LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
Supplement 2025, pp. 325-341

JOINT AND SEVERAL LIABILITY IN INSOLVENCY PROCEEDINGS

Constantin Bogdan ION
ORCID[ID]: 0009-0005-1762-3620
E-mail: ion_bogdan_tom@yahoo.com
Afiliation: Universitatea Titu Maiorescu, Bucharest

Abstract: *Joint and several liability is regulated in article 169 of Law number 85/2014. The liability of the persons covered by the legal text, if their actions caused the debtor's insolvency, is subordinate to the purpose of the insolvency procedure, which is to cover the debtor's liabilities.*

Members of the management/supervisory bodies of the legal entity or any other person bear part of the liability or the entire liability not because they directly caused it to the detriment of the creditors, but because, by committing the acts described by the law, they contributed to the debtor reaching a state of insolvency, that is, that state of the patrimony characterized by the insufficiency of the funds available to pay the debts due.

Therefore, the liability is personal, tortious, which only occurs when, by committing any of the acts listed in the legal text, the debtor company has contributed to becoming insolvent.

Since it is a tort liability, in order to be engaged, the general conditions of tortious civil liability must be met, which arise from the content of Article 1357 of the Civil Code (illegitimate act, damage, causal link and fault), conditions that acquire some special connotations in this situation.

Keywords: *liability; insolvency procedure; debtor; creditors.*

Introduction

The Insolvency of Legal or Natural Persons, as understood by society and as governed by Romanian legal norms, is in fact a financial condition that prevents such persons from fulfilling their monetary obligations to creditors. It represents a de facto inability to meet current payment obligations.

In the specialized legal literature (Cărpenaru, 2016, pp. 714–715), it has been noted that insolvency and pre-insolvency proceedings aim to:

- maximize the realization of assets and recovery of claims by creditors;
- provide debtors with an opportunity for effective and efficient business recovery;
- ensure impartial and objective procedures;
- guarantee equitable treatment of creditors;
- ensure a high degree of transparency and predictability in the proceedings;
- recognize the existing rights of creditors and respect the statutory order of priority in satisfying claims;
- limit credit risk and systemic risk associated with derivative financial instruments;
- ensure access to financing during pre-insolvency, observation, and reorganization phases;
- provide a foundation for voting on the approval of the reorganization plan;
- promote negotiation and renegotiation procedures;
- enable timely realization of assets during bankruptcy proceedings; and
- ensure judicial oversight of the activity of insolvency practitioners.

This condition is not a subjective status to be determined by debtors or creditors at their discretion. Rather, the circumstances under which a person may be subjected to insolvency proceedings are strictly

and clearly regulated by Law No. 85/2014 on Insolvency and Pre-Insolvency Proceedings (Official Gazette No. 466/25.06.2014).

Moreover, this financial condition should not be confused with insolvability, as the two concepts are distinct and should not be treated as synonymous—even though, in practice, an insolvent person may also be insolvent in the economic sense. Thus, while the two situations may overlap, they are not identical.

In the legal literature (Pop, 2015, pp. 442–443), a clear distinction has been made between the two terms. It has been stated that insolvability results from the insufficiency of a person's assets in comparison to the total amount of due debts, whereas insolvency refers to the debtor's inability to meet certain, liquid, and due payment obligations due to a lack of available financial resources.

The insolvency procedure, regulated by Law No. 85/2014, is intended both to prevent insolvency whenever possible and to satisfy the debtor's liabilities through the recovery of claims by creditors.

In this context, the law provides not only for specific mechanisms of claim recovery from the debtor's estate, but also grants creditors the possibility to recover, in full or in part, their claims from certain persons whose conduct contributed to the onset of the insolvency and, consequently, to the damage suffered by the creditors—namely, the failure to recover their claims.

The latter scenario will be the focus of the following section.

Joint and several liability in insolvency proceedings

As a preliminary observation, it must be noted that, from the perspective of active legal standing, both the debtor in a state of insolvency and the creditor who has suffered prejudice due to the non-payment of their claim may file a petition for the commencement of insolvency proceedings. However, both parties must provide evidence of compliance with the legal requirements for the court to admit the request.

Thus, in situations where it is established that the debtor's entry into insolvency proceedings is attributable to the fault of certain

individuals, the imposition of joint and several liability is a procedure that can only follow the court's finding of the debtor's state of insolvency and, consequently, the opening of the insolvency proceedings.

