

AUDITOR AND LEGAL INCOMPATIBILITY CASES

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Abstract:

The Algerian and French legislator has revealed a tendency on their part to prohibit auditors from accepting or exercising their functions in the event of the existence of incompatibility, it also prohibits them from retaining functions in the event of the occurrence of an incompatibility requiring him to cease his functions immediately, and otherwise he will be subject to criminal sanction.

The mission of auditors requires their impartiality and independence with respect to the entities they control. This is why they support incompatibilities which are determined by legal texts. This is due to the impossibility of performing certain functions due to particular circumstances and not due to a radical lack of competence.

Keywords: auditors, independence, incompatibility, criminal, company accounts.

INTRODUCTION:

Given the need for control for companies and despite the liability that may arise in the event of violations and transgressions, the Algerian legislator obliged joint stock companies to appoint specialists to carry out this process and called them commissioners to the accounts, which is an adaptation of the French term COMMISSIONERS AUX COMPTES, and designated them by their own legislation of Law No. 10-01 of June 29, 2010, which repealed Law No. 91-08 of April 27, 1991.

Article 22 of Law 10-01 defines the auditor as any person, who exercises, on a regular basis, in his own name and under his responsibility, the mission of certifying the validity, regularity and conformity of company accounts, and organizations with the provisions of applicable legislation.

The accountant's duties consist primarily of supervising the affairs of the company, examining its accounts and ensuring their accuracy and discipline¹, in order to protect third parties dealing with the company and to protect the company itself and its shareholders against actions inappropriate actions that could be committed by managers. For the accountant to be able to fully fulfill his functions he must enjoy complete independence in the exercise of his functions, which means that the accountant must not have the slightest direct or indirect financial interest with his client; this is the element of neutrality Obligatory presence.

The auditor seeks, when he undertakes to issue numbers, to protect the interests of the company and to defend other legitimate interests linked to it. The impartiality and independence of the auditor are the necessary premises for any serious and effective audit of the company's accounts and budgets, this monitoring is of no use if the auditor becomes an obedient tool in the hands of company management or if he becomes the expression of the voices of a minority who want to sow confusion and create obstacles that hinder the activity of the company. The auditor must then be protected, his independence must be guaranteed and his impartiality must be confirmed in relation to the management of the company².

From this point of view, the offense of non-compliance by the accountant with cases of legal incompatibility has been stipulated so that this control is characterized by the necessary

¹ The second and third paragraphs of article 715 bis 4 of decree no. 75-59 of September 26, 1975 amending and supplementing the commercial journal, Official Journal no. 101 of December 19, 1975; Article 22 of Law No. 10-01 of June 29, 2010 relating to the professions of chartered accountant, auditor and approved accountant, Official Journal of the Algerian Republic, No. 42 of July 11, 2010.

² Benjamila Mohammad, the responsibility of the auditor in controlling the joint stock company, master's thesis, Faculty of Law, Mentouri University of Constantine, Algeria, 2010-2011, p.29.

independence in relation to the management bodies, preventing the accumulation of the function of accountant with any other work that would create a relationship between them and other members of the company or other companies, and also prohibition. Some people refuse to assume this function due to considerations of private interests and family ties, which effectively affect the independence and impartiality of account keepers³.

The problem that arises here is therefore the following: what are the legal controls that govern the criminalization of non-compliance by the auditor with cases of legal inconsistency?

In order to respond to this problem, we will follow the descriptive and analytical approach, analyzing the legal texts from this aspect. On the other hand, we will rely on the comparative approach, relying on French case law dealing with the subject.

In this regard, we will divide our research into two fundamental sections: the identification of cases of legal inconsistency (first section), the elements of the offense of disrespect towards the auditor and cases of legal inconsistency in a joint stock company (second section).

The first section: identifying cases of legal incompatibility

For auditors to be able to exercise their functions, they must not find themselves in a situation of legal conflict. The latter prevents a person from exercising legal control functions themselves in a specific company, even if they are registered on the list of the organization and hold the title of auditor. He is not prohibited from practicing the profession, but rather from practicing it in one company rather than another, because it is characterized by a relative nature⁴. These are cases or situations in which a professional exists who makes one of the criteria required to exercise his profession non-existent and unavailable and leads to questioning his integrity and independence in his work of managing a specific company⁵.

