



*Abuse of corporate assets: between judicial contribution
and adaptation to business life*

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Abstract

The offense of misuse of corporate assets aims to punish the directors of certain commercial companies who, in bad faith, have used the assets of the latter in a manner contrary to the corporate interest and for personal ends or to promote another company or business in which they have direct or indirect interests. In order to adapt to business life, justice has established, with its judgments, the explanatory parameters of the text of the law, taking into account the ambiguous nature of this offense on the one hand and its inclusion among the crimes of hidden objects whose evidence is difficult to access.

Personal interest, company funds, use, judiciary, business life.

1. INTRODUCTION

Considering that society is governed by a set of rules, it is a reality that the rights of individuals end where the rights of others begin. Since then, every individual who exceeds the imposed boundaries has been condemned for their behavior by the courts, acknowledging the arbitrary nature of these actions.

The theory of arbitrariness in the use of rights is a legal innovation aimed at reconsidering transgressions that can arise from the perception of a protected or legally recognized right. Moreover, the practical effect of this theory can only be realized through the actions of the competent judge who decides based on the context of each case within their jurisdiction.

Therefore, the assumptions associated with misconduct in corporate activities are numerous, with the crime of abuse restricted to the use of company assets in limited liability companies and joint-stock companies. This offense occurs when company executives misuse of company funds with malicious intent for purposes they know are contrary to its interests, for personal gain, or to favor another company or institution in which they have direct or indirect interests. Thus, Algerian legislation recognizes this offense and has enacted legal provisions to protect this type of company.

The misuse of company funds is considered a form of fraud, which involves altering certain facts. The concept of fraud has become closely linked to financial auditing, especially after the events witnessed by major American companies in 2001.

Consequently, fraud has been given special attention due to the significant impact it has on companies and users of their financial information in general , This impact extends to both the financial reports of the company and its assets (Sharad Ghazalin, 2017)

Money has often proved to be vulnerable to attacks, especially from the narrow surroundings of business operators and managers of its various agencies. These attacks have led the laws to intervene to confront and put an end to them because they know that the practice of corporate activity in an atmosphere of uncertainty and financial threat, whether through waste or embezzlement, will inevitably be reflected in their activity by declining investment and trade rates, but also negatively on the national economies of the states (Fathalla, 2018).

In view of the fact that this type of offense depends, on the one hand, on technical and technical methods and, on the other hand, on the fact that the perpetrator of the offense has been able to conceal, through his position within the company, unlawful

conduct, the legislature intervenes to deter the actions of the director and to determine a criminal sanction.

The study of this subject is of great importance, as despite the existence of legal texts for this offense, they appear to be somewhat ambiguous in their outlines. This ambiguity is evident in the language used, the components of the crime, and the specifics of the statute of limitations. Despite the legislative silence, the French judiciary has been at the forefront of establishing the features of this offense, allowing for legal flexibility aimed at effectively deterring any form of financial misconduct.

Hence, the issue raised here is: How has the judiciary contributed, through its rulings, to balancing the establishment of interpretative rules for the legal text related to the offense on the one hand, and adapting to the business environment on the other?

Therefore, we will delve into the misuse of company funds to achieve a personal interest contrary to the company's interest (the first requirement). Additionally, we will explore the inclination towards a specific system for the statute of limitations in public prosecution for the offense of misusing company funds (the second requirement).

1 - Use the company's funds to achieve personal interests contrary to the company's interests :

The offense of misuse of the company's funds only occurs if the original perpetrator is in legal or actual motion, or if the company is liquidated. The offender's description is a prerequisite for the commission of the offense.

The legal process is either to be the head or one of the directors of the company, whether members of the board of directors or the board of directors, or general directors in respect of the shareholder or the operator in respect of the limited liability company.

In the case of private companies, this does not mean impunity for their owners, but rather that they are subject to the provisions of the General Penal Code, so that such acts constitute a misdemeanor of betrayal of honesty (REBUT, 1997)

On the basis of the criminal offense envisaged by the legislature, the material element of the offense is any material conduct by the company's funds in violation of the company's interest. We shall therefore be exposed to the definition of the concept of use in the offense of abuse of the company's funds (sect. I) And to the contribution of the judiciary to the establishment of a presumption of personal interest in violation of the company's interest (sect. II).

