Company Laws of the EU

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Nullity is relative when the rule breached has the safeguard of a private interest as its sole purpose. Only the person whose law intended to provide protection may ask the Court to pronounce the nullity. In this way, a manager who is not a partner, who contested the non-renewal of his mandate, is not entitled to request nullity of deliberation of an ordinary general meeting, invoking the violation of rules relating to the convening of meetings; only one partner could have requested this[81]. **699**

Action for nullity shall lapse after three years from the day when the nullity was incurred[82]. However, nullities may be "repaired by a vote of the majority", with the exception of those based on the unlawfulness of the corporate purpose[83]. Courts favor these actions in regularization. **700**

c) Effects of nullity

The success of a nullity action leads in principle to the annihilation of the irregular act with regard to all concerned: all the consequences of this act must be annuled and the situation restored to the state where it was before the act. In French corporate law, the consequences of nullity are mixed. Neither the company nor the partners can claim a nullity against third parties in good faith[84]. However, nullity resulting from incapacity or a defect in consent is binding even against third parties by the incapable person and his or her legal representatives, or by the partner whose consent was defected by mistake, deceit, and duress. **701**

Furthermore, any clause in the bylaws would be contrary to a mandatory provision of Articles 1832 to 1844-9 of the Civil Code which sets forth the main principles of corporate law is deemed to be "unwritten"[85]. Only the disputed clause is deleted. Such would be the case of a so-called "leonine" clause which would attribute the total profits to a partner or would exempt him or her from all losses[86] or a clause of the statutes which would take away a partner's right to vote[87]. The other clauses of the bylaws remain valid and the company does not cease to exist. **702**

Finally, the persons who have committed the irregularity could be held liable. **703**

4. What is the Regime of Responsibility of the Managers?

a) Conditions

The manager of a limited liability company shall be severally or jointly liable as the case may be, to the company or to third parties either for infringements of the laws and regulations applicable to limited liability companies or for breaches of the bylaws, or for misconduct in their management, that is to say behavior that is not in the interest of the company ("corporate interest")[88]. **704**

In practice, the risk for the manager held liable is seldom, because the violation of the law, or the bylaws, or even mismanagement, is often difficult to establish. In addition, court proceedings, including the lack of class actions, make it difficult for those who wish to lodge a complaint about the manager's wrongful conduct[89]. **705**

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[81] Cass. comm. 17 December 2002, *BJS* (2003), 307, note Le Cannu.
[82] C.com., Article L. 235-9.
[83] C.com., Article L. 235-3.
[84] C.com., Article L. 235-12.
[85] C.civ, Article 1844-10. 2).
[86] C.civ, Article 1844-1, paragraph 2.
[87] C.civ, Article 1844; see also: Cass. comm. July 9, 2013, n.11-27.235 and n.12-21.238, *Rev. soc.* (2014), 40, note Ansault.
[88] C.com., Article L. 223-22.
[89] See below.

706 On the other hand, when the company is in liquidation, the general managers may be ordered to pay all or part of the debts of the company, if they have committed misconduct that has contributed to the insufficiency of assets ("excess of liabilities over assets")[90]. In this case, the liquidation of the company makes it easier to prove the director's misconduct. Managers thus dread this type of situation, because court decisions may be severe for them. For example, in a decision of 30 November 1993, the Court of Cassation held the manager should be ordered to settle all debts of the company, even if the management fault he had committed was only one of the causes of the asset shortage[91].

707 However, the situation seems to be changing. In the United Kingdom or the United States, partners of a healthy company *(in bonis)* are not afraid to hold the directors responsible, on the basis of a breach of one of their fiduciary duties. They can thus claim that the directors did not act in good faith (loyalty), or with diligence (skill and care). In France, several judgments of the Court of Cassation referred to a duty of loyalty of the directors, respectively towards the partners and the company[92].

708 Lastly, Article L. 242-6 of the Commercial Code could punish corporate executives with five years of imprisonment and a fine of 375,000 euros for the most serious offences. The offenses covered are: the abuse of corporate assets, the abuse of power, the distribution of fictitious dividends and the presentation of non-conforming corporate accounts.

b) Procedure

709 In the event of a breach by a manager, the partners may seek compensation for the damages caused to the company ("Derivative action") or for personal damages ("direct Partner Law suit").