Legal inconsistencies are divided into general and special in turn, with the former applying to all types of business companies, while the latter type concerns only one type of company.

The first requirement: general legal incompatibility related to account holders

These cases apply to all types of business companies, and the general case of incompatibility involves certain circumstances that contradict the appointment of the auditor. If he is appointed despite the availability of one of them, he must resign immediately⁶.

Section I: Prohibition of the accountant from exercising a commercial activity or a remunerated profession

It is only possible to achieve the desired objective of legal supervision if the auditor exercises his functions in complete independence from any person participating in the management of the company and from any act that places him in a subordinate authority. He must therefore stay away from anyone, contractual work and any commercial work, whether directly or indirectly. Thus, the Algerian legislator⁷ intervened by prohibiting the governor from carrying out commercial activities, and he cannot combine the status of trader with his status of legal observer, in particular in the form of intermediary or agent responsible for commercial and professional transactions. Furthermore, all paid work requires a legal link, and the Algerian legislator⁸ has excluded the combination of the function of accountant and the function of junior employee, teaching and research tasks in the field of accounting in a contractual framework, or complementary, ability.

³HossamBouhajar, the criminal protection of commercial companies in Algerian and comparative legislation, doctoral thesis, unpublished, specialized in criminal law, Faculty of Law and Political Sciences, University of Batna 1, Algeria, academic year 2017-2018, p.292.

⁴Said Boukrour, Legal eligibility to exercise the profession of accountant in commercial companies, Journal of Enterprise and Commerce, University of Oran, Algeria, n° 4, 2008, p.87.

⁵abdelkaderfeninekh, Offenses linked to the control of commercial companies by the accounting agent, doctoral thesis, specialty business law, Faculty of Law, University of Oran, Algeria, 2011-2012, p.76.

⁶ Said Boukrour, op. cit., p.87.

⁷ Article 64, paragraph 1, of Law No. 10-01.

⁸ Article 64, paragraph 4, Law No. 10-01.

In order to preserve the sacred character of the exercise of the profession of auditor in complete independence and in the absence of any legal subordination, the Algerian legislator⁹ has prohibited assuming any administrative responsibility or being a member of the Supervisory Board Commercial companies provided for by the Commercial Code, with the exception of participating in the constitution of a company whose corporate purpose is to carry out the legal audit of accounts. These include limited liability companies, limited liability companies, civil companies or solidarity groups¹⁰.

It is also not possible to combine the exercise of the profession of accountant, auditor and approved expert with the same company or organization¹¹, just as it is not permitted to combine legal certification functions and contractual experience with the same company.

This also conflicts with the legitimate tasks of monitoring each parliamentary mandate or each electoral mandate within the executive body of elected local councils¹². In this regard, the professional elected member of Parliament or local council must inform the organization to which he belongs within a maximum period of one month from the date of taking up his position¹³. Then, a professional is designated to succeed him who will manage the current affairs of his profession¹⁴, through the appointment of the Minister responsible for Finance on the proposal of the President of the National Council, the President of the Council of the National Chamber, or the President of the National Council of 'Organization, as a professional qualified to lead the office, whose functions end with the lifting of the impediment. The designated professional must be subject to the same legal incompatibility¹⁵.

The French legislator¹⁶ has prohibited the auditor from combining his activity with any other paid employment. However, the law allows a bookkeeper to pursue training related to his profession or to occupy a paid position as a bookkeeper or accountant.

The French legislator¹⁷ has also prohibited accountants from combining their employment with any commercial activity, whether carried out directly or through an intermediary person. However, he provided for two exceptions to this ban. The first concerns the exercise of commercial activities related to one's profession with the need to respect the rules of ethics and the independence of the accountant. The second exception is to allow the exercise of secondary commercial activities when the accounting profession takes the form of a commercial company with multiple professions.