1-1- Use of the company's funds in the offense of abuse of the company's funds

In order to determine what is meant by this element, the constituent elements must be subject to use in the context of this offense (I) and then the funds in place of this offense (II).

1-1-1. Components for use in misdemeanor misuse of company funds

The use of the term "misdemeanor refers to any action or decision affecting the company's funds. Thus, the Algerian legislator used a term that would cover all acts or actions of the director that he resorted to prejudice the company's funds for his personal purposes. It is not necessary for the offense of misuse of the company's funds to be transferred or wasted. even if there is no lack of company. However, it often results in damage to the company as a result of each use in this way, a lack of remuneration, and no prospect of profit through such use as a result of the unusual nature of the use (Abdelkader, 2005)

The legislature's choice of this term has undoubtedly been deliberate, since it is very broad. It allows the judicial authorities to follow up extensively on the crime of the arbitrary use of the company's funds in order to combat the illegal conduct of companies. It also takes into account the fact that there is no contradiction with the Algerian legislature's decision to respect the principle of strict interpretation of the Penal Code.

The concept of use encompasses all the uses on which this crime is based, and the use is sufficient, i.e., it does not require or involve any ownership of the object used. The offense is independent of it, and the mere arbitrary use of the company's funds establishes the offense without the need for an ultimate intention or will of the object used (Al-Waheb, 2004).

Referring to the legal concept of misuse, it is realized through management or transactions. The latter refers to operations that affect the capital by either transferring it or diminishing it, present or future (such as selling, gifting, entering into a lease contract, etc.). An example of this is deductions made by the manager to cover personal expenses, as well as the company assuming loans for the manager's personal use. All of these actions constitute misuse within the framework of the offense of abusing company funds.

This concept also includes management actions, such as the arbitrary purchase of goods from institutions controlled by the manager. The accumulation of these goods, sold at a lower price by the company, led to its bankruptcy. Therefore, the concept encompasses routine management activities such as maintenance, insurance, deposits, loans, and leasing (Besquahea, 2016)

For this purpose, the Algerian legislator has attempted to prevent the commission of this crime within joint-stock companies by intervening and regulating certain provisions. These provisions are made obligatory, and in the event of non-compliance, we find ourselves facing the commission of the crime in its elements. This is particularly evident in the provisions related to agreements within the company and the remuneration of the administrative bodies of the company (Abdelkader, 2005)

And thus, the usage mentioned in defining this crime appears to have a broader concept than the embezzlement, which involves an intention to possess, as stipulated in the material element of the crime of breach of trust specified in Article 376 of the Algerian Penal Code, which states: 'Anyone who embezzles or squanders...' Consequently, the crime of breach of trust only occurs if the trustee considers the entrusted money to be his private property, allowing him the right to embezzle, squander, and use it.

Among the differences in the elements of these two crimes is the requirement for the use of company funds to commit the crime of arbitrary use of its funds without the need to specify a certain level or magnitude. In contrast, the provision related to the crime of breach of trust requires embezzlement or squandering

Additionally, it does not require reaching a specific threshold of usage for the commission of the crime, The offense occurs merely through the use of company premises, vehicles, and all other means such as phones and computers, whether for free or at a lower price than the actual service value, unless these advantages are linked to the job (Besquahea, 2016)

In this context, the French judiciary (Crim. 25 Nov 1975, B. n°257; J.C.P. 1978, note Delmas-Marty) considers arbitrary use as the manager's personal benefit in terms of financial amounts attributed to the company by granting themselves bonuses or additional perks.

If the form of use is not a significant factor, the crucial aspect is the realization of usage, whether resulting from negligence, positive action, or even intentional abstention.

In a decision issued by the Commercial Chamber of the French Court of Cassation, it was emphasized that intentional abstention (Cass. Crim, 28 janv. 2004, n° 02-88.094) itself constitutes a decision, underscoring the importance of the realization of usage regardless of whether it stems from negligence, positive action, or deliberate abstention.

