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Failure to convene the statutory auditor to the ordinary general meeting is not a cause for nullity of the deliberations

The decision issued on February 20, 2021 by the Commercial Chamber of the *Cour de Cassation* (French Supreme court) rightly recalls that the failure to convene the statutory auditor to the ordinary general meeting does not result in the nullity of the deliberations made during such meeting.

The facts of the case are fairly usual: the President of two simplified joint stock companies was dismissed from office at two separate ordinary general meetings held on December 17, 2012 and December 31, 2012 respectively. The latter, disputing his removal from office against a background of an action for unfair competition and an accusation of disparagement, argued that said meetings were null and void because the statutory auditor of each of the companies had not been convened. The Lyon Court of Appeals dismissed his request for nullity in a decision dated September 13, 2018. The case was then brought before the *Cour de Cassation* which was therefore asked to rule on the question of the potential nullity of the deliberations made during a general meeting to which the company's statutory auditor had not been convened.

The answer given by the *Cour de Cassation* in its decision of February 10, 2021 is clear and concise: "*the nullity provided for under Article L. 820-3-1 of the* [French] *Commercial Code is not applicable in the event of failure to convene the statutory auditor to the general meetings in question*".

This straightforward conclusion certainly deserves some elaboration.

The appellant complained that the Lyon Court of Appeals had failed to investigate, "*if necessary on its own initiative, whether the nullity of the disputed deliberations could be pronounced on the basis of Article L.820-3-1 of the* [French] *Commercial Code* (…)". It should be recalled here that Article L.820-3-1 of the French Commercial Code provides that "*the deliberations of the body mentioned in the first paragraph of Article L.823-1 §1 I made whereas a statutory auditor has not been properly appointed or made on the basis of the report of a statutory auditor appointed or remaining in office contrary to the provisions of this title or other provisions applicable to the person or entity in question are null and void*". This Article, therefore, covers three specific cases:

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- firstly, the deliberations of the ordinary general meeting of shareholders made whereas a statutory auditor has not been properly appointed,
- secondly, the deliberations of the ordinary general meeting of shareholders made on the basis of a report from a statutory auditor appointed contrary to the provisions of Title II "Statutory Auditors" of Book VIII of the French Commercial Code or other applicable provisions, and
- thirdly, the deliberations of the ordinary general meeting of shareholders made on the basis of a report from a statutory auditor who has remained in office contrary to the above-mentioned provisions or other applicable provisions.

In the case at hand, it appears that the companies did have a statutory auditor that had been properly appointed. As such, the *Cour de Cassation* strictly adhered to the scope of application of Article L.820-3-1 of the French Commercial Code: the failure to convene a properly appointed statutory auditor to a meeting cannot be equated with the failure to properly appoint a statutory auditor or with the fact that the statutory auditor has been improperly appointed, or improperly remains in office, within a company. We believe that the answer provided by the *Cour de Cassation* is quite welcome insofar as it proposes an interpretation of Article L.820-3-1 of the French Commercial Code that is fully in line with the letter of the text.

However, one may be surprised, as some commentators have been[1], that the legislator allows a situation to persist where the failure to convene a statutory auditor to an ordinary general meeting does not lead to the nullity of the deliberations made during said meeting while the failure to appoint a statutory auditor leads to the nullity of said deliberations. As Professor Jean-François Hamelin rightly pointed out, "*while at first sight it may seem more serious not to appoint a statutory auditor when the company is required to do so than not to convene him to a general meeting, it is also possible to say: what is the point of sanctioning the failure to appoint a statutory auditor, if it is sufficient to appoint one and never convene him?*"

Yet, it should be noted that Article L.820-4 of the French Commercial Code restores a certain balance in this area. This text imposes criminal sanctions – namely two years' imprisonment and a fine of 30,000 euros – when the manager of any person or entity:

- required to have a statutory auditor, fails to cause one to be appointed, and
- having a statutory auditor, fails to convene him to any general meeting.

It should be noted that the reasoning of the Lyon Court of Appeals, in its decision dated September 13, 2018, is also interesting insofar as it recalled the causes of nullity applicable to general meetings provided for under Article L.235-1 of the French Commercial Code. For the record, this text deals, in its first paragraph, with the causes of nullity of companies and instruments that amend by-laws, and, in a second paragraph, with the causes of nullity of instruments or deliberations that do not amend by-laws.

In response to the arguments put forward to request the nullity of the disputed deliberations on the basis of Article L.235-1 of the French Commercial Code, the Lyon Court of Appeals made the following reminder: "*Under Article L. 235-1 of the* [French] *Commercial Code only the violation of a mandatory provision of Book II – which is not the case of Article L. 820-4 of the* [French] *Commercial Code included in Book VIII – is*

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sanctioned by nullity".

In conclusion, the party claiming that the contentious meetings are null and void could not rely on the provisions set forth in Article L.820-3-1 of the French Commercial Code – according to which only the deliberations made whereas a statutory auditor has not been properly appointed are null and void – nor on those set forth in Article L.820-4 of said Code, the breach of which does not lead to nullity since it is no longer included in Book II of the French Commercial Code. Indeed, since an Ordinance of September 8, 2005, the provisions relating to the status and regime of statutory auditors have been transferred from Book II to Book VIII of the French Commercial Code. It should be noted that the consequences of this recodification *a priori* result more from a lack of attention of the legislator than from a real desire to have the failure to convene the statutory auditor escape nullity[2].

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[1] *SAS – Pas de nullité pour défaut de convocation du commissaire aux comptes* (Simplified Joint Stock Companies – No nullity for failure to convene the statutory auditor) – Commentary by Jean-François Hamelin, *Droit des sociétés* No. 7, July 2021, comm. 92

[2] *ibid*.

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