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Corporate officer's criminal and civil liability and delegations of authority: Vade mecum and modus operandi

Organizing the management of their subsidiaries in France is a major concern for both French and foreign corporate groups.

Appointing senior executives to positions such as president or managing director partially addresses this issue. However, it does not always meet the challenges of day-to-day management, especially when the designated legal representative is distant from the place of operations.

This is why delegations of authority are increasingly used.

The purpose of this article is to provide a practical overview of the principles governing the liability of corporate officers and the companies they represent, as well as the conditions for the validity of the delegations of authority they grant.

A delegation of authority is a legal act by which an authority (the delegator) relinquishes part of the powers conferred on him/her and transfers them to a subordinate authority (the delegatee). The delegatee then assumes the obligations and responsibilities associated with the delegated authority.

The scope of application and conditions for the validity and implementation of a delegation of authority have been progressively defined and refined by case law.

The purpose of delegating authority is to place the criminal consequences of actions or omissions on the actual decision-makers, rather than solely on the head of the company.

1. Liability within the company

1.1 The principle of criminal liability of corporate officers

Corporate officers may be held criminally liable in two cases:

- The corporate officer has personally committed offenses in the course of his/her duties (misappropriation of corporate assets and credit, abuse of majority, hiring of illegal workers, etc.).

As the material perpetrator of the relevant offenses, he/she is criminally liable for his/her actions. This is the application of the principle of criminal liability for one's own actions (Article 121-1 of the French Criminal Code).

In this case, the corporate officer may not be exonerated from criminal liability. He/She cannot invoke the existence of a delegation of authority as a means of defense.

- The corporate officer may also be held liable for offenses materially committed by a subordinate.

According to an established case law, corporate officers may be held criminally liable when the material perpetrator of the offense is an employee acting in the course of his/her duties. It is indeed the responsibility of corporate officers to personally comply with, and to ensure that company employees comply with, applicable regulations.

1.2 Corporate officers concerned

Corporate officers whose criminal liability may be incurred due to their personal obligations include those mentioned by the laws and regulations governing French companies (managers of *sociétés à responsabilité limitée*, the president, the managing director, the deputy managing directors, the chairman of the management board, members of the board of directors of French *sociétés anonymes* and *sociétés par actions simplifiée*, and, more generally, any and all persons who has the power of management in any types of French companies).

1.3 Offenses concerned

The criminal liability of corporate officers may be incurred based on any offenses provided for in the French Criminal Code and all special criminal laws (in matters such as labor, financial, environmental, health and safety, etc.).

Prosecutions against the corporate officer may coexist with those against the subordinate who materially committed the offense and against the legal entity itself.

1.4 Criminal liability of legal entities

A legal entity may be held criminally liable if a corporate body or representative of said legal entity has committed an offense on its behalf (Article 121-2 of the French Criminal Code).

A. A corporate body or a representative of the legal entity

This refers to an individual or a corporate body vested with the authority to ensure, with or without the power of representation, the functioning of a legal entity, (such as a President, managing director, manager, general meeting of shareholders, etc.).

An interim trustee, the liquidator of a company, a special agent, and individuals holding a delegation of authority can also be considered representatives of the legal entity.

B. The perpetration of an offense

A legal entity is criminally liable whenever a natural person (a member of a corporate body or a representative of said legal entity) commits an offense (on behalf of said legal entity) for which he/she is criminally liable (in his/her capacity as member of the corporate body or representative).

C. On behalf of the legal entity

An offense committed in the interest of a legal entity (financial interest, strategic interest, etc.) is considered as an offense committed on behalf of said legal entity.

Conversely, if a corporate body or representative acts in the course of or in connection with his/her/its duties but for his/her/its own benefit and personal interest, or even to the detriment of the legal entity, the legal entity's criminal liability is generally not incurred.

When a corporate officer commits an offense that triggers the legal entity's liability, said corporate officer may also be held personally liable if it is established that the offense is "separable" or "detachable" from his/her duties.

This is the case when the corporate officer intentionally commits a particularly serious offense that is incompatible with the normal exercise of corporate duties.

2. Delegations of authority

2.1 Conditions for the validity of a delegation of authority

A. Conditions related to the delegatee

In principle, the delegation of authority must be granted to a subordinate, i.e., an employee having an employment contract with the relevant company.

The delegation of authority may be granted to any subordinate, regardless of his/her position in the company hierarchy, provided he/she has the skills, resources and authority required to effectively ensure compliance with the measures laid down by law and regulations.

A relationship of subordination must exist between the delegator and the delegatee.

In corporate groups, it is accepted that a delegation of authority can be granted by the head of the group to an employee of another group company over whom he/she exercises hierarchical power. In such a case, French courts recognize the existence of a relationship of subordination, even though there is no direct employer/employee relationship between the delegatee and the company in which the delegation of authority is exercised.

Apart from this case, a person from outside the company cannot receive a delegation of authority. For example, French courts have ruled that a corporate officer cannot invoke a delegation of authority given to an engineering consulting firm or an external maintenance company. However, in French *société par actions simplifiée*, the most flexible corporate form under French law, an outsider can be appointed as managing director.