710 **aa) Derivative action (*action sociale* ut singuli).** Corporate lawsuit (*action sociale*) seeks compensation for the damages suffered by a company. The manager brings an action, on behalf of the company (*action sociale* ut pluri or ut universi). But if the director has himself or hersef caused damages to the company, he will not launch an action against himself on behalf of the company! This is why a derivative lawsuit may also be filled by a partner (*action sociale* ut singuli). This derivative lawsuit is of a subsidiary nature: it can only be launched in the deficiency of directors[93]. It should be noted that possible damages awarded by the courts go to the company and not to the partner, hence the interest of introducing class actions in corporate law in France.

711 **bb) Direct claim (*action individuelle*).** The partner can also claim damages (*action individuelle*). But the courts rarely accept this type of action. The partner must demonstrate that the damages suffered by him or her is personal and sets itself apart from damages suffered by the company. Thus, the Court of cassation held that the offense of presenting or publishing non-conforming accounts may cause the shareholders of a company personal and direct damage resulting from the depreciation of securities[94]. On the other hand, the shareholder who complains of having sold his securities at a loss, due to a shrinkage of the value of the shares caused by a

[90] C.com., art L. 651-2.
[91] Cass. comm. 30 Nov. 1993, *Bull. IV*, 440.
[92] Cass. comm., 27 Feb. 1996, *JCP E* (1996), II, 838, note Schmidt and Dion; Cass. comm., 24 February 1998, *BJ* (1998), 813, note Petit; Cass. comm., 15 Nov. 2011, *Rev. soc.* (2012), 292; Cass. comm., 12 March 2013, n.12-11970.
[93] Cass. crim., 12 December, 2000, *Rev. soc.* (2001), 323, note Constantin.
[94] Cass. crim., 30 January 2002, *JCP E* (2002), 1082, note Cellier.

mismanagement of the company, has not established the proof of personal damage, distinct from that which might be suffered by the company[95].

5. What are the Limits of the Members' Freedom in Defining the Bylaws of the Limited Liability Company?

The freedom to draw the bylaws is less strong in the LLC than in the SAS. The bylaws may nevertheless provide for clauses limiting the power of managers (C. com., Article L. 223-18, paragraph 4) or determine the terms and conditions of the partners' collective decisions[96]. **712**

6. Oversight Mechanisms

a) Internal control body

In the LLC, it is possible to create a supervisory body. But the latter would only have powers internally: it can not take commitments enforceable against third parties. **713**

b) Auditors

The LLC is required to have a statutory auditor and a substitute if, at the end of a financial year, it exceeds two or more of the following three thresholds[97]: – a balance sheet total of at least 4,000,000 €; a turnover excluding taxes of more than € 8,000,000; 50 employees. **714**

The auditor shall certify, providing a justification of their assessment, that the annual accounts are accurate, honest give a true and fair view of the results of the operations of the past financial year as well as the financial position and assets of the person or the entity at the end of this financial year[98]. **715**

The irregularities and inaccuracies noted by the auditors during the performance of their duties are reported for the next general assembly or meeting of the competent body[99]. He or she shall inform the public prosecutor of the criminal acts of which he or she became aware, without being liable in any way by such disclosure[100]. **716**

He or she is required to draw the general managers attention to all "facts likely to compromise the continued operations of the company" that he or she would have noted during the execution of his duties[101]. **717**

c) Abuse of majority and abuse of minority

aa) Abuse of majority. *(1) Definition.* The majority partners abuse their right to vote when a contested resolution is taken contrary to the corporate interest and with the sole purpose of favoring members of the majority to the detriment of members of the minority. Thus, the systemic setting aside of corporate gains constitutes an abuse of the majority[102]; the transformation of a public limited company into a limited partnership **718**

[95] Cass. comm. 15 January 2002, *RJDA* 650 (2002).
[96] C.com., Article L. 223-27, paragraph 1.
[97] C.com., Article R. 223-27 referring to Article R. 221-5.
[98] C.com., Article L. 823-9.
[99] C.com., Article L. 823-12.
[100] C.com., Article L. 823-12, paragraph 2.
[101] C.com., Article L. 234-1, paragraph 1: "alert" procedure.
[102] Cass. comm. of 18 April 1961, *Bull III*, n. 175, See also Cass. comm., 6 June 1990, *BJ* (1990), 782, note Le Cannu; Cass. comm. 1 July 2003, *BJ* (2003), 1137, note Constantin.

motivated essentially by tax advantages that the principal shareholder of the company could benefit from[103] or the absorption of a loss-making subsidiary motivated solely by tax interest[104].

