



What is the extent of a CEO's authority?

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The person with the highest operational position in a corporation is its CEO. The CEO is in charge of the company's executive (in other words: day-to-day) management, regardless of the title they have been given: '*gedelegeerd bestuurder*' (managing director), '*dagelijks bestuurder*' (executive director), '*algemeen directeur*' (general manager) etc.

The confusion about these terms has been around for a while. In its ruling of 3 August 1984 the *Raad van State* ('Council of State') already put them all in one big melting pot. In the case before it, the *Raad* scrutinised the articles of association of a public limited company. The articles granted general power of representation to the '*gedelegeerde bestuurder*' (managing director), either or not acting jointly with another director.

Despite this provision, the *Raad* ruled – unjustly – that the managing director could bind the company only within the limitations of the executive management. This proves that, unfortunately, even one of our highest courts of justice drops the ball from time to time.

Today, the confusion is still a fact of life. With the introduction of the new Companies and Associations Code (CAC) the term '*zaakvoerder*' (managing director) has been eliminated for private limited companies and replaced with 'director'. Below, we'll try to create some clarity on the issue.

Power of representation

The CAC specifies that each director is authorised to perform all acts of management necessary or useful for realisation of the *object* (NL: 'voorwerp') (formerly the 'goal') of the company. The articles of association may establish that the directors form what is called a '*collegiaal bestuursorgaan*': a multi-person management body of directors with equivalent decision-making authority whose decisions are based on consensus. Provisions in the articles of association that limit the powers of one or more directors or the management body cannot be invoked against third parties.

Each director or – in the case of a management body as described above – the management body, represents the company to the outside world, which includes representation at law. However, the articles of association may grant one or more directors the power to represent

the company on their own or jointly. Such representation clause can be invoked against third parties, provided that it has been published in the Appendices to the Belgian Official Journal.

The management body may delegate the executive management of the company as well as representation of the company in this context to one or more persons, who act individually, jointly or as a board.

Case law – executive management

The Belgian Court of Cassation ruled on 26 February 2009 that in fiscal cases, a notice of objection may be filed by the executive board; but it didn't stop there. The ruling clarifies: *'Executive management acts are 1) acts that are required in view of the needs of the daily life of the company, and 2) acts that in view of their minor importance as well as the necessity of a quick solution, make intervention by the board of directors redundant.'*

By combining minor importance with urgency, the highest court adopted a rather unworldly interpretation of executive management, implying, for instance, that non-recurring acts of great importance do not fall under the definition of executive management – not even when they are very urgent. Thus, even if the board cannot be called together on time, the executive board still does not have the authority to act.

Partial codification of case law

The modernisation of Belgian corporate law initiated a discussion about the interpretation of executive management. After all: the law was too vague in this respect and a clarifying definition was lacking. The legislator therefore took inspiration from the case law of the Court of Cassation. He did, however, give a broader interpretation to the term *executive management*.

Instead of combining conditions, the legislator leaves room for interpretation. The new CAC reads: *'Executive management comprises the actions and decisions that do not extend beyond the needs of the daily life of the company, as well as the actions and decisions that, either in view of their minor importance or of their urgency, do not justify an intervention of the management body.'*

Again, the CAC does not provide a definition of the term *gedelegeerd bestuurder* (managing director).

In practice

It is easy to see that the new interpretation of executive management may still be at odds with how CEOs perform their duties.

However, what is undisputable is that the terms *gedelegeerd bestuurder* (managing director),

dagelijks bestuurder (executive director) and *directeur* (director) all cover the same concept. All three functions include power of representation and decision-making power, but only in matters of executive management. If these directors exceed their powers, the company remains bound. However, their liability does become an issue.

Clever and cautious CEOs will want to learn from this. Many make the mistake of thinking that CEOs may enter into any type of contract unreservedly. This could be a good moment for you to check. In the event of excess of powers or in case of doubt, the solution is to have the management board approve the acts in question.

Executive management body

Prior to the CAC, only public limited companies had the option of establishing an executive management body. Due to the personal nature in a private limited company, the managing director was not allowed to delegate the daily management to someone else, a problem that was often solved by appointing a director with special powers of attorney. However, a director does not act as a body, but indeed as a mandatory as the latter's authority does not stem from the law. Presenting the power of attorney is required. In the new CAC, the legislator has introduced the option of setting up an executive management body for private limited companies.

The provision that the executive management will be carried out by one or more individuals who act individually, jointly or as a body may be invoked against third parties, provided that it has been published in the Appendices to the Belgian Official Journal. However, limitations to the power of representation of the executive management body cannot be invoked against third parties.

Conclusion

CEOs who are granted general power of representation under the articles of association bind their company *ab initio*. Nevertheless, as an executive management body they must always question their own powers. After all: they risk actions for liability for any acts that fall outside executive management or that do not take into account any limitations of power under the articles of association.

Are you considering setting up an executive management body for your company? We will be happy to help you make the necessary amendments to your articles of association.

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