The High Council of Auditors (H3C) has issued an opinion¹⁸ on article L 822-10 of the Commercial Code, relating to activities, work or professions incompatible with the profession of auditor, amended by Law No. 486 of March 22, 2019, the aim of introducing two exceptions to the principle of incompatibility between the profession of accountant and the exercise of commercial activity¹⁹.

Article L 822-10, 3° of the Commercial Code establishes a general principle of incompatibility between the profession of accountant and the exercise of any commercial activity. The High Council of Auditors considers that this article covers any natural or legal person registered on one of the lists of auditors provided for in Article L 822-1 of the Commercial Code, whether or not this person actually exercises the role profession of auditor.

⁹ Article 64, Paragraph 1, Clause 3, Law No. 10-01.

¹⁰ Article 46, Law No. 10-01.

¹¹ Article 64, Paragraph 1, Section 4, Law No. 10-01.

¹² Article 64, Sections 5 and 6, Law No. 10-01.

¹³ Article 64, paragraph 2, Law No. 10-01.

¹⁴ Article 64, paragraph 3, Law No. 10-01.

¹⁵ Article 76, Law No. 10-01.

¹⁶ L. 822-10, al. 2 French Commercial Code.

¹⁷ L. 822-10, al.3 French Commercial Code.

¹⁸ H3C, Opinion No. 2021-01 of the High Council of the Audit Office relating to the exercise by an auditor of a commercial activity in application of article L.822-10 of the commercial code, April 15, 2021.

¹⁹ Art 20 LAW no. 2019-486 of May 22, 2019 relating to the growth and transformation of businesses, JORF no. 0119 of May 23, 2019.

The Higher Council of Accounts considers that the exercise of a commercial activity must be understood as the exercise of several commercial activities as defined in articles L 110-1 and L 110-2 of the commercial code, but it is not concerned about the ban on commercial activities which are carried out within the framework of limited needs for daily life.

The High Council of Auditors indicates that the incompatibility concerns the hypothesis of the direct exercise of a commercial activity as well as the exercise of an intermediary person. He believes that direct practice must be understood as a practice exercised by the auditor himself, in his name and on his own behalf. He considers that the practice of intermediary, within the meaning of this provision, involves the intervention of others. This third party may be a natural person who actually works under the influence and on behalf of the auditor. This third party may also be a legal entity or a group whose decisions the auditor controls, whether by virtue of the exercise of voting rights, of a company or of a group agreement or real authority.

Article L 822-10, 3° then provides for two exceptions to the general principle of incompatibility between the accounting professions and the exercise of a commercial activity. Concerning the first exception, the High Council of Auditors considers that this provision allows the auditor registered with the Organization of Chartered Accountants to carry out commercial activities secondary to the profession of chartered accountant, provided that the nature of these activities, which are carried out on a complementary basis, does not lead to an obstacle to the exercise of the profession or to the independence of the associated chartered accountants, as well as to their compliance with the provisions relating to their profession and their deontology. The Supreme Council adds that the wording of this judgment does not allow an auditor not registered with the Organization of Chartered Accountants to carry out commercial activities secondary to the profession of chartered accountant.

As for the second exception, according to the opinion of the Superior Council of Auditors, a multi-professional company²⁰ registered on the list of auditors may carry out secondary commercial activities which are not prohibited, neither to auditors nor to other professions which are the purpose of the company.

Second section: Prevent the auditor from exercising a profession that compromises his independence

Algerian²¹ and French²² legislators stipulate that the auditor is prohibited from exercising any profession which would lead to compromising his independence. Consequently, any activity or work likely to undermine its independence is considered incompatible with the profession of auditor. This legal doctrinal²³ supports the need to appear objective and impartial, in order not to be subject to distrust or suspicion, imposed by the nature of the profession.

The notion of independence was clarified in the Code of Ethics by the auditor²⁴ through the need for the latter to be independent of the person or organization to which he provides a mission or service, and to avoid placing oneself in a position perceived as likely to harm the reputation of the impartial exercise of one's mission or service.