The delegation of authority is only valid if the delegatee has the skills, authority and resources necessary to perform the mission entrusted to him/her.

a) Skills

For this requirement to be met, French case law considers that the delegatee must have the technical and legal knowledge corresponding to the rules and regulations he/she is responsible for applying.

b) Authority

French case law considers that the delegatee must have the power to give orders, enforce them and put an end to any risky situation.

For this requirement to be met, the delegatee must have a minimum degree of independence in the performance of his/her mission. The delegatee must not be required to refer to the delegator before making any decision.

c) Resources

The delegatee must have the human, technical and material resources needed to perform his/her mission. Indeed, judges generally hold liable the person who has the effective power to decide on the investments

required to comply with regulations.

B. Conditions related to the delegator

For a delegation of authority to be valid, the delegator must be part of a sufficiently large company and must not be able to personally ensure effective supervision of the company's operations and staff.

However, the company head does not need to demonstrate a complete impossibility of personally performing the mission delegated under the delegation of authority.

French trial judges refer to a number of criteria to determine whether the company is large enough to implement a delegation of authority. The main criteria include payroll size, the complexity of the company's structure (e.g., geographical distance between establishments), the nature of the operations, or the organization of work.

Delegations of authority are, therefore, generally implemented in companies with several subsidiaries or separate establishments.

C. Conditions related to the delegation of authority itself

French case law has laid down a number of basic requirements for the delegation of authority itself. These requirements are not exhaustive and are assessed on a case-by-case basis by French courts.

The delegation of authority must be certain and unambiguous. The recipient of the delegation must be clearly identifiable.

It must be precise and limited in scope. A delegation of authority is not valid if it results in the corporate officer completely abandoning his/her responsibilities.

A delegation of authority must be long-lasting, meaning that it must have a sufficient duration.

For a delegation of authority to be valid, the corporate officer must have delegated his/her authority before an offense was committed. This is to avoid delegations being granted *a posteriori* with the sole aim of enabling corporate officers to escape criminal liability.

Finally, the delegatee must be informed of the precise content of the delegation (nature of the authority transferred, purpose and scope of the mission, transfer of the corporate officer's criminal liability, etc.).

2.2 Conditions for sub-delegations of authority

The holder of a delegation of authority may transfer all or part of the authority that has been delegated to him/her to a sub-delegatee.

However, successive sub-delegations must not shift responsibility onto mere executors, nor result in confusion

about who ultimately holds the responsibility and faces potential sanctions. For this reason, French courts only accept cascading delegations of authority under very strict conditions.

The sub-delegator must ensure that his/her sub-delegatee possesses the skills, authority, and resources necessary to carry out his/her mission and is capable of assuming the responsibilities entrusted to him/her.

The sub-delegatee must meet the conditions required by French case-law for delegates. However, it is not necessary for the corporate officer who made the initial delegation of authority to have previously authorized this sub-delegation.

2.3 Specificity of intra-group delegations of authority

The specificity of an intra-group delegation of authority lies in the fact that the delegatee is not an employee of the group company in which the delegation of authority is intended to be exercised. Most often, the delegation is granted by the corporate officer of the parent company to an employee of this company or to an employee of one of its subsidiaries to exercise powers in another company within the group (or even in several other companies within the group).

The very principle of intra-group delegations of authority appears to be in contradiction with the concept of legal autonomy of companies.

However, French courts have recognized such practices that are increasingly used within corporate groups.

2.4 A delegation of authority may not be invoked for actions based on civil liability

A civil liability action brought against a natural person or a legal entity is available to any victim to ensure compensation for the harm suffered. Such an action remains personal and targets the person responsible for the damage. Therefore, the delegator cannot invoke a delegation of authority to exonerate him/herself from civil liability.

A company can always be held civilly liable for acts/actions committed by an employee.

Indeed, pursuant to Article 1242 paragraph 5 of the French Civil Code, the company is liable for acts/actions committed by its employees in the performance of their duties, regardless of whether the employee is criminally liable by virtue of a delegation of authority. This principle is confirmed by Article L. 4741-7 of the French Labor Code.

For the company to be held liable, the employee must have acted within the scope of his/her duties and not for purposes that are unrelated to or contrary to his/her responsibilities.

It is only under the triple condition that the employee acted outside the scope of his/her duties, without authorization, and for purposes unrelated to his/her responsibilities, that the employer can be exonerated from civil liability.

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A legal entity is also liable for faults committed through its corporate bodies, without the need to implicate said bodies personally. However, to seek the civil liability of the legal entity, two conditions must be met:

- The action must be committed by a person vested with the power to represent the legal entity;
- The act/instrument must be executed in the name and on behalf of the legal entity.

The company can hold its corporate officers who are natural persons and their delegates harmless from and against the financial consequences whenever their personal or joint and several civil liability is sought. The company may take out an insurance for this purpose. However, such coverage cannot apply when the criminal liability of the corporate officer or delegatee is incurred.

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