

## What is left of the company managers' liabilities once they are no longer in office?

When appointed, every company manager has a natural question in mind on the extent of his/her liabilities during his/her term of office and to the means to bear these liabilities by having the company subscribe to specific insurance policies.

But it is less common to have company managers consider the question of what will be their liabilities once they ended their functions.

And yet, ending their functions does not cancel the potential liabilities based on their former duties as corporate representatives. Based on the nature of the liability, the former company manager can, long after the term of its office, be liable for the exercise of its former duties.

### From a civil liability perspective,

◆ The company manager of a financially healthy company is liable towards the company, its shareholders and third parties, for infringements of applicable laws and regulations, breaches of the articles of association of the company and mismanagement.

◆ The bearers of potential legal actions against a former company manager are the company (by a duly empowered legal representative), the purchaser of the company's shares (when the former manager has sold to the purchaser 100% of the company), a minority shareholder of the company (if the alleged damage is different from the effective damage of the company) and finally a third party when the manager's fault can be split off from his duties ("*faute séparable des fonctions*")<sup>1</sup>).

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<sup>1</sup> If the manager's fault can not be split off from its duties, the company is liable and the third party can only issue a writ against the company.

◆ The manager of a company having financial difficulties (based on the amended bankruptcy law applicable to proceedings submitted as from February 15th, 2009) may be liable for insufficient assets to pay off liabilities if he committed acts of mismanagement. Such liability could arise during bankruptcy proceedings.

◆ In the context of insufficient assets to pay off liabilities proceedings which are held against the former manager, the judges shall seek if the manager can be held responsible for mismanagement (or for a fault of such seriousness that it can be considered as mismanagement) which triggered the insufficient assets situation.

According to French case law, the former company manager is subject to liabilities usually incurred in the context of bankruptcy proceedings on the basis of the performance of his former corporate responsibilities. This liability remains even if mismanagement proofs are found out long time after he left, and when he ended his functions before his former company became insolvent or before the decision of bankruptcy has been rendered by the Court.

The statute of limitations applicable to the "*gérant de SARL*", the "*administrateurs*", the "*membres du Conseil de Surveillance*", the corporate representatives of "*société en commandite par actions*" and of "*société par actions simplifiée*" is in principle of three years which can be increased to ten years if the fault is considered by the Courts as a crime.

This statute of limitations starts the day the fault has been committed or the day the fault has been revealed if it has been hidden before.

As for the other company managers, the statute of limitations is of five years, pursuant to article 2224 of the French civil Code. The

statute of limitations starts at the date when the petitioner knew or was supposed to know the facts which entitled him/her to undertake a legal action.

### **From a criminal liability perspective,**

◆ Company managers can be held liable for different kinds of offences provided for by criminal law (such as breach of trust and fraud), by company criminal law (such as misappropriation of funds, abuse of power or of voting rights, distribution of sham dividends, presentation of wrong financial accounts, ...) or by the applicable laws in relation to the company's activities (regulated activities, environmental law, labour law, ...).

◆ The statute of limitations applicable to offences other than misappropriation of funds generally depends on the nature of the offence: one year for minor offenses, three years for trespassing and ten years for felonies, but are subject to the following exceptions.

These statutes of limitations can start the day after the offence has been committed or the day the offence has been found out if it has been hidden. However, the definition of the day the offence has been committed and the various suspensions of the statute of limitations tend to increase the term of the statute of limitations.

◆ The statute of limitations applicable to misappropriation of funds is of three years. However, the starting date is the day the expense which has been improperly borne by the company has been accounted for in the financial accounts, unless it has been hidden.

### **Finally, from a tax liability perspective,**

A company manager may be personally liable for taxes, fines and penalties owed by the company he/she manages if personal misconduct or repeated and serious inobservances of the company's tax obligations has prevented the collection of such taxes.

Therefore, one has to admit that the term of office of a company manager does not put an end to his/her liabilities.

Nevertheless, there are some ways to mitigate these liabilities, although limited.

For instance, when the former manager has sold to a purchaser 100% of the company he/she managed, the former manager can request from the purchaser a waiver of action and proceedings against the former manager – seller of the shares. However, such waiver shall not prevent the former manager from a legal action brought by the company or by a minority shareholder.

Special attention must be paid to the fact that granting a "quitus" to the company managers for the performance of their duties at the end of the financial year-end when accounts are approved by the shareholders, is not efficient as it is contrary to the provisions of articles L.223-22, §4 and L.225-253, § 1 of the French commercial Code which state that are deemed null and void any clause of the articles of association having the effect of subordinating the exercise of civil proceedings to prior notice or authorisation of the shareholders' meeting, or which contains a waiver of the exercise of these proceedings.

Where criminal law is concerned, a company manager may hope to escape his/her criminal liabilities if he/she can prove that the offence was committed by another individual to whom he/she has granted a delegation of powers in compliance with the Courts' criterion (i.e. authority of the delegate, technical capacity, experience, sufficient means), as long as the manager can not be considered as a party to the offence, and if the offence does not result from a poor organization of the company.

Finally, from a tax law perspective, a delegation of powers may efficiently allow the company manager to be exonerated from his/her liability if he/she proves that he/she has not exercised his/her managing powers.

Therefore, a company manager is not relieved from his liabilities for the exercise of its former duties, once he/she has left his/her office.

By acknowledging the constraints relating to their personal liabilities, assets, statute of limitations, former company managers are prepared to anticipate and protect themselves from such risks.

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