Independence is embodied in the exercise by the auditor of total freedom, both in reality and in appearance, of the powers and skills conferred on him by law. To achieve this, he must avoid any

²⁰ Recalling that the purpose of the multi-professional practice company ("SPE") is the joint exercise of several of the professions of lawyer, lawyer at the Council of State and the Court of Cassation, judicial auctioneer, bailiff, notary, judicial administrator, legal representative, industrial property advisor, chartered accountant and auditor.

²¹ Article 64, first paragraph; Article 3, Law No. 10-01.

²² Art. L. 822-10, al. 2 French Commercial Code.

²³ FarhaZéraoui Salah, The accounting control function of account agents in commercial companies, Algerian Review of Legal, Administrative and Political Sciences, University of Algiers, first issue, 1994, p.197.

²⁴ Art 5 of the Code of Ethics of the profession of French auditor. (Amended by Decree No. 2020-292 of March 21, 2020, JORF No. 0072, text No. 4 of March 24, 2020, modifying the code of ethics of the profession of auditor.).

situation in which there is bias, conflict of interest or influence linked to direct or indirect personal, financial or professional ties.

Before accepting approval, the auditor must verify that he is in a position of independence vis-à-vis the person or body which was called upon to approve his accounts²⁵.

The compromise that the auditor is forced to make is to reconcile his independence and his competence, which constitute two characteristics of the quality of the control. For the accountant to be effective, he must have good knowledge of the business. He must communicate with management to obtain the information he needs, which jeopardizes his independence. Independence is not an absolute standard, as it is impossible to achieve independence since each person has some degree of dependence or relationship with others²⁶.

It therefore seems difficult for the auditor to be totally independent and fully competent. He will have to find a compromise between his independence and his competence to determine the level of audit quality he wishes to achieve.

The general obligation of independence, which has been rethought by the Code of professional ethics, is not limited to the particular cases provided for by the Commercial Code, where the accountant has taken, received or maintained an interest in the direction of the person whom he supervises or in front of the person he supervises or who controls him, in other words, by him, the independence of the auditor could be compromised in other cases, some of which have been decided mainly by the Professional Ethics Commission of the National Agency of Auditors, as well as by the High Council of Auditors, which must ensure respect for the ethics and independence of the auditors²⁷.

For example, for the Professional Ethics Commission of the National Agency of Accountants, it is incompatible with the obligation of independence of auditors to combine the functions of chartered accountant for an individual company with limited liability and its function of auditor for a joint stock company, which have no link with the share capital but have co-directors²⁸.

In the same way as previously, if two companies participate in the management and the majority of shareholders and have no connection with the capital, then in this case, the accountant of one of the two companies cannot accept the position of accountant in the other company, due to the possibility of a violation of his independence²⁹, and therefore a violation of legislative texts³⁰.

In addition to these cases where the independence of the auditor is threatened, there are other cases which also lead to compromising this independence, and therefore the auditor must take preventive measures³¹ in order to avoid the occurrence of a risk³².

²⁵ D. PORACCHIA, L. MERLAND and M. LAMOUREUX, Auditors, Rep. Companies, Dalloz, September 2008, no. 116.

²⁶ Tiphaine Compennolle. From individual independence to collective independence of auditing: the contribution of systemic theory. ACCOUNTING, CONTROL AND AUDIT BETWEEN CHANGE AND STABILITY, May 2008, France. P.7.

²⁷ The missions of the High Council are specified in article L. 821-1 of the commercial code. This involves ensuring the supervision of the profession with the assistance of the National Company of Auditors. As such, he must ensure the proper execution of periodic controls by the auditors, the terms of which he defines (C. com., art. L. 821-7, b), and occasional controls decided by the National Company or regional companies (C. com., art. L. 821-7). It must also ensure compliance with the ethics and independence of the auditors. In this perspective, the High Council is responsible for identifying and promoting good professional practices, issuing an opinion on the standards developed by the National Company of Auditors before their approval by order of the Keeper of the Seals, Minister of the Justice.

²⁸ Bull. CNCC no. 107, 1997, p. 455.

²⁹ Bull. CNCC n° 145, 2007, p. 187, Bull. CNCC, n° 147, 2007, p. 524.