When the state of insolvency arises from transactions that have resulted in the loss of assets, the creation of fictitious liabilities, or the deviation of the debtor's activity from its normal course, the unsatisfied liabilities of the debtor—which, in the context of insolvency proceedings, represent damage caused to the creditors—may be remedied through the imposition of liability upon those who, through their conduct, contributed to the debtor's insolvency (Bufan, Deli-Diaconescu, & Sărăcuț, 2022, p.845).

According to the provisions of Article 169(1) of Law No. 85/2014, upon the request of the judicial administrator or liquidator, the syndic judge may order that all or part of the debtor's liabilities—up to the amount of the damage causally linked to the specific act—be borne by the members of the management and/or supervisory bodies of the legal entity debtor in insolvency, as well as by any other persons who contributed to the debtor's state of insolvency through one or more of the following acts: a) using the assets or credit of the legal entity for personal benefit or that of another person; b) carrying out production, trade, or service activities for personal gain under the cover of the legal entity; c) ordering, for personal interest, the continuation of an activity which was clearly leading the legal entity to cease payments; d) keeping fictitious accounting records, causing the disappearance of accounting documents, or failing to keep records in accordance with the law (in cases where accounting documents are not handed over to the judicial administrator or liquidator, both fault and the causal link between the act and the damage are presumed; this presumption is rebuttable); h) any other intentional act that contributed to the debtor's state of insolvency, as established under this Title.

Applying these principles, Romanian courts have issued inconsistent rulings concerning the interpretation and application of this provision on joint and several liability in insolvency proceedings. As a result, the High Court of Cassation and Justice, under Articles 514–518

of the Civil Procedure Code, clarified the legal nature of the liability regulated under Article 169(1) of Law No. 85/2014 in its Decision No. 14/2022, rendered in the interest of the law and published in Official Gazette Part I No. 902 of September 13, 2022. In paragraphs 74–76, the Court held: *"The provisions of Article 169(1) of Law No. 85/2014 regulate expressly determined circumstances under which the members of the management and/or supervisory bodies of a legal entity in insolvency, or any other person, may be required to bear all or part of the debtor's liabilities, if through their actions they contributed to the debtor's insolvency.The liability governed by this article is of a special nature, distinct from general tort liability under Article 1,349 of the Civil Code. Unlike general tortious acts, which are broadly defined, the unlawful acts described in Article 169 are specific. The liability of the individuals referred to in the legal text is subordinated to the purpose of insolvency proceedings, namely to cover the debtor's liabilities, which consist of the obligations assumed by the debtor and left unsatisfied upon maturity—that is, the total claims registered in the final table of claims. Members of the management/supervisory bodies or other individuals do not bear liability because they directly created the liabilities, but because their actions led the debtor into a state of insolvency—defined as a financial state marked by the insufficiency of available funds to pay due debts. The liability regulated by Article 169(1) of Law No. 85/2014 is liability toward the debtor legal entity, as the party harmed by entering a state of insolvency. Therefore, the causal link—essential for engaging liability—must exist between one of the acts listed under Article 169(1)(a)–(h) and the debtor's resulting state of insolvency."*

From the ensemble of applicable legal provisions, along with the principles laid out in the above binding decision (pursuant to Article 517(4) of the Civil Procedure Code), it follows that the liability under Article 169 of Law No. 85/2014 is personal and tortious in nature. It arises only when one of the enumerated acts has contributed to the debtor's insolvency.

Since this is a case of tort liability, the general conditions for tortious liability must be met, as established in Article 1,357 of the Civil

Code: an unlawful act, damage, causal link, and fault. In this context, these elements gain specific legal nuances.

In practice, the judicial liquidator, appointed by the syndic judge at the opening of insolvency proceedings, is required to draft a report on the causes and circumstances leading to the debtor's insolvency. This includes analyzing all available evidence and identifying any facts that may fall within the scope of the aforementioned legal provision and that may be attributable to members of the debtor's management or supervisory bodies—or other individuals.