Thus, the act of refraining can result in an arbitrary withholding of company funds. The French judiciary (Crim. 28 janv. 2004, n° 02-87.585.) , for instance, deemed the

intentional abstention of managers of a limited liability company, who were also partners in a real estate civil company, as constituting an arbitrary inclusion of a financial amount in the company's assets. This amount was received mistakenly from the real estate civil company due to a banking error. Similarly, intentional abstention by a company director from demanding payment from another company in which he has interests for the goods delivered to it is also considered within this context (Cass.Crim, 15 mars 1972 Bull crim, n°107, Rev Sociétés 1973).

While this affirmation may seem inherent in the rules governing the life of the company, leading to powers and responsibilities for the company's managers, it does not inherently extend into the realm of criminal law. Criminal law is governed by the principle of the legality of crimes and penalties, which serves as the strict source of interpretation for criminal law. It imposes a commitment to precise definitions of terms and excludes any broad interpretation (Khaled, 2013)

Moreover, the concept of usage does not necessarily imply earmarking funds for a specific purpose and/or transferring the financial responsibility of the company to the managing partner, as clarified in the old judicial precedent, which was somewhat explicit (Cass. Crim., 8 mars 1967, n° 93-757.65.) Usage is simply the act of utilizing money, even temporarily, sometimes even with the intention of returning it (Cass. Com., 7 juin 2000, n° 99-84.487.)

The norm is for the usage to be temporary, although it is permissible for it to be continuous. This is evident in the case of a company director occupying a residence owned by the company without adequate compensation.

In this scenario, the usage persists throughout the director's occupancy of the property. Determining the timing of the commission of the crime is crucial, especially regarding complicity and concealment. Participation in the crime of arbitrary use of company funds requires that the act of complicity be prior to or concurrent with the usage. Conversely, the crime of concealment only occurs if arbitrary usage precedes it (Besquahea, 2016)

It's worth noting that harm is not a constitutive element of the crime. The legislator criminalizes behavior or actions more than outcomes, as the crime is committed merely by the failure of the company director to distinguish between his financial liability and the financial liability of the company he manages (Besquahea, 2016) This has led the courts to adopt a risk-based criterion, considering the usage as a component of the material behavior at the crime whenever it poses an unusual risk to the financial liability of the company. The judiciary examines each case individually and has not established a unified standard for determining the risks that affect the financial liability of the company (WILFRID, 1996)

As a result, this crime is considered, both legislatively and judicially, a crime of risk. Its occurrence does not require the presence of a criminal result or harm; even if the manager returns the money he used, the crime can still be deemed to have occurred (Hossam, 2018)

1-1-2 the company's funds are the property of the misdemeanor.

Under the misdemeanor offence of misuse of the company's funds, use must be made of its funds. The company's assets are the sum of real and movable property (LARGUIER, 1992), whether material or moral (Cass. crim., 14 Nov. 1973, n° 72-93.925, Bull.crim. N° 415, JCP G 1973), authorized in or not reflected in the accounting documents at the disposal of the director of the company in order to be used for the realization of the company's projects and activities and the attainment of its interest in the realization of the company (Abdelkader, 2005).

Thus, this may involve the company's real estate, movable property, equipment, goods, inventory, debts, rights, trademarks, and patents. The usage could be limited to simply using the company's money, such as using a company-owned car for personal purposes or using company funds to cover personal expenses, like the company paying the rent for a car used by the director for personal purposes (Besquahea, 2016)

These funds must be owned by the company or, at least, the company should have the right to use them, such as leased funds or loans. On this basis, all personal rights closely associated with the natural person should be excluded, considering the company as a legal entity. These funds should have entered the possession of the company at its establishment, such as initial contributions or during its existence, as evidenced by its thriving activities, whether in terms of profits or through capital increase operations, regardless of the method used for that purpose (Abdelkader, 2005)

In this context, the abuse of the company's funds is criminalized only in money companies, so we must always bear in mind the autonomy of the moral person's financial assets. Since the company is a legal entity with its own capital, the directors must administer the company's funds in their capacity and cannot equate their personal funds with those of their companies. We must point out that if the funds belong to the company and are in its hands solely by deposit, then the responsibility of the director of the company is only on the basis of a betrayal of trust. Thus, the leased money may be the object of the crime on the grounds that it is the funds of the company that were used to pay the rental allowance that are the object of abuse and not the leased money (as if it were renting a car or a shop).