³⁰ Violate the provisions of article L. 822-10 of the commercial code and those of articles 4 (impartiality), 5 (independence) and 6 (conflict of interest) of the code of ethics.

³¹ Art. 12 C. ethics. Fr.

³² Bull. CNCC, n° 146, 2007, p. 357.

The Higher Council of Auditors also announces its position on the application of the rules linked to the independence of the auditors, as well as on the possibility of establishing preventive measures when there is a risk for the auditors of compromising one's independence, such as not presenting oneself as independent³³.

The auditor is the first judge of the accounts and he must, like the other judges, be impartial and independent in making his decisions and in the exercise of his functions³⁴. This is what the European Commission affirmed in its clarifications of May 16, 2002 on the independence of the accounts persons responsible for statutory audits, where it has judged that this independence is essential to public confidence in the reports it produces, it increases the credibility of the financial information published³⁵. In order to guarantee the impartiality of the account representatives and to ensure the credibility and transparency of the control they exercise; the legislator has established a set of rules which enshrine the principle of their independence. This ensures that the governor of accounts is a body within the municipality. - Joint stock company, and not an agent of the shareholders³⁶.

The second requirement: special cases of incompatibilities linked to auditors

Beyond the general principle of independence, commercial law and the Code of Ethics envisage certain particular cases of incompatibility, cases in which the independence of accountants is undoubtedly compromised³⁷. These cases of incompatibility are mainly based on the existence of an interest received or held by the accountant from the regulated body or certain of the companies associated with it³⁸. The term "incompatibility" appears explicitly in article L. 822-11, I, paragraph 2, of the Commercial Code which refers to "personal, financial and professional relationships, [...] incompatible with the exercise of the public function ". The function of accountant and these are clarified. » Links in the Code of Professional Ethics.

The first section: special cases of incompatibility of a personal nature

Cases of incompatibility of a personal nature result in the impossibility of appointing him as auditor of a joint-stock company if there is a relationship between him and some people. For this reason, he stressed the impermissibility of appointing all relatives and legal relatives up to the fourth degree as auditors within the company. The same provision was also included so that those responsible for management and members of the Board of Directors and the Supervisory Board do not assume the task of auditor³⁹, due to the conflict between supervisory tasks and management tasks⁴⁰. In order to preserve his independence, he is not permitted to interfere in the administrative work within the company, that is, to interfere directly or indirectly in the administrative work, which is one of the tasks of the leaders, because Sharia review is an ongoing process⁴¹. The task is devoid of any participation in the management of the facility. He must attest

³³ Opinion delivered by the High Council of the Audit Office pursuant to article 1-5 of the decree of August 12, 1969 on an individual referral [Nov. 24, 2005].

³⁴ Benjamila Mohammad, op. cit., p.81.

³⁵ Commission Recommendation of 16 May 2002, Independence of the statutory auditor in the EU: fundamental principles (Text with EEA relevance) [notified under number C (2002) 1873].

³⁶ Articles 64 to 70 of the law regulating the profession, as well as the text of Article 715 bis 6 of the Algerian Commercial Code.

³⁷ TGI Paris, May 18, 1979, Bull. CNCC n° 36, 1979, p. 425.

³⁸ According to article L. 822-11-I, paragraph 1, of the commercial code, "the auditor cannot take, receive or retain, directly or indirectly, an interest in the person or entity in which he is responsible for certifying the accounts, or with a person who controls it or who is controlled by it within the meaning of paragraphs I and II of article L. 233-3".

³⁹ Article 715 bis 6, paragraph 1 of the Algerian Commercial Code.

⁴⁰ Article 715 bis 4, paragraph 2, of the Algerian Commercial Code, which specifies: "Their permanent mission, with the exception of any interference in management, is...".

⁴¹ Chahla ADNANE, Legal incompatibilities linked to the auditor in a joint stock company, Journal of Comparative Legal Studies, University of Chlef, Algeria, Volume 7, Number 2, 2021, p. 694-695

to the regularity, validity and honesty of the company's accounts, because he is a man of the art of accounting⁴².