According to Article 72 of Law No. 31/1990 (as amended and republished, Official Gazette No. 1066 of November 17, 2004), *"The obligations and liability of administrators are governed by the provisions applicable to mandate contracts."*

The liability of former representatives of a company for the performance of their duties is contractual in nature, arising under the mandate contract concluded between the parties. Under the principles of contractual liability, proof of the existence of the mandate and of the failure to perform—or defective performance—of obligations by one party raises a presumption of fault on the part of the debtor (i.e., the administrator), as per the New Civil Code (adopted by Law No. 287/2009, Official Gazette No. 511 of July 24, 2009).

It is important to note that an administrator must be appointed at the time of incorporation of the company, with their express consent. The law does not permit the establishment of the legal fiction known as a commercial company without appointing an administrator. This is expressly stated in Article 209 of the Civil Code, which provides that: *"A legal person exercises its rights and fulfills its obligations through its management bodies, from the date of their constitution."* (Bufan, Deli-Diaconescu, & Sărăcuț, 2022, p. 303)

Given that the legislator has outlined distinct situations and corresponding legal conditions for each subparagraph of Article 169(1) of Law No. 85/2014, each case of liability must be analyzed individually.

According to Article 169(1)(a) of Law No. 85/2014, liability may be imposed where an administrator or other individuals have used the

company's assets for personal benefit. The purpose of this provision is to penalize executive abuse, where personal interest is pursued at the expense of the company's social interest, harming both the company and the broader community of stakeholders.

Accordingly, mere allegations by the liquidator or claimant are insufficient to trigger joint and several liability. The court cannot impose patrimonial liability without proper evidence, and invoking Article 169 does not automatically establish liability for members of the management bodies. The legislator did not create even a rebuttable legal presumption of guilt or liability (with the exception noted under letter d, as will be addressed below). Instead, liability may be imposed only after the administration of evidence that leads the court to a firm conclusion that the debtor's insolvency resulted from one or more of the acts enumerated by law.

Thus, the syndic judge—or, where applicable, the judicial review court—has the task of verifying the regularity of the management decisions in relation to the company's corporate interest and identifying any abuse that may have led to the debtor's insolvency. The obligation to cover the liabilities can only be attributed to those administrators who have exploited the company's capital for personal interest or who, through their management policy, have failed to safeguard the corporate interest, instead promoting other interests.

The corporate interest and the personal interest of the administrator are two of the legal and statutory limits on the powers conferred upon them. The executive's mission is clearly defined: to act in the service of the corporate interest. Any deviation from this objective must be carefully examined, as fraud constitutes a significant obstacle to the exercise of management prerogatives.

Under normal circumstances, the administrator's personal interest aligns with the corporate interest. Only when an abnormal state is introduced into the company's management dynamics do these interests diverge.

Any subordination of the corporate interest to another interest violates good governance principles. A management act becomes

unlawful if it was performed in the administrator's personal interest and to the detriment of the company.

In this context, it is observed that a company's assets are reflected in its annual inventory and balance sheet.

The inventory comprises the set of operations used to ascertain the existence—either quantitatively, valuationally, or both—of all assets and liabilities in the company's patrimony as of the date of the operation. The balance sheet reflects the patrimonial asset elements, the main asset classes being:

- Fixed assets (tangible, intangible, and financial assets),
- Current assets (inventory, receivables, marketable securities, or other values),
- Prepaid expenses and similar asset items, and
- Bond redemption premiums.

Asset diversion may take various forms, such as:

- The administrator's failure to return company-owned goods and personal use of said assets,
- Unauthorized transfers of company property (e.g., transferring goods owned by the debtor without compensation).

Such actions constitute misuse of corporate assets, and may be sanctioned under Article 169 of the Insolvency Law.

The claimant requesting the application of this article must specifically identify the wrongful act imputed to the person concerned. General assertions—such as those often made by public creditors like ANAF (National Agency for Fiscal Administration), particularly when they are the ones requesting the liability and not the court-appointed liquidator—are insufficient. For example, claims that the insolvency practitioner failed to analyze how the company's cash or receivables were used, or whether the legal representative misappropriated company funds, do not meet the burden of proof.

Another hypothetical scenario (based on admissible evidence) could involve a situation in which the judicial liquidator, analyzing financial statements and trial balances over several years and publishing a causal report in the Official Bulletin of Insolvency Proceedings (BPI), observes

significant discrepancies in the company's balance sheets on certain dates—especially between receivables, assets, and cash holdings (either in bank accounts or in hand).

