La Kanzlei

Handling "self-dealing" in Germany and France

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In Germany

In German law, the prohibition of ‘self-dealing’ is enshrined in Section 181 BGB. This stipulates that a representative is generally not authorised to enter into legal transactions in their own name (self-contracting) or as a representative of a third party (multiple representation).

The prohibition also applies to legal representatives, meaning that the managing director of a German GmbH (limited liability company under German law) in particular is subject to the prohibition. It extends to all legal transactions, i. e. both contracts and, in principle, unilateral legal transactions.

The legal consequence of a breach of Section 181 of the German Civil Code is that the representative transaction is pending invalid. However, it can be authorised retrospectively by the represented party.

The prohibition can become particularly relevant in practice if the legal representative of the shareholder of a GmbH appoints himself as managing director or concludes contracts on behalf of several group companies.

It is possible, and in practice often expedient, to exempt the managing director from the restrictions of Section 181 BGB. The articles of association should therefore contain an authorisation for the shareholders' meeting to release the managing directors from the restrictions of Section 181 BGB. The exemption from § 181 BGB, which is usually granted as part of the appointment of the managing director, is published in the commercial register.

In France

In French law, there is no legal provision comparable to section 181 BGB that applies to an SAS (simplified stock corporation under French law) or SARL (limited liability company under French law).

The legal representative of an SAS or SARL represents the company vis-à-vis third parties. This provision is mandatory; the articles of association cannot remove the status of legal representative of the company, which is an element of legal certainty for third parties who do business with the company. The legal representative is vested with the broadest powers to act on behalf of the company in all circumstances, depending on the type of company, within the limits of the company's purpose, subject to matters requiring a shareholders' resolution.

French law contains special provisions on the conclusion of agreements between the company and its directors or shareholders (so-called conventions réglementées). According to Art. L. 227-10 C. Com. (SAS) and L. 223-19 C.Com (SARL), an auditor's report must be submitted to the shareholders of an SAS / SARL when the annual financial statements are approved, in particular on agreements concluded during the financial year between the company and (directly or indirectly) its chairman or managing director. This does not apply to agreements relating to ongoing business and concluded under normal conditions. The shareholders decide on this report, whereby a refusal to approve the agreement in question does not invalidate the agreement. Rather, the legal representative is liable for damages in the event of refusal.

Special provisions apply to single-member SASs, as such agreements are subject to the provisions of Art. L. 227-10 IV C. com. and therefore are merely recorded in the company's register of resolutions. No separate report or authorisation procedure is therefore required. The same applies to a one-man SARL if the shareholder is also the managing director of the SARL.

Practical tips

The legal regulations regarding self-dealing differ considerably between Germany and France. Companies operating or doing business in both countries should take note of the following practical tips:

In Germany

- Drafting the articles of association: When founding or amending the articles of association, the possibility of exemption from Section 181 BGB for managing directors should be taken into account. This allows for more flexible management without the restrictions of the prohibition on self-dealing.
- Monitoring and authorisation: Companies should establish internal mechanisms to monitor potential self-dealing. Transparent communication and the possibility of subsequent authorisation by the represented party are important here.

In France

- Powers of the legal representative: As there is no specific regulation in France such as Section 181 of the German Civil Code, companies should clearly define the powers of their legal representative in the articles of association or rules of procedure, depending on the legal form. This creates clarity about the powers and limits of action.

- Agreements with managing directors / shareholders: Observe the French regulations on ‘conventions réglementées’. Business transactions between the company and managing directors/shareholders must be transparent and are subject to certain reporting and authorisation requirements.

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