

Recognition of the existence of a manifestly unlawful disturbance resulting from the failure to file annual accounts and statute of limitations applicable to actions based on ordinary law provisions

While many company managers fail to comply with their obligation to file annual accounts, the *Cour de cassation* (French Supreme Court) has decided to reinforce the applicable sanction mechanism in an unprecedented decision issued on March 3, 2021^[1].

Wishing to obtain financial information on their former supplier (the “**Supplier**”), two companies specializing in the distribution of bedding products (the “**Distributors**”) applied to the Summary Judge to have the Supplier ordered to file its annual accounts for the period from 2008 to 2015, subject to a periodic penalty payment.

The claim brought by the Distributors was based on the ordinary law provisions set forth in Article L. 232-23 of the French Commercial Code, combined with those of Article 873 §1 of the French Code of Civil Procedure which allow to initiate summary proceedings to put an end to a manifestly unlawful disturbance.

The Versailles Court of Appeals, in a judgment dated February 15, 2018, held that the Distributors’ claim was admissible, but the Supplier appealed to the *Cour de Cassation*.

The Supplier claimed that the summary proceedings to ensure compliance with the legal obligation to file accounts could only be initiated under the conditions provided for by the special provisions set forth in the French Commercial Code, in particular those set forth in Article L. 123-5-1 of said Code.

It also argued that the Distributors’ claim was inadmissible because it was time-barred pursuant to Article 1844-14 of the French Civil Code.

In its decision of March 3, 2021, the *Cour de Cassation* held for the first time that the special provisions allowing a third party to request in court that the annual accounts of a company be filed did not exclude the

application of ordinary law provisions.

Moreover, since the purpose of the injunction to file the annual accounts was to put an end to a manifestly unlawful disturbance, the *Cour de Cassation* inferred that the limitation period provided for in Article 1844-14 of the French Civil Code was not applicable.

The unprecedented recognition of the non-exclusive nature of the special provisions set forth in the French Commercial Code

Legal actions initiated by third parties wishing to compel a company to file its annual accounts are expressly addressed in the French Commercial Code.

Article L. 123-5-1 of the French Commercial Code stipulates that: *“At the request of any interested party or the public prosecutor, the presiding judge of the court, ruling in summary proceedings, may enjoin, subject to a periodic payment penalty, the manager of any legal entity to file with the clerk of the registry of trade and companies the documents and instruments which this legal entity is required to file pursuant to legal or regulatory provisions.”*

Article R. 210-18 of the French Commercial Code also allows any interested person, after giving formal notice to the company, to *“request the President of the Commercial Court, ruling in summary proceedings, to appoint an agent to carry out the formality”*.

More generally, Article L. 232-23 of the French Commercial Code imposes on any and all joint-stock corporations the obligation to file their annual accounts, any reports issued by their management and auditors, as well as the proposed allocation of earnings.

In addition, Article 873 §1 of the French Code of Civil Procedure also allows any person with an interest in acting to ask the President of the Commercial Court to order the *“interim measures [...] that are necessary [...] to put an end to a manifestly unlawful disturbance.”*

The decision rendered by the *Cour de Cassation* on March 3, 2021 provided clarification on the enforceability – whenever special provisions set forth in the French Commercial Code allowing for the forced filing of annual accounts apply – of the general provisions mentioned in Article L. 232-23 of the French Commercial Code, combined with those of Article 873 §1 of the French Code of Civil Procedure.

As per the *specialia generalibus derogant*^[2] principle, the trial judges and the *Cour de Cassation* were in fact justified in holding that the summary proceedings aimed at ensuring the fulfilment of the legal obligation to file the accounts could only be exercised under the conditions provided for by Articles L. 123-5-1 and R. 210-18 of the French Commercial Code.

However, wishing to reinforce the obligation imposed on joint stock corporations to file annual accounts, the *Cour de Cassation* refused to apply this principle, thereby offering an additional legal remedy to any person wishing to go to court to ensure compliance with this obligation.

Even though this decision of the *Cour de Cassation* only targets joint-stock corporations, there seems to be no justification for not applying these findings to all companies required to file their annual accounts.

The *Cour de Cassation* therefore considered that the failure to file annual accounts constitutes a manifestly unlawful disturbance that justifies the combined application of Article L. 232-23 of the French Commercial Code and Article 873 §1 of the French Code of Civil Procedure.

A manifestly unlawful disturbance is usually defined as “*any disturbance resulting from a material or legal fact which, directly or indirectly, is an obvious violation of the rule of law*”^[3].

The obvious violation by the Supplier of the rule of law resulting from Article L. 232-23 of the French Commercial Code is undisputable in this case.

However, it should be recalled that it is the persistence and the length of this violation which substantiated in this case, according to the Versailles Court of Appeals, the existence of a manifestly unlawful disturbance.

As the *Cour de Cassation* confined itself to upholding the decision of the Versailles Court of Appeals without providing any clarification on this point, it is therefore appropriate to wonder whether there would be a manifestly unlawful disturbance if the failure to file accounts was a single one-off.

It also follows from the decision of the *Cour de Cassation* that the legal action aimed at putting an end to the manifestly unlawful disturbance resulting from the failure to file annual accounts differs from the action based on the provisions set forth in Article L. 123-5-1 of the French Commercial Code in that it must be directed against the company, not against its manager.

In the case at hand, the Supplier argued that the Distributors’ claim was misdirected since the injunction could only be ordered against its manager.