719 *(2) Sanctions.* The abuse of majority, if it is found, generally results in the nullity of the decision taken. This nullity may be requested by partners, even if they voted in favor of the adoption of the contentious resolution[105]. The action in nullity can also be carried out, on behalf of the company, by its general manager[106]. Other sanctions are possible. Minority partners may also obtain damages, but for this reason they must assign not the company but the majority[107]. Finally, they have the possibility to ask for dissolution of the company[108].

720 **bb) Minority abuse.** *(1) Definition.* Minority abuse implies that the attitude of the minority is contrary to the corporate interest in that it prohibits the carrying out of an operation essential to the company and proceeds from the sole purpose of favoring the interests of the minority to the detriment of all other partners[109]. Decisions are numerous. Most often, they relate to the refusal to vote for an increase in share capital. For instance, the refusal to vote for an increase in capital necessary for the survival of the company and dictated by personal considerations is found to be unfair: the minority partner wanted to provoke the dissolution of the firm, both for paying back the managers for being ousted and for promoting the interests he held in a competing company, which his son-in-law held a majority[110].

721 *(2) Sanctions.* The compensation for minority abuse may be the award of damages. It is also possible for the judge to appoint an "administrator" (*mandataire de justice*) to represent the minority shareholders at a new general meeting and to vote on decisions on their behalf in accordance with the corporate interest[111].

722 **cc) Equality abuse.** The refusal to vote on an essential transaction for the company by an egalitarian partner constitutes an abuse of equality[112]. The sanctions are the same as in a minority abuse.

d) Management expertise

723 In an LLC, one or more partners representing at least one-tenth of the share capital may apply to the courts for the appointment of an expert to report on one or more management operations[113]. For this purpose, it is appropriate to establish alleged irregu-

[103] Paris, 29 June 1981, *Rev. soc.* (1982), 791, note Guilberteau.
[104] CA Paris, September 5, 1995, Revue "*Droit des sociétés 1996*", n. 43, obs Vidal.
[105] Cass. comm. 6 June 1990, cited above.
[106] Cass. comm. 21 January 1997, *Rev. soc.* (1997), 527, note Saintourens.
[107] Cass. comm. 6 June 1990, cited above.
[108] Cass. comm. 18 May 1982, *Rev. soc.* (1982), 804, note Le Cannu; Cass. comm. 8 Feb 2011, *Rev. soc.* (2011), 167, note Lienhard.
[109] Cass. comm.15 July 1992, *Rev. soc.* (1993), 400, note Merle.
[110] Cass. comm. 5 May 1998, *Rev. soc.*(1999), 344, note Boizard; March 9, 1993, *Rev. soc.* (1993), 403, note Merle, Cass. comm. 20 March 2007, *BJ* (2007), § 199, 745, note Schmidt; Cass. comm. 4 Dec. 2012, *Rev. soc.* (2013), 150, note Viandier (note that these above-mentioned cases concern a joint stock company).
[111] Cass. comm. 9 Mar. 1993 cited above, 5 May 1998 aforesaid; Cass. comm. 4 Feb. 2014, n. 12-29348, Cass. civ. 3rd, 21 Dec. 2017, n. 15-25.627.
[112] Cass. comm. 16 June 1998, *BJ* (1998), 1083, note Le Cannu.
[113] C.com., Article L. 223-37.

larities affecting such transactions[114]. The report is sent to the plaintiff, the public prosecutor, the works council, the auditor and the manager. This report must, in addition, be attached to that which is prepared by the auditor for the next general meeting.

e) Designation of a provisional administrator, if any

The provisional administrator (*administrateur provisoire*), is a person appointed by the court and responsible for, in the case of serious problems which prevent the normal operation of a company, to temporarily manage the company. **724**

The appointment of a provisional administrator is justified in the event of failure and paralysis of the corporate bodies: for example, in the event of a serious conflict between partners making it impossible to vote on resolutions presented to the general meeting due to a tied vote[115]. Even though management bodies regularly operate, the appointment of a provisional administrator is sometimes requested by minority partners who contest the policy pursued by the majority. Courts are reluctant to admit such claims[116]. **725**