Thus, the crime in this photograph first uses money, such as the car belonging to the company, and the manager leaves it at his wife's disposal without any payment to the

company. The offense also finances; for example, if the car is not owned by the company, the company leases it, and the company manager leaves it at the disposal of his wife without any payment to the company.

The offense also carries out ownership, such as the car being not owned by the company but purchased by the company, and the manager then edits the gray card in his wife's name (Besquahea, 2016), It is noted that the company's accounting and financial documents are also considered funds, in addition to all editions and contracts and copies of the deliberations and decisions of the governing and supervisory bodies, which is a logical position given the importance of these documents in influencing the life of the company and the secrets contained therein.

If the nature and sources of these funds differ, it is more important to assess how they are used, whether or not they were originally allocated to them (Abdelkader, 2005).

2- Contribution of the judiciary to the presumption of personal interest contrary to the company's interest

Pursuant to articles 800, paragraph 4, 811, paragraph 3, and 840, paragraph 1, of the Commercial Code, the offence of arbitrary use of the company's assets is committed if the company's funds are used by its managers in contravention of its interest (first) aimed at the personal interest (second).

2-1 The Use Contrary to the Company's Interest
Punishment for the use of company funds only occurs if it is contrary to the company's interests. It is noteworthy that while the law considers this interest, it does not provide a specific definition for it. Therefore, the punishable usage is the one that goes against the company's interests (Cass. crim., 7 mars 2012, n° 11-82.877)

There is no legal definition; however, two theories exist for defining the company's interests, with a third theory mediating between them (Abdelkader, 2005) (Besquahea, 2016) :

Contractual Theory: According to this theory, there is a parallel between the company's interest and the interest of the shareholders. The company's interest is intertwined with the shareholders' interest as long as it results from a collective intentional act aimed at achieving agreed-upon purposes. These purposes are always financial and involve the pursuit of profit sharing or the realization of an interest mutually beneficial to the partners
Regulatory or Institutional Theory: This theory interprets the company's interest based on it being the ultimate interest of the institution. According to this perspective, the company appears as if it is an organization governed by compelling legal rules. The company's interest is considered the private interest of the legal entity, distinct and independent, surpassing

the various interests of those dealing with it. The company creates a new legal entity with its own financial obligations, emphasizing that it has a separate private interest from the interests of partners or shareholders.

Due to the limitations of these two theories, the company emerges from the hybrid nature of these theories. The impact of contractual and organizational factors varies depending on the type of company and its stage of development. Therefore, the concept of the company's interest is mixed and has a mysterious nature, particularly evident during conflicts or incidents that may disrupt the company's existence. This is especially relevant when conflicting interests are at play, and thus, the company's interest serves as a regulator or constraint for disturbances that require the intervention of the company's interest. The latter reacts to restore balance and uphold the principle of equality imposed on commercial companies.

Thus, the legislator requires that the use be contrary to the company's interests, and this is realized when the perpetrator of the offense of misusing company funds causes harm to the company, meaning losses. This harm occurs when the guilty director interferes with the company's funds, depleting or stripping them of their assets, or increasing their burdens through illegal means. It can also be considered contrary to the company's interest to expose it to a danger it wouldn't have faced if not for the director's actions, as this may lead to missed profit opportunities.

Therefore, the use contrary to the company's interest encompasses any behavior that directly threatens the company's continuity and development, considering it an independent entity. The intention behind such actions is to harm various interests associated with them. (Abdelkader, 2005)

In reality, the managers are entrusted with the management of the company for its benefit. This obligation requires them not to engage in actions that go against the company's interests. In this offense, it is necessary to consider the company's interest as a legal entity and then the partners' interests. Harming the company's interests will inevitably impact the interests of the partners (Fadela Yassad, 2018).