The intervention in management aims to give the auditor an opinion on the adequacy of the work submitted to the board of directors, because a large part of the management and management work is subject to adequacy considerations that the company estimates in light of changing conditions, data and market conditions. However, giving his opinion on matters related to violations, which are subject to criminal prosecution if neglected, is not considered interference in the work of the administration and management. Thus, the auditor will have exercised his functions of assessing the legality of the acts, actions and decisions taken by the administration and has nothing to do with the appropriateness of these actions⁴³.

The same provision extends to management officials, members of the board of directors or supervisory board, as well as to spouses of management officials and members of the board of directors or supervisory board of companies holding one tenth (1/10) of the capital of the controlled company, or if the latter itself owns one tenth (1/10) of the capital of this company⁴⁴. Likewise, the spouses of people who receive a salary for a permanent activity, either management officials, or members of the Board of Directors, or the Supervisory Board, cannot⁴⁵.

The Code of Ethics of the accounting profession⁴⁶ has clarified particular cases of inconsistencies of a personal nature, so that it is incompatible with the accounting profession if there is a family link between ascendants and the first-degree descendants, as well as first-degree kinship ties, as well as a marital tie, as well as persons linked by civil solidarity agreement or within the framework of a cohabitation relationship.

Any personal relationship between each person exercising a sensitive function with the organization whose accounts have been approved, on the one hand, and, on the other hand, between the auditor or a member of the company of the auditor, is incompatible with the mission of exercising legal control. Personal relationships (first-degree ascendants and descendants, first-degree relatives and marital relatives) are also incompatible with the exercise of the legal control mission by the auditor, when they arise between a person who, from one part, exercises a sensitive function within the person or organization whose accounts have been approved by him. On the other hand, an associate or employee of the accountant, or any other person involved in the authentication task, or any member of the network to which the accountant belongs.

Second section: Special incompatibility of a financial nature

This financial reason is based on the prohibition of combining the function of accountant, member of the administrative body and any person receiving remuneration from the company or members of the administrative body, or from any project holding a determined percentage of the capital of the company (10 percent, for example), or the company owns such a percentage of this project⁴⁷.

Particular cases of incompatibility of a financial nature are represented by the inability to control the accounts of natural or legal persons who have received salaries, fees or other privileges, in particular in the form of loans, advances or guarantees from of the company or authority during the last period three years as an accountant for the same company or organization⁴⁸.

Also, if a company or an organization involves two (02) or more auditors, they must not be affiliated with the same authority, must not have any interest and must not belong to the same

⁴² Mohamed SALAH, the standard of special report of the auditor on regulated agreements of June 2013 - When the regulatory power legislates, Business and Commerce Review, Business and Commerce Laboratory, University of Oran 2 Mohamed Ben Ahmed, No. 13, 2017, p. 110.

⁴³ Benjamila Mohammed, op. cit., p. 82.

⁴⁴ Article 715 bis 6, paragraph 2 of the Algerian Commercial Code.

⁴⁵ Article 715 bis 6, paragraph 3 of the Algerian Commercial Code.

⁴⁶ Art. 32 C. ethics. Fr.

⁴⁷ Elias Nassif, Encyclopedia of Commercial Companies, Part 11, Al-Halabi Legal Publications, Beirut, Lebanon, 2009, p. 218

⁴⁸ Article 66, paragraph 1, Law No. 10-01.

accounting firm⁴⁹. Furthermore, chartered accountants, bookkeepers and chartered accountants are prohibited from carrying out any task in institutions in which they have direct or indirect interests⁵⁰.

The Code of Ethics⁵¹ for the accounting profession, auditors and chartered accountants has identified particular cases of financial incompatibilities, because it has been specified that they are incompatible with the exercise of the profession of judicial control. On the one hand, the financial relationships arising between the person or organization whose accounts have been approved or the person or organization which is or was audited within the meaning of article L. 233-3 of the Commercial Code which concerns controlled companies. On the other hand, the auditor, the Company of auditors to which the latter belongs, the partners and employees of the accountant who participate in the authentication task, the people with whom the latter is linked by marital bond, by a civil agreement of solidarity or as part of a common law union, and any person closely related to the accountant⁵². A spouse or partner considered to be in the situation of a spouse according to national legislation, a child of whom he or she has custody according to national legislation, a parent who belonged to the same family for at least one year from the date of the relevant transaction, as well as a legal entity, a trust company or a company that exercises management responsibility for the persons mentioned above are supervised directly or indirectly by These persons.