In the absence of any justification from the statutory administrator regarding the reduction of company assets between those dates, and where debts remain at the same or higher level, such discrepancies may, under Article 329 of the Civil Procedure Code, raise the presumption that the diverted assets were used in the administrator's own interest or for third parties, to the detriment of the company—but only regarding inventory and liquid assets, not receivables.

This distinction is critical because receivables cannot be presumed collectible with certainty, and the administrator's passivity in collecting receivables does not in itself amount to "use" within the meaning of the legal provision. It may only be qualified as such if there is conclusive evidence that the debts were recoverable and the administrator knowingly and in bad faith failed to take the necessary steps.

In such a case, the plaintiff must demonstrate that the administrator deliberately failed to recover debts, thereby favoring the debtor clients and harming the company, and that this illicit conduct contributed to or caused the company's insolvency.

Thus, in the hypothetical scenario above, we could conclude that an administrator who used company assets for personal purposes, and who was summoned during both trial and appeal stages and failed to provide a defense or explanation for how those sums/assets were used for the benefit of the company, has satisfied the conditions for engaging joint and several liability under Article 169(1)(a) of Law No. 85/2014.

Another example would involve a situation in which the statutory administrator, after their powers were revoked by the opening of the insolvency proceedings, fails to surrender the company's assets to the liquidator—leaving the liquidator to merely identify them on paper—while continuing to use them. These assets may include cash, luxury vehicles, work equipment, etc.

Article 169(1)(b) of the Insolvency Law addresses cases in which persons engage in production, trade, or service activities for personal gain under the cover of the legal entity.

In other words, the law aims to sanction situations where the company is used as a mere façade for commercial operations carried out by individuals who are now defendants in the insolvency-related liability proceedings.

An analysis of national court practice (see Civil Judgment No. 362/19.05.2021 delivered by the Iași Tribunal and Civil Judgment No. 224/22.05.2023 rendered by the Sibiu Tribunal, both available on www.rejust.ro) reveals that this legal basis is rarely invoked and, when it is, it is often only in a formal manner, without substantiation. This occurs primarily due to the difficulty in proving the legally permitted factual scenario, and secondarily because such factual circumstances have rarely been clearly alleged in practice.

Nonetheless, one could imagine a situation within the scope of this provision in which the individuals engaging in such activities earn higher profits by using this scheme to reduce tax or social security contributions—such as health insurance, pension payments, etc.—or where the real activity is unlawful, and the legal entity is used merely as a façade to create an appearance of legality in order to evade regulatory scrutiny.

Moving forward, it is worth analyzing Article 169(1)(c) of Law No. 85/2014, which governs the situation where the person against whom joint and several liability is sought ordered, for personal interest, the continuation of an activity that was clearly leading the legal entity towards cessation of payments.

The reason the legislator limited the scope of liability to cases where the act was committed "in personal interest" is to distinguish between situations where the responsible person continued the business in the good-faith hope of recovery, versus where the continuation served their own personal interest, such as maintaining their position or profiting from the resulting economic consequences. As a result, this limitation

excludes liability for negligence or imprudence, since personal interest implies fraudulent intent, not mere fault.

Thus, without specific evidence demonstrating which activities were carried out by the defendant administrator, how they were executed, the timeframe, and most importantly, how those activities contributed to the insolvency, the alleged wrongful act cannot be deemed proven.

For example, under the ambit of this legal provision, we can imagine a scenario where the administrator, acting in that capacity, entered into contracts which the company was obviously unable to fulfill even at the time of their conclusion—contracts that were inherently detrimental to the company regardless of the performance of the other party.

A practical scenario could involve an administrator signing transport contracts, acting as carrier, for a fee per unit (e.g., per kilometer or per ton), at a rate well below the company's operating costs, making any profit impossible from the outset. These contracts may even include penalty clauses in favor of the counterparty, who may in fact be a proxy for the administrator.

Such contracts violate the principle of good faith in negotiations, creating a serious imbalance between income and expenses. This situation involves ongoing contractual performance that—although legally executed—was clearly detrimental to the company from the beginning. This ultimately leads to inability to meet payment obligations and therefore to insolvency.

In such a case, the administrator's personal interest is evidenced by the fact that they transported goods and generated personal profit, while using the company's assets and incurring costs far exceeding the contractual income. This results in the company's eventual insolvency.

