability companies whose capital is wholly owned, directly or indirectly, by the General State Administration or its public entities. In this sense, the minister in charge of the company will offer

In this regard, it is hereby established that the minister in charge of the company shall propose to the Minister of Finance (or the public entity represented at its general meeting) the appointment of a number of company directors representing, at most - and complying with the number of directors appearing in the Articles of Association - the share established by the Council of Ministers when it agrees to the provisions of Article 169 d) of Act 33/2003, of November 3, 2003, on Public Administrations Property. That is when, under the powers vested in the Council of Ministers, the supervision of these companies is assigned to a specific department, or the ministry in charge is modified (Article 180, Section 1, of Act 33/2003). The directors would not be affected by the prohibition which, in theory (and in accordance with the general regime provided for in Article 213 of the LSC) is applied to civil servants working under the Public Administration and having duties related to the activities of a company (whatever it may be) (Article 180, Section 2, of Act 33/2003). Companies obliged to submit their accounts to audit must also set up an Audit and Control Committee reporting to the Board of Directors (Article 180, Section 3 of Law 33/2003).

### **3. The delegation of powers of the board of directors and the conceptual delimitation of senior managers and officers**

It is also interesting to highlight the new wording of Article 249 of the LSC due to Act 31/2014, of December 3, amending the Capital Companies Act for the amelioration of corporate governance. We find it interesting, mainly, since the delegation of powers<sup>47</sup> and the assignment of certain duties to the directors is an essential issue when it comes to conceptually delimit the positions of senior managers and directors within the state public sector. We shall not forget, either, that in the state-owned companies set forth in Article 166, Section 2, of Act 33/2003, the appointments of the chairman, managing director, president, or any equivalent position governing the board and having the maximum executive responsibility within the company, will be made by the Board of Directors, following the proposal of the minister in charge. (Article 181 of Act 33/2003).

Article 249 of LSC prescribes the delegation of powers of the board of directors. We already know that when the company's Articles of Association do not provide otherwise, and without prejudice to the powers of attorney that may be granted to any person, the Board of Directors may appoint one or more Chief Executive Officers or Executive Committees from among its members. In this case, the content, limits and modalities of delegation of powers must be established. It is also specified that the permanent delegation of any power of the Board of Directors to the Exe-

<sup>47</sup> Vid. Ortiz del Valle, M.C. "Estado actual de la delegación de facultades en las sociedades de capital", Cuadernos de Derecho y Comercio, 2016, pp. 143-172, y "La reforma del gobierno corporativo en las sociedades de capital", Revista de Sociales y Jurídicas, núm. 11, 2016, pp. 423-453.

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cutive Committee or to the Chief Executive Officer, as well as the appointment of the directors who are to occupy such positions, shall require for their validity two thirds of the members of the Board to vote in favour and will not take effect until its inscription has been made with the Mercantile Registry. Nonetheless, a main aspect in the new wording of the provision is the need to execute a certain contract. When a member of the Board of Directors is appointed Chief Executive Officer or is entrusted with executive duties under another position, he and the Company must sign a contract specifying so. This contract must also be previously endorsed by the board of directors, and it requires two thirds of the members of the Board to vote in favour. The director who is to represent the company may not attend the deliberation and voting. In addition, the signed contract shall be incorporated as an annex to the minutes of the meeting. This contract must detail all the aspects for which he/she may obtain remuneration as a result of the performance of executive functions. It should also include the possible compensation for early termination of such functions, as well as the amounts or insurance premiums or contributions to savings systems to be paid by the Company. The law specifies that the appointed chairman may not receive any remuneration for the performance of executive duties whose amounts or concepts are not provided for in the contract (Article 249, Section 3, LSC). This contract, which may also be found within state-owned companies, must always comply with the reviewed provisions (such as compensation for termination, remuneration and review on lawfulness) in terms of particulars of commercial and senior management contracts of the state public sector. No doubt, the contract must also comply with the remuneration policy passed by the General Meeting (Article 249, Section 4, LSC). Let us not forget either, in conclusion, that among the

non-delegable powers there are some of singular importance in our field. These are: decisions relating to the remuneration of directors, within the statutory framework and, where applicable, the remuneration policy approved by the general meeting (Article 249, bis.i, LSC), subject to public law regulations; the appointment and dismissal of the chief executive officers of the company and the definition of the terms of their contracts (Article 249, bis.g); the appointment and dismissal of executives who answer directly to the board or to one of its members; the definition of the basic terms of their contracts, including their remuneration (Article 29, bis. h LSC).