The manager bears the responsibility of safeguarding the company's interests, and any omission is considered a management error. These errors stem from intentional ignorance of the company's interests, thereby constituting all managerial decisions that contradict the company's interests. Such actions result in the imposition of criminal penalties on the perpetrators. (Amina.2021)

The offense of arbitrary use of company funds occurs when the action is contrary to the company's interest at the time of its commission, regardless of its outcome. Judicial authorities then assess the nature of the violation of the company's interest at the time the manager committed the act, taking into account the legal and material conditions of the offense itself, as well as the financial situation of the company and

the economic environment surrounding the legal entity. Judges must reconsider the act in its industrial and commercial context, considering the potential harm the company may incur and the benefits it could have anticipated. (Al-Waheb, 2004)

It is noteworthy that the authority to assess the violation of the company's interests lies with the judge. At the time of the offense, the judge will be guided by various pieces of evidence, especially the company's financial documents and various data such as invoices and bank statements. The judge must examine the facts and their connection to another crime, the method of commission, or any attempt to conceal it.

In this context, this use of funds must pose real risks to the company without corresponding gains. The company's interests do not necessarily align with the partners' interests. In an older French judicial precedent, the Court of Cassation (Cass. crim., 24 mars 1969, n° 67-12.976, Bull. crim., n° 130) stated somewhat categorically: " The acceptance of some and the agreement of others do not erase arbitrariness; the law aims not only to protect the interests of the partners but also to safeguard the financial integrity of the company."

Given that the payment of bonuses is contingent on distributing shareholder profits, it is impermissible to grant bonuses unless the company has achieved genuine profits, excluding notional profits (Fawzia, 2012)

Moreover, the amount of bonuses should not exceed ten times the distributable profits, with the aim of preventing excesses and avoiding shareholders determining excessive amounts to the detriment of the company's interests.

From this perspective, some argue (F. GARRON, 2004) that several factors contribute to considering the director's receipt of bonuses as an abuse of the company's funds. The simplest assumption is that bonuses without consideration may be considered an imaginary act through which an individual benefits from the salary allocated to them by the company without performing any actual work (Cass. Crim. 22 sept. 2004, Bull. Joly 2005)

The French judiciary(Cass. Crim. 22 sept. 2004) , for its part, deemed bonuses arbitrary when granted without the approval of the competent authority. In such cases, the director should obtain a bonus that the General Meeting of Shareholders is supposed to determine through a summons initiated by them.

Excessive bonuses also constitute arbitrariness when they surpass the financial capabilities of the company. Regardless of the circumstances, the sovereign authority remains with the judges to assess the arbitrary nature of these bonuses.

On the other hand, various personal expenses incurred by the director are considered an abuse of funds when borne by the company. For instance, the chairman of the

board, who was convicted of multiple fines for traffic law violations and knowingly allowed the company's treasury to cover his personal expenses (Cass. crim., 3 févr. 1992) , was deemed to have committed the offense. The French Court (Cass. crim. 13 déc. 2000) of Cassation also considered it an offense when the company incurred expenses related to the personal security of the company's CEO without any accounting or financial compensation.

A company director can be deprived of the financial amounts that should be reimbursed to the company, such as in the case of a president who appropriates funds from the sale of company assets (Cass. Crim. 28 Nov. 1977, Bull. Crim. n° 372)

2 -2 Use of money for personal benefit

It is evident through an analysis of the texts of Articles 800 and 811 of the Algerian Commercial Law that the offense of misusing company funds is intentional. As long as the legislator requires the element of malicious intent to be present in the perpetrator of the offense, there is also a necessity for the involved director to achieve personal benefit through such usage.