Moreover, it is only when the company is exposed to a certain and imminent danger that the judge agrees to appoint a provisional administrator[117]. **726**

Finally, it is necessary for a turnaround to be anticipated, otherwise the only way out is the judicial dissolution of the company. **727**

As for the request for the appointment of an administrator, it can be presented to court either by the administrative or management bodies, or by a partner or a group of partners. It seems that creditors also have this right[118]. **728**

f) Judicial dissolution for just Cause

If no recovery is possible, the company must be dissolved[119]. For example, the presence of a disagreement between two partners in equal shares of an LLC which had prevented any collective decision from being taken for several years was considered as constituting just grounds for dissolution[120]. **729**

The right to act in dissolution belongs to any partner who claims legitimate interest[121]. This is not the case of the partner responsible for the disagreement[122]. But the judge may also order the dissolution of a company when it has been observed that the disagreement was known by the partners without it being possible to determine who was at fault[123]. The judges can not reject the application for dissolution and order the exclusion of the applicant by forcing him to sell his or her shares or the shares with his co-partners[124]. However, it is possible to provide for in the bylaws that a dissolution could be avoided if the partners buy back the company rights of the plaintiff in dissolution. **730**

[114] Cass. comm. 5 May 2009, *Rev. soc.* (2009), 807, note Godon.
[115] Cass. comm. 23 March 1971, *Bull. civ.* IV, 90.
[116] Cass. civ. 3, 21 November 2000, *RJDA* 3 (2001), n. 321, CA Paris 22 May 1965, Fruehauf, *Reccueil Dalloz* (1968), 167, note Contin, Cass. comm. 17 January 1989, *Bull* IV, n. 28.
[117] Cass. comm. 21 Feb. 2012, *Rev. soc.* (2012), 289, note Brignon and Poracchia.
[118] Cass. comm. 7 June 1988, *BJ* (1988), 581.
[119] Cciv, Article 1844-7, 5°.
[120] Cass. comm. 18 Nov. 1997, *BJ* (1998), 129, note Petit, V. Cass. comm. Dec. 9, 2014, *Rev. soc.* (2015), 2223, note Saintourens.
[121] Cass. comm. 28 Sept. 2004, *RJDA* 1 (2005), n. 39.
[122] Cass. comm. 16 June 1992, *RJDA* 10 (1992), n. 921.
[123] Cass. comm., 13 Feb. 1996, *RJDA* 5 (1996), n. 641 and Cass. comm. Sept. 16, 2014, Revue "*Droit des Sociétés*" 2014, n. 162, note Hovasse.
[124] Cass. comm. 12 March 1996, *RJDA* 7 (1996), n. 926; Cass. comm. 18 November 1997, *RJDA* 2 (1998), n. 174.

III. The Limited Partnership

1. General Management

731 Unless otherwise stipulated by the bylaws, all the general partners are managers. But the bylaws may provide that the management of a company will be performed by several managers selected from amongst the general partners, or otherwise. The rules relating to the appointment, extent of powers, remuneration and liability of the manager of partnership are applicable to the manager of the limited partnership[125]. The limited partner cannot interfere in the management of the company[126]. If this were the case, the limited partner would be held jointly with the general partners of past commitments.

2. What is the Discipline on the Members' Meeting in the Limited Partnership?

732 The limited partnership consists of two categories of partners: the general partners (*commandités*) and the limited partners (*commanditaires*). The general partners have the status of partners of the partnership: they must be tradesmen; they are jointly and severally liable for company debts[127]. Conversely, limited partners can not be held liable for company debts and do not have the status of a tradesman.

[125] C.com, Article L. 222-2.
[126] C.com, Art L. 222-6.
[127] C.com, Article L. 222-1.

Chapter 7
Groups of companies

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Contents

I. The Principle of Autonomy of Each Company Member of a Group

733 We tend to believe that French law does not recognize groups of companies, whereas, in truth, the reality is more nuanced. Groups appeared in French law at the end of the 19th century, when case law admitted that a shareholder could be a legal person and that having this person sit on the board of directors had become common practice. The law of 4 March 1943, prohibiting cross-holdings, pushed lawmakers to intervene in the area of groups, but always on a very *ad hoc* basis. The lack of a specific law on groups of companies does, however, result from a deliberate choice. In the 19th and 20th centuries,