#### 4. Remuneration

The remuneration for the holding of the position is another of the aspects that were significantly affected by Act 31/2014, of 3rd December, amending the Capital Companies Act for the amelioration of corporate governance. A new formulation of Articles 217, 218 and 219 of the LSC was provided, and if necessary, the question should be raised as to whether this regulation is applicable to public companies. For us, it is applicable as long as it is not contrary to administrative regulations. According to what we have reviewed, it cannot be understood otherwise because there is an express reference to the applicable commercial legislation.

Therefore, it is required for the company's Articles of Association to be consistent in terms of remuneration. Put differently, the Articles of Association of state-owned companies must specify the remuneration regime, but regimes which do not comply with the public legal framework cannot be accepted, nor can the decision of the general meeting be disregarded. However, these regulations have reduced corporate freedom to

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a minimum (basic and complementary remunerations: Supplemental bonus as per job title and variable pay). The maximum amount of the annual remuneration of all the directors (and therefore of the board members) must be agreed by the general meeting of the state-owned companies, complying with the imposed remuneration limits, and shall remain in effect until its modification is approved. The distribution of remuneration among managers is quite another matter. It shall be distributed, unless the general meeting determines otherwise, by their agreement, and the board shall decide to take into account the functions and responsibilities given to each member (Article 217, Section 3, LSC). It should be noted that any agreement on remuneration that does not observe the remuneration limits established for public companies, whether by the general meeting or by the board itself, would be declared null and void.

The question of remuneration, even in the case of public companies, and depending on the types of remuneration (as could be the case of complementary remuneration), must comply with the criteria set forth in Article 217, Section 4 of the LSC. We point out that the remuneration of the directors, as indicated by the commercial lawmaker, must in any case be in reasonable proportion to the importance of the company, its economic situation at any given time and the market standards of comparable companies. The remuneration regime in place should be designed to promote the long-term profitability and sustainability of the company and incorporate the necessary safeguards to avoid excessive risk-taking and the rewarding of unfavorable results. Thus, the classification of the different public companies into groups is based on their characteristics and the criteria listed in the administrative regulations, or the criteria for assessing the appropriateness of the supplemental bonus per job title,

together with the criteria of Article 217, Section 4 of the Capital Companies Act, as described above.

However, the discrepancies between public and private regulations cannot be denied. In private commercial companies, the position of director is free of charge, unless the Articles of Association provide otherwise by determining his remuneration regime (Article 217, Section 1, LSC). This principle is contrary to the remuneration regime like that of public companies, which is based on the basic remuneration as a mandatory minimum remuneration. And some of the remuneration systems provided for in Article 217, Section 2 of the LSC do not seem particularly in harmony with the nature of public companies. This may be the case with profit-sharing remuneration or the system provided for in Article 219 LSC on remuneration given with shares of the company. The latter is ruled out, of course, at least for public sole proprietorships. However, we don't believe that there are clear reasons to and nor we do believe that there are definitive reasons to exclude the possibility that the remuneration regime established in the Articles of Association of a public company may determine any or some of the different remuneration categories to be received by the directors and those positions provided for in Article 217, Section 2 of LSC (a) fixed allowances, b) subsistence allowances, c) profit participation, d) variable pay with general indicators and parameters of reference, e) remuneration in shares or linked to their price evolution; f) compensation for dismissal, as long as this dismissal is not based on the non-fulfillment of the member's duties; and g) systems of savings or protection that may be deemed appropriate). This can be the case as long as the remuneration limits are observed, and particularly the maximum remunerations established in the specific public regulations that we

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have reviewed. Such amounts of the public regulation cannot be understood as a restriction of the acceptable remuneration categories and their identification exclusively with the fixed allowance as the only remuneration option.