This financial relationship, incompatible with the profession of auditor, has been limited to two operations: The first is the case of obtaining or holding, directly or indirectly, shares or any other financial securities, giving or which may give access, directly or indirectly, to capital or voting rights. To the person or organization whose accounts are approved. The second process is the case of direct or indirect access to or holding of financial instruments specified in Article L.211-1 of the Monetary and Financial Code⁵³.

This excludes the holding of shares, bonds or financial instruments through various collective investment schemes⁵⁴, including managed funds such as pension or life insurance funds where the holder has no lack the ability to influence investment management.

The financial relationships which arise between the same persons mentioned above are also incompatible with the exercise of the function of legal control, when the operations are not carried out or subscribed under normal market conditions and concern: 1° any deposit of term funds; 2. Granting or maintaining any loan or advance; 3° Subscription to a life insurance contract; 4° Granting or obtaining insurance and guarantees.

These relationships also contradict the exercise of the legal control function when they arise between the person or body whose accounts have been approved and the auditor after his appointment.

Third section: Special cases of incompatibility of a professional nature

⁴⁹ Article 68, Law No. 10-01.

⁵⁰ Article 67, Law No. 10-01.

⁵¹ Art. 33 C. ethics. Fr.

⁵² Paragraph 26 of Article 3 of Regulation (EU) No. 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the Parliament European Union and Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

⁵³ Article L. 211-1 of the Monetary and Financial Code: "I. – Financial instruments are financial securities and financial contracts. II. – Financial securities are: 1. Equity securities issued by joint stock companies; 2. Debt securities; 3. Shares or shares of collective investment undertakings III. – Financial contracts, also called "futures financial instruments", are futures contracts which appear on a list fixed by decree. – Commercial paper and cash vouchers are not financial instruments.

⁵⁴ OPCVM under French law (Articles L214-1 to L214-191 of the Monetary and Financial Code) are organizations whose activity consists of investing in the markets the savings collected from their unit holders. They must receive prior approval in general, or subsequently in certain cases, from the Financial Markets Authority (AMF).

This reason is based on the ban on combining the position of auditor with any paid administrative or technical position in the company⁵⁵.

As for special cases of a professional nature, they are represented in the impossibility of auditing the accounts of persons assigned by the company by virtue of functions other than the functions of representative auditor within a period of five years from the date of date of termination of their functions, as well as the persons responsible for management or the members of the supervisory board or the board of directors within five years from the cessation of their functions⁵⁶.

The Code of Ethics⁵⁷ of the accounting profession, auditor and chartered accountant has specified the particular cases of incompatibility resulting from the professional relationship, which also apply when there exists a professional relationship between two people linked to a contract of work or a business relationship which does not constitute a current transaction concluded under usual market conditions.

Any professional relationship between, on the one hand, the person or organization whose auditor are audited or whose manager is incompatible with the exercise of the profession of accountant, and on the other hand, the accountant, member of the management board of the accounting company, , and any person closely related to the accountant⁵⁸, the husband or partner, who is considered to be in the situation of the husband according to national legislation, a child in whose custody, in accordance with national legislation, a parent who belonged to the same family for at least one year from the date of the transaction in question, as well as a legal entity, a trust company or a company whose management responsibility is exercised by the persons mentioned above directly or controlled in a manner indirectly by these people.

Added to this are the partners and auditors who participated or any other person involved in the task of certifying the accounts.

The third requirement: temporary incompatibilities

Legal texts have not defined the notion of state of incompatibility, to the extent that there is great confusion in its clarification, which is exacerbated by the precision of the features of distinction with the similar term, in particular the state of prohibition, which we will return to in the definition of the prohibitions emanating from Algerian and French legislators, provided that we address the reality of the distinction between them in the corner of the materiality of the crime.