It is noteworthy that the legislator did not precisely define the content of personal interest. Therefore, the concept revolves around two fundamental ideas. The first idea relates to the enrichment of the director by obtaining unjustified financial benefits from the company. The second idea involves making the company a source to cover the personal expenses of the director (Amina)

Unjustified expenses are considered sufficient when the director of the organization fails to provide professional justifications for them, such as mission expenses, receptions, transportation, and travel expenses. Likewise, a criterion for the payment of expenses for personal benefit is when any hidden deduction by the director is made for personal gain (Besquahea, 2016)

Personal interest can be either material or moral. It is material when the director seeks to enrich himself from the company's funds at its expense. In addition to the material personal interest, there is also a moral aspect, which can be professional. This includes the director retaining his position for an extended period, enhancing his influence and status in society, gaining recognition in economic and commercial circles, or even pursuing political and electoral goals (Fadela Yassad, 2018) . Examples of this include aspiring to protect the family's reputation, the hope of avoiding harm from others, or the desire to attract recognition from those benefiting from the misuse (Besquahea, 2016).

This personal interest can be either direct or indirect. The director's interest is considered direct when they can benefit from personal advantages in any capacity, whether as a director, partner, or employee, either within the company itself or in the

context of relationships with other companies where the individual is also a director or majority shareholder.

For example, a director who owns several companies may make payments to another company he owns, allowing him to generate substantial profits. Similarly, a CEO of a joint-stock company, through false confirmations, may force the company to grant excessive and unjustified commissions to a limited liability company he established (Cass. crim. 14 févr. 1974, D. 1974 somm. 2) There have also been cases where a director was convicted of incurring undue fees to maintain the company's business volume (Cass. crim., 10 mars 2004, n° 1445, RJDA 7/04, n° 841)

The director's interest is considered indirect when the beneficiary of the actions subject to prosecution is someone with whom the director has a connection (Besquahea, 2016), especially if the beneficiary has common interests with that director.

In such a case, if there is no economic relationship between the victim company and the benefiting company, the crime is committed if it is recognized that the director uses, without distinction, according to the available opportunities, the goods of one for the benefit of the other (Cass. crim., 23 mai 2007, n° 06-84.113)

Subsequently, if the company and the other legal entity together form an economic group due to subsidiary interests, then the abuse is confirmed when it comes to the interests of the group, not the interests of the directors.

The judge is the only one allowed to examine the director's personal interest in each case separately (Cass. crim., 4 Nov. 2004, n° 6236, RJDA 5/05, n° 577.) , except in cases where the latter has withdrawn company funds covertly. The personal interest is presumed, and the director must then exonerate himself by proving the use of funds for the absolute benefit of the company (Cass. crim., 27 mars 2002, n° 1869: RJDA 10/02, n° 1037.)

Proving the personal use for personal purposes can be achieved through a wide range of assumptions and circumstantial evidence: "If there is no justification for its use other than for the benefit of the company, then the company funds that have been covertly deducted by the director necessarily serve personal interests (Cass. crim., 31 janv. 2007, n° 02-85.089, Bull. crim., n° 28, Rev. Sociétés 2007) "

Conclusion:

In conclusion, the offense of misusing company funds is employed to penalize directors of certain commercial enterprises who misuse these funds with malicious intent. They do so by using the funds in ways that contradict the company's interests, serve personal objectives, or favor other companies in which they have direct or indirect interests. The judiciary relies on interpretative approaches to the legal text of this offense, given its ambiguous nature, categorizing it among hidden crimes where it is challenging to find clear evidence. Among the results reached are:

- Requiring the director to use the company's funds is a condition for committing the crime of arbitrary use of its funds without specifying that this use must reach a certain threshold or amount of severity. It suffices for the simple use of these funds to constitute an offense.
- The crime of arbitrary use of company funds occurs when the act is contrary to the company's interests at the time of its commission, regardless of its outcome. In addition, it is necessary for the involved director to achieve a personal interest through such use.

Furthermore, we propose to the Algerian legislator, based on this study:

- Provide a precise definition for the term "arbitrary use," respecting the principle of narrow interpretation in criminal law.
- For the offense to occur, the director must have a personal interest. Therefore, we suggest that the Algerian legislator specify this personal interest to avoid its broad interpretation.

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