



## AGGRAVATION OF THE CRIMINAL RISK WITHIN FRENCH COMPANIES: HOW TO REACT?

The risk of being faced with charges of criminal activity under French law, and especially business criminal law, has become an increased and particularly serious possibility for companies, their senior managers, and their employees. Such risk presents a potential challenge for both companies and individuals and can affect their proprietary interests and lead to imprisonment for individuals. The impact of criminal charges can also prove particularly detrimental to the operation and reputation of a company.

The increasing criminalization of society in general and of the corporate world in particular contributes to accentuating this risk of criminal charges. Understanding and anticipating such risk has, therefore, become a necessity for any French company.

### AN INCREASING CRIMINALIZATION

The consequences of criminal proceedings, which can involve police custody, an indictment, a search of

premises, or even a public hearing, are already particularly traumatic for any company. Furthermore, a conviction can lead to prison sentences for the senior managers and/or employees of the firm, the inability to do business or bid on public contracts, and fines the amounts of which are quintupled for companies. Criminal damages can be considerable, so it is vital that any company assess its risk in advance.

Legislative developments regarding the criminal liability of companies are trending toward harsher consequences for criminal activities. The same applies for French case law, which has shown broader judicial interpretation of the applicable laws and regulations. With regard to harassment, for example, the legislature has significantly increased the penalties relating to this offense; penalties have doubled since the passage of French law n°2012-954 on August 6, 2012.<sup>1</sup> Further, the criminal court has extended the scope of its authority by holding that the mere “possibility” of a victim’s poor working conditions was sufficient to prove the offense.<sup>2</sup> Proof of a victim’s poor

<sup>1</sup> French Official Journal (*Journal Officiel*) edition of August 7, 2012.  
<sup>2</sup> Cass. Crim, December 6, 2011, n°10-82.266: JurisData n°2011-030093.

working conditions, therefore, does not need to be demonstrated, as article 222-33-2 of the French Criminal Code seemed to indicate.

This expansion of the regulations and their judicial interpretation tends to create uncertainty as to the scope of the criminal risk. However, the shift toward unpredictability is in blatant contradiction of the fundamental legal principle of well-defined consequences for offenses and a strict interpretation of French criminal law.

Prevention, therefore, proves essential and even becomes an obligation for any French company, given that judges are increasingly holding management responsible for not taking steps to avoid the criminal risk.

## A NECESSARY ANTICIPATION

The implementation of internal risk management procedures is an efficient means to stop the commission of offenses and the subsequent criminal charges. The purpose here is to identify and then process the criminal risk.

**Identifying and Prioritizing the Risks.** Senior managers must, depending on the business sector of the company, ask themselves the right questions: *Is the training of the most exposed operational members efficient? Are they trained on crisis management? Are the associates sufficiently protected against psychosocial risks? Is it unadvised, and thus even by way of an act that is not normative, to use such or such material? Does a corruption risk exist in the business exchanges, or even in the contractual relationships established?* In numerous matters, an answer to these questions would have helped avoid the commission of an offense in the first place.

Thus, the performance of a criminal audit to identify the risk areas is recommended. The legal, human, or even political consequences will then be assessed and prioritized depending on their seriousness and their recurrence.

**Informing and Training on Risk Prevention.** A company and its staff will be most effectively protected by ensuring compliance with the mandatory legal provisions and avoidance of criminally sanctioned activities.

This compliance effort must be made in the form of specific training actions related to the business sector. Companies are subjected to an increasing number of regulations and technical standards and must constantly adapt themselves to these developments. The financial and strategic stake is decisive here. Legal monitoring is therefore indispensable to anticipate the regulatory modifications and enable the company to develop new industrial strategies. Such monitoring must cover in particular the French (AFNOR), European Community (CEN), and international (ISO) standards and integrate the non-normative acts. With regards to manslaughter, judges have not hesitated to condemn entities that had not complied with the recommendations made in simple circular letters.

More general training on the proper attitude to have in the event of a criminal charge is also very useful. It appears that an increasing number of companies are indicted, in particular on the grounds of “complicity,” for having reacted badly when faced with offenses committed within their organizations. However, this behavior is generally related primarily to the ignorance of these issues. Appropriate training on the manner of responding to a search of premises, of cooperating in the event of a requisition, and of answering the investigating judge can help prevent unwanted criminal proceedings.

**Creating an Awareness and a Culture of Risk.** As the criminally sanctioned behaviors often deal with ethics, a breach thereof is susceptible to affecting the image and earnings of the company. Compliance with the laws and regulations in all countries where it has operations is therefore an operational priority, ranking on the same level as searching for technological and commercial performance.

The objective here is to create a “culture of risk,” in particular through the adoption of an ethics charter or a code of good conduct. Greatly expanded in the United States, this practice has been developing in Europe and France. Numerous companies publicize a collection of guiding principles and values with which they wish to comply and promote their activities to comply with the regulations and adopt an irreproachable behavior from an ethical standpoint. Most of these documents involve themes relating to the protection against psychosocial risks that may affect staff, the protection of clients, the proper conduct of business, and compliance with the rules of safety, health, and environmental protection. While considered a unilateral undertaking of the employer or incorporated into the employment agreement, the legal value of these documents depends on their content and on their form.

**Delegating and Managing Risks.** Positioning risk management at the appropriate hierarchical level in the company is also a valuable means of prevention. In business law, the criminally sanctioned offense is often due to the absence of monitoring or negligence in implementing proper prevention procedures.

The delegation of authority enables companies to ensure that the correct person is responsible for the performance of the monitoring and prevention obligations, which may be accomplished more efficiently by him or her than by the managing director, who may be too distanced on a day-to-day basis from the operational management. Such delegation encourages a greater responsibility of the staff and also enables the managing director to better control the compliance of the employees with the applicable regulations. Moreover, delegation becomes an obligation when the managing director does not have the ability to ensure a compliance with these obligations him/herself, pursuant to the legislation governing the activities of the company. The fact of not delegating his/her powers would then be representative of an “aggravating circumstance” before the courts.

Delegation can be implemented in all matters, except when prohibited by law. French case law imposes certain conditions that must be met in order for the delegation of authority to have an exonerating effect on parties' criminal liability. In particular, a delegation must be precise and limited. It may also apply only to an individual who has the necessary competence, means, and authority and who must have expressly accepted such authority. A delegation can, in these conditions, protect the managing director on the condition that he or she was not personally involved in the offense.

## CONCLUSION

The increased criminal risk to which companies are exposed is obvious. Senior managers must, so as to avoid it, adopt a proactive prevention policy. The actions described can be performed in connection therewith, so as to mitigate this risk, both with regard to the probability of its occurrence and the seriousness of its consequences.

## LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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