The first section: Legal prohibitions stipulated in Algerian law

The auditor, accountant are prohibited from directly or indirectly seeking a client to request a task or employment that falls within their legal jurisdiction. They are also prohibited from seeking clients by reducing their fees or granting them compensation or other privileges. as well as any form of advertising to the public. These prohibitions also apply to companies and groups practicing the profession⁵⁹.

The Algerian legislator⁶⁰ also provides that the auditor is prohibited from professionally controlling the accounts of the company in which he makes direct or indirect contributions. Carry out management work, whether directly, through participation or on behalf of managers; Accept, even temporarily, the tasks of tribal control of management activities; Accept organizational duties of holding or supervising the institution or oversight body accountable; Perform the function of tax advisor or legal expert for a company or organization responsible for auditing its accounts; He held a paid position in the company or organization he supervised less than three (03) years after the end of his mandate.

⁵⁵ Elias Nassif, op. cit., p. 218.

⁵⁶ Article 715 bis 6, clauses 4 and 5 of the Algerian Commercial Code.

⁵⁷ Art. 32 C. ethics. Fr.

⁵⁸ Paragraph 26 of Article 3 of Regulation (EU) No. 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the Parliament European Union and Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

⁵⁹ Article 70 of Law No. 10-01.

⁶⁰ Article 65 of Law No. 10-01.

Section Two: Legal prohibitions stipulated in French law

This is the prohibition for the auditor to exercise, for a certain period, functions within the body or person subject to supervision, and the prohibition extends to the exercise functions of auditor for a specific period for people who have been managers or employees of a legal company, person or body subject to surveillance⁶¹.

In accordance with article L. 822-12 of the Commercial Code, auditors and signatory members of auditor company (the functions of bookkeeper are exercised in the name of the company), natural persons associates, shareholders or directors of this company who sign the report intended for the body responsible for ruling on the accounts⁶² cannot be appointed director, general manager or member of the supervisory board, nor occupy management functions within the persons or organizations that they control, for a period of less than three years after the end of their functions. Furthermore, during the same period, they cannot exercise the same functions as the person or organization which controls or has been controlled within the meaning of article L. 233-3 of the Commercial Code relating to controlled companies.

According to certain doctrinal jurists⁶³, the prohibition applies to auditors who are natural persons, to the legal entity and to the signatory partners, namely the “technical” partner and the partner who represents the legal entity. The text therefore does not include other non-signatory partners; article L. 822-12 of the Commercial Code only prohibiting appointment to the position of director (or employee).

In addition, according to article L. 822-13 of the Commercial Code, persons who have been directors or employees of a person or organization cannot be appointed auditors of this person or organization for a period of less than five years after their termination of office. Moreover, during the same period, they cannot be appointed auditors for persons or organizations which own at least 10% of the capital of the person or organization in which they exercise their functions, or in which the latter owns not less than 10% of their capital at the end of their employment.

CONCLUSION

Given the importance of the role of the auditor in the audited entity and its impact on its success, the legislator wanted to limit the exercise of the profession to specialists whose competence and integrity are worthy of trust to guarantee financial and accounting information and establish trust between clients.

The legislator also ensured the independence of the auditor vis-à-vis the management body by establishing the principle of incompatibility with the profession, by not having an element of subordination such as the fact of receiving a salary or interest to ensure the exercise of his duties with complete impartiality and objectivity. He is also criminally liable for non-compliance with the principle of incompatibility with the profession.

Through our research on this topic, we arrived at the following results:

Algerian and French legislators have insisted on banning certain people from practicing the accounting profession for reasons of private interests and family ties, which effectively undermine the independence and impartiality of accountants.

- It appears from the texts relating to cases of inconsistency, in particular from the French legislator, that they were excessive in their inclusion of cases on the one hand, and on the other hand, in the use of vague terminology, this which appears to be due to a lack of respect for the rules related to legal drafting.

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⁶²Art L. 822-9French commercial code.

⁶³D. PORACCHIA, L. MERLAND and M. LAMOUREUX, op.cit., n°148.

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