Regarding Article 169(1)(d) of Law No. 85/2014, liability may also arise when the administrator of an insolvent debtor:

- keeps fictitious accounting,
- causes accounting documents to disappear, or
- fails to keep proper records in accordance with the law.

(See the Minutes of the meeting of the Presidents of the specialized sections of the High Court of Cassation and Justice and the Courts of Appeal, Căciulata, 15–16 May 2015, item 12.)

Moreover, pursuant to the Decision regarding the uniform interpretation and application of Article 169(1)(d), if the defendant fails to deliver the accounting documents to the insolvency practitioner after being formally notified, it is presumed (rebuttably) under Article 328 of the Civil Procedure Code that all conditions for liability under this provision have been met.

According to Article 11 of Law No. 82/1991 (republished in the Official Gazette No. 454/18.06.2008), the responsibility for organizing and maintaining the accounting records of a legal entity rests with the administrator. In addition, under the Civil Code, the mandatary (the agent/ the administrator) is liable not only for fraud (dol) but also for fault (culpa) in the execution of the mandate.

According to the provisions of Article 10(1) of Law No. 82/1991, republished, responsibility for the organization and management of accounting records lies with the administrator, who is obligated to manage the affairs of the respective company.

Failure to maintain proper accounting records makes it impossible to detect early financial distress, thus rendering insolvency undetectable at a point when it might otherwise have been mitigated. These adverse effects would be avoided if accounting were properly kept, as this would enable the administrator to take the appropriate preventive measures in due time.

Where accounting is properly maintained in compliance with legal requirements, a presumption of causality is established between the wrongful act and the damage suffered, namely the outstanding liabilities recorded in the creditors' table.

We refer to this presumption as rebuttable, since the person against whom liability is sought may challenge it in court by attempting to reverse the legal presumption, for example, by demonstrating:

- that they did not receive the notification from the insolvency practitioner requesting the handover of accounting documents,

due to various reasons (e.g., no longer residing at the registered address, temporary or prolonged absence from the country—an issue often encountered where Romanian nationals emigrate to other EU Member States for employment),

- or that there were procedural irregularities in the notification process.

All such claims must be substantiated before the court, and the provisions of Article 249 of the Romanian Code of Civil Procedure apply in full, requiring the defendant to present proof of these assertions.

In conclusion, based on the foregoing, it is only in the case of the conduct described under Article 169(1)(d), second sentence of Law No. 85/2014 on insolvency prevention and insolvency proceedings that a rebuttable presumption of all necessary conditions for triggering patrimonial liability arises. This is an exceptional situation compared to the other cases regulated by the same article.

Regarding the misconduct defined under Article 169(1)(e) of Law No. 85/2014, this legal provision stipulates that members of the management bodies and any other persons may be held liable if they: *"diverted or concealed part of the legal entity's assets, or fictitiously increased its liabilities."*

As with the act provided under letter (a) of Article 169, the judicial administrator's report on the causes and circumstances that led the company into insolvency must contain a detailed analysis of the debtor's assets. However, with regard to receivables, no evidence has been presented that the defendants have collected them.

At the level of jurisprudence, solutions have been identified explaining the above-mentioned mechanism (see, by way of example, civil judgment no. 311/20.06.2024 issued by the Specialized Tribunal of Argeș and civil judgment no. 177/14.03.2025 issued by the Iași Tribunal). By way of example, the following considerations can be highlighted: *thus, the misappropriation of a part of the legal entity's assets consists in changing the destination of goods belonging to it, while the concealment of liabilities means hiding certain goods or patrimonial rights of the debtor. The company's assets are reflected in the annual*

inventory and in the balance sheet. Methods of misappropriating assets include failure to return goods belonging to the company by the administrator, or transfer without consideration of goods constituting the debtor's property. The act of misappropriating the company's assets equally constitutes an abuse of social goods.

In concrete cases, concrete proof must be made of the misappropriation or concealment of a part of the legal entity's assets by the defendant, or of the fictitious increase of its liabilities; mere invocation of theoretical aspects is not sufficient. Assertions made before the courts, according to which the company appeared at the end of certain years with outstanding receivables, which were merely listed, cannot in themselves lead to the conclusion that the defendants misappropriated or concealed part of the company's assets without a detailed presentation of this asset, how the misappropriation or concealment was carried out, and how they at least contributed to the insolvency of the company.