However, the *Cour de Cassation* endorsed the clever reasoning of the Versailles Court of Appeals which had recalled that the provisions of Article L. 232-23 of the French Commercial Code require any joint stock corporation – **not its manager** – to file the annual accounts.

Since the claim brought before the Summary Judge was not based on the provisions set forth in Article L. 123-5-1 of the French Commercial Code, the Versailles Court of Appeals had therefore inferred that the Supplier’s interest to defend was characterized.

Third parties wishing to initiate summary proceedings in order to obtain the forced filing of a company’s annual accounts must, therefore, be careful to direct their action either against the company or against the manager, depending on the legal basis of their claim.

Uncertainty regarding the statute of limitations applicable to actions aimed at putting an end to the

manifestly unlawful disturbance resulting from the failure to file annual accounts

The Supplier argued in the alternative that the Distributors' claim, based on Article L. 232-23 of the French Commercial Code, was time-barred as per the provisions set forth in Article 1844-14 of the French Civil Code.

Without providing further details, the *Cour de Cassation* dismissed this argument and held that *"the alleged statute of limitations, based on the provisions of Article 1844-1 of the Civil Code, [could] not be raised"*.

This argument ought to be rejected since Article 1844-14 of the French Civil Code relating to the three-year statute of limitations period only concerns actions for nullity of the company or of instruments and deliberations subsequent to its inception.

In this respect, the legal committee of the *Association Nationale des Sociétés par Actions* (French association of joint stock companies, commonly referred to by its acronym **"ANSA"**) had held in 2018 that the derogatory provisions set forth in the French Commercial Code relating to the shortened three-year statute of limitations period in corporate law matters concerned actions other than the right of injunction relating to the filing of accounts and could not, therefore, be applied^[4].

As the *Cour de Cassation* had not been asked to rule on the argument based on the expiry of the five-year statute of limitations period^[5] under ordinary law, there is still an uncertainty as to its applicability to actions seeking to ensure the filing of annual accounts based on the existence of a manifestly unlawful disturbance.

However, it should be recalled that the Versailles Court of Appeals, in its judgment of February 15, 2018, held that *"it does not matter what the alleged statute of limitations period is, the ordered disclosure measure was necessary to put an end to the manifestly unlawful disturbance resulting from the lack of transparency which has been established"*.

As such, the *Cour de cassation*, just like the Court of Appeal of Versailles, the reasoning of which it upheld in its March 3, 2021 decision, seems to infer from the existence of a manifestly unlawful disturbance that the action is not subject to any statute of limitations.

If the *Cour de Cassation* was to confirm this stand in the future, it would contradict the principle recalled by ANSA's legal committee^[6] according to which *"there is no action that is not subject to a statute of limitations under commercial law"* - and from which it inferred that actions based on Article L. 123-5-1 of the French Commercial Code are subject to a five-year statute of limitations period.

According to ANSA, the application submitted to the Summary Judge on the basis of this Article can, therefore, only relate to the accounts of the past financial year and the four preceding financial years.

Some legal writers who commented the decision of the *Cour de Cassation* have thus considered that the five-year statute of limitations period should be applied both to actions directed against the legal entity and to those directed against its manager^[7].

On the other hand, other legal writers have emphasized that the manifestly unlawful disturbance resulting from the failure to file annual accounts constituted “*a continuous infringement*” and that “*the statute of limitations period had not, therefore, started to run*”^[8].

In conclusion, while the decision rendered by the *Cour de Cassation* has made it possible to clarify the various legal bases on which third parties may rely to obtain compliance with the obligation to file annual accounts, it has also given rise to uncertainties as to the conditions in which the plea alleging the existence of a manifestly unlawful disturbance may be applied.

It will therefore be necessary to remain attentive to future decisions of the *Cour de Cassation* on this subject to obtain answers to these questions.

^[1] Commercial Chamber of the *Cour de Cassation*, March 3, 2021, No. 19-10.086

^[2] The specific derogates from the general, i.e., a special provision as to a particular subject matter is to be preferred to general language, which might have governed in the absence of such special provision.

^[3] This definition was notably been used the Versailles Court of Appeals in its judgment of February 15, 2018 which was appealed before the *Cour de Cassation*.

^[4] *Association nationale des sociétés par actions*, Legal Committe, February 7, 2018, No. 18-004

^[5] Article 2224 of the French Civil Code: “*personal or movable property actions can be brought within a period of five years from the day the holder of a right becomes or should have become aware of the facts allowing him to initiate such actions.*”

Article L. 110-4 I° of the French Commercial Code: “*Obligations deriving from trade between merchants or between merchants and non-merchants shall be time-barred after five years unless they are subject to special shorter statutes of limitations periods.*”

^[6] Aforementioned *Association nationale des sociétés par actions*.

^[7] J.-F. Barbiéri, “*Obligation incombant à une SASU de déposer ses comptes à la demande d’un tiers et prescription*” (Obligation incumbent on a SASU [single-member simplified joint-stock corporation] to file its accounts at the request of a third party and statute of limitations period), *Revue des sociétés* 2021, p. 309.

^[8] P. Duprat, “*Le défaut de publicité des comptes annuels constitue un trouble manifestement illicite dont le juge des référés de droit commun peut ordonner la cessation*” (The failure to publish the annual accounts constitutes a manifestly unlawful disturbance to which the summary judge may under ordinary law order to put an end), *Lexbase, Lettre juridique* n°859, March 25, 2021: Sociétés.

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