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Criminal mismanagement

Disloyalty towards the group of companies ?

Par Romain Dupuis le 19 August 2021

In a ruling 6B_103/2021 of 26 April 2021, the Federal Court once again considers the status of the complainant as the holding of a group of companies, one of whose subsidiaries has been the victim of acts of disloyal management (art. 158 CP).

The facts are relatively complex, but can be summarised as follows. Company A SA is the Geneva-based holding of company group A, which is active in the pharmaceutical sector. C and E are shareholders and directors of the company.

The holding itself owns companies B SA, also based in Geneva, and F SARL, a limited liability company under Russian law.

In 2014, Group A decides to create a partnership with Russian state group H, through its Russian subsidiary, in order to strengthen its activities in Russia. C convinces E to entrust the negotiation to his son in view of his good connections in the country.

F SARL thus grants C's son the power to represent it in the negotiations.

The creation of a joint venture is proposed. The board of directors of the holding gives its approval and the final agreement is about to be signed. However, the signing meeting is cancelled without explanation.

Several months later, the holding and its Swiss subsidiary B SA discovered that the joint venture had indeed been registered in the Russian commercial register, but it turned out that its shareholders were group H and a third-party company owned by C's son. The son and C were directors of the company.

In short, Group A has been replaced by a third party in the planned project, resulting in potentially significant financial losses for the Swiss companies in the group that were to be allocated the profits made by the Russian subsidiary through the joint venture.

The holding and the Swiss subsidiary B SA filed a complaint against C and his son for unfair management. The Geneva Public Prosecutor's Office closed the proceedings, but the complainants lodged an appeal with the Court of Justice. The Court upheld the dismissal, considering that the competence of the Swiss authorities should be denied and that in any case there was insufficient suspicion of unfair management.

Seised of an appeal in criminal matters, the Court of Cassation examined the appellants' standing to appeal.

It reiterated that only those whose rights have been directly affected by an offence can have the status of injured party – and consequently of complainant – (art. 115 para. 1 CPP), which excludes consequential damages. Therefore, in principle, when an offence is committed to the detriment of the assets of a legal person, only the legal person suffers damage, to the exclusion of its shareholders.

The appellants argue, however, based on the case law of the Federal Supreme Court, that when the offence in question is that of unfair management, it is necessary to analyse towards which entity or entities the defendant had a management duty, since in the event of a violation, it is these entities that must have the status of injured parties.

In this respect, they explain that the strategic decisions concerning the Russian subsidiary were taken from Switzerland, that the subsidiary was only an 'administrative relay' in Russia and that its profits were paid in full to the holding, so that the duty of loyalty of the managers had to be extended to the whole of group A.

The TF is not convinced by this argument. It reiterates that the manager of a subsidiary only has a duty to look after the interests of the parent company when such an obligation results from the organisation and purpose of the subsidiary (ATF 109 IV 111). This presupposes that the subsidiary is subject to the sole management of the parent company (judgement 6B_586/2011 of 7 February 2012).

The FSC deduces from this that the manager of a subsidiary only violates his duty of loyalty if his actions directly and exclusively harm the interests of the parent company, for example when he embezzles funds that should have gone to the latter.

In the case in point, the FSC recognises that the Russian subsidiary was wholly owned by A plc. However, it notes that the draft agreement with group H makes no mention of A SA or B SA and does not provide for any rights of the latter on the profits of the joint venture. It further notes that the private expert report submitted in the proceedings describes the damage as the absence of dividends resulting from the future profits of the joint venture and the failure of the subsidiary's value to increase.

The Federal Supreme Court rightly concludes that, by supporting such an argument, the complainants are only claiming damage suffered as shareholders, i.e. indirect damage. They therefore have no standing to appeal against the cantonal court ruling.

It is clear from this ruling that the Court of Cassation intends to maintain a strict approach with regard to the status of a holding as a complainant : it is only when the latter is exclusively and directly harmed that it can claim the status of complainant. On the other hand, when it only complains of indirect damage, such as the failure to increase the value of its subsidiary or the reduction in expected dividends, it cannot be considered a direct injured party.

The reader will wonder why group A did not file a complaint through its Russian subsidiary. We learn from the judgement that it was liquidated in 2019 for unexplained reasons. There were undoubtedly various obstacles to filing a complaint. Moreover, the jurisdiction of the Swiss

authorities, denied by the Court of Justice, would have been even more difficult to demonstrate.

While the solution reached by the Federal Supreme Court should, in our opinion, be unreservedly approved with regard to the son of C, who had no duty of loyalty to the parent company, it may be wondered whether it is not too severe with regard to C, who was a director of the holding and therefore owed it loyalty. In any case, even if this undifferentiated approach seems strict, the solution is in line with the general principle that only those who suffer indirect damage are harmed.

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