There may also be situations where the administrator records in the accounting records operations of withdrawing sums of money without providing supporting documents regarding that operation. In this context, the absence of evidence regarding the use of the withdrawn sums may represent a fact likely to establish a presumption of their misappropriation by the defendant sued.

For the claimant to obtain a favorable ruling, beyond the concrete acts committed as provided by the applicable norm, they must also prove the time of commission of these acts, which must be prior to the occurrence of the insolvency, as the latter must be a direct consequence of the act sought to be sanctioned.

Regarding the provisions of article 169 paragraph (1) letter h) of Law no. 85/2014, which provide that any other intentional act that contributed to the debtor's insolvency may engage the patrimonial liability of members of the management or supervisory bodies of the company, as well as any other person, the act must be concretely substantiated, committed with the subjective attitude prescribed by law (intention), and have contributed to the debtor's insolvency.

Under this regulation, a person's liability cannot be engaged if the intentional act committed did not contribute to the debtor's insolvency. Therefore, it is necessary to prove the existence of a causal link between the illicit act expressly enumerated in article 169 and mentioned in the statement of claim, and the debtor's insolvency.

Thus, the claimant must invoke and prove in the action two distinct temporal moments: 1. the moment of occurrence of the company's insolvency, characterized by the insufficiency of available cash funds for the payment of certain, liquid, and due debts; and 2. the moment of commission by the defendant of the illicit acts covered by article 169(1) of Law no. 85/2014, prior or concurrent with the occurrence of the insolvency, and the manner in which the illicit acts caused wholly or partially the insolvency of the company, as defined by the legislator.

Besides this means, but correlatively to it, the insolvency law also provides another supplementary remedy through which creditors may recover their claims or reduce their liabilities, provided in articles 117–122 of the same code.

We say correlatively because it is possible that certain acts through which the debtor's assets were fraudulently alienated under the means provided in article 169 be annulled by the insolvency judge if the requesting party proves that the legal conditions are met.

If successful, and the court annuls the fraudulent acts, the movable or immovable goods (including sums of money) will return to the debtor's patrimony subject to insolvency proceedings and, as such, the estate from which claims will be satisfied will increase.

It should be noted that the success obtained in court will not benefit only the creditor who initiated the procedure, but all creditors without preference, since the legal norms do not confer such a privilege. This is because annulment means that the act is considered never to have been validly concluded and is contemporaneous with its creation, preventing it from producing effects — in other words, the civil legal act, through the finding of its absolute nullity, is considered never to have been concluded (Boroi, 2012, p. 270).

The effect occurs conditioned on the retention, through the court's ruling, in the patrimony of the same debtor, while creditors collectively, according to the rank and extent of their claims, will benefit from that patrimonial value.

Beyond these means at the disposal of any creditor to recover their claims, it is also relevant that fiscal legislation contains special provisions available to tax creditors through which they can realize their fiscal claims only if the debtor is declared insolvent, without the need to open insolvency proceedings, as results from article 25 of the Fiscal Procedure Code.

Conclusions

The analyzed article must be interpreted and applied restrictively and preserves the natural balance between the free will that the administrator must have in managing the business—an administrator who must act in good faith—and that of an administrator who intentionally and through fraudulent maneuvers distorts, in their own interest or that of another, the purpose and activity of the company, committing the acts described by the legal text.

In practice, this measure is most often subsidiary to the recovery of claims by creditors; the interest in exercising such actions usually arises only to the extent that the recovery of claims is unsuccessful through reorganization or liquidation procedures.

This is because when the judicial administrator or, as the case may be, the judicial liquidator identifies assets in the debtor's patrimony whose value clearly exceeds the value of the claims forming the creditors' table, they no longer exercise it, even though the applicable rules oblige the administrator/liquidator to conduct checks regarding such acts from the beginning of the insolvency procedure.

The norm is beneficial to corporate life because it seriously draws attention to the responsibility that company administrators have towards the company, but also, indirectly, towards creditors, being a possible

sanction that will be borne by the persons named by the legal norms from their personal assets.

The liability of administrators in this legislative form is all the more justified since their form of legal representation of the company is not one of ordinary mandate law but a much broader one that reaches the situation where the administrator's will represents even the will of the commercial company itself, so the loyalty towards the interests of the company they represent must be much deeper.

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