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French Supreme Court Extends Transfer of Criminal Liability During Merger by Absorption to All Company Types

The criminal liability of the absorbed company is transferred to the absorbing company, regardless of the corporate form of the company involved in the merger by absorption.

In a ruling handed down on May 22, 2024,¹ the Criminal Division of the French Supreme continued the jurisprudential work it had begun in 2020 and extended the transfer of criminal liability from the absorbed company to the absorbing company to all corporate forms, beyond the French *sociétés anonymes* initially concerned.

Case Background

In 2015, a French *société à responsabilité limitée* (SARL X) carried out installations on a campsite. SARL X was convicted for criminal breaches of planning law by a criminal court in 2021.

In 2022, SARL X was absorbed by another *société à responsabilité limitée* (SARL Y). In 2023, the Court of Appeal convicted SARL Y, the absorbing company of SARL X.

SARL Y then appealed the conviction to the French Supreme Court. On May 22, 2024, the Court took the opportunity to extend its case law on the transfer of criminal liability to the absorbed company, ruling that the absorbing company must be convicted for acts committed by the absorbed company, even if it was incorporated as a SARL.

State of the Law Prior to the Ruling

Until 2020, the French Supreme Court — contrary to the European Court of Human Rights² and the Court of Justice of the European Union³ — held that the merger by absorption led to the disappearance of the absorbed company and thus, ended the criminal proceedings against it. In its previous stance, the Court relied on a strict interpretation of the principle of the personal nature of criminal penalties, according to which the dissolution of the absorbed company, following the merger by absorption, led to the disappearance of its legal personality and the extinction of all proceedings against it⁴.

In two rulings handed down on November 25, 2020,⁵ and April 13, 2022⁶, the Court reversed its position.

In its ruling of November 25, 2020, the Court accepted that the criminal liability of an absorbed company could be transferred to the absorbing company.

Conditions

The Court made this new rule subject to three conditions:

1. It applied only to companies falling within the scope of Directive 78/855/EEC of October 9, 1978, as codified by Directive (EU) 1132 of the European Parliament and of the Council of June 14, 2017 — namely French **sociétés anonymes** (SA), French **sociétés par actions simplifiées** (SAS) and certain French **sociétés en commandite par actions** (SCA).
2. It applied only to merger by absorption **carried out after November 25, 2020**.
3. It allowed only strictly financial penalties to be imposed on the absorbing company, i.e., **finés** and **confiscation** — to the exclusion, in particular, of penalties relating to the prohibition of entering into public contracts or exercising a professional activity.

Exception of Fraud

The Court has ruled that in the event of fraud (i.e., in the case of a absorption merger motivated by the need to make a company disappear in order to put an end to criminal proceedings), the absorbing company may still be prosecuted, without any condition relating to (1) the type of company, (2) the date of the transaction, or (3) the nature of the sanction being imposed.

In its ruling of April 13, 2022, the Court applied the fraud rule, specifying that criminal courts — faced with a merger by absorption that caused a company to disappear before November 25, 2020 — must investigate whether or not the operation was fraudulent, in order to decide whether the criminal liability of the absorbed company should be transferred to the absorbing company.

Impact of the May 22, 2024, Ruling

The May 22, 2024, ruling is interesting due to the fact that (1) it concerns a French SARL, i.e., a corporate form normally excluded from the rule laid down by the November 25, 2020, ruling, and (2) it is unrelated to any fraud situation.

In this decision, the French Supreme Court set aside the condition relating to the nature of the company concerned and held that the transfer of criminal liability is now automatic in the case of mergers and acquisitions, **regardless of the corporate form of the company involved in the merger or acquisition**.

The Court thus states in principle that “the economic and functional continuity of the legal entity means that the absorbing company cannot be considered as distinct from the absorbed company, allowing the former to be convicted under criminal law for offences committed by the latter prior to the merger by absorption.”

In the absence of any fraud, the rule transferring criminal liability from the absorbed company to the absorbing company will therefore apply to all mergers and acquisitions operating as of November 25, 2020, the date of the French Supreme Court’s landmark ruling on this subject.

Conclusion

In light of these rulings, three situations can now be distinguished:

1. If a merger by absorption is **fraudulent**, the criminal liability of the absorbed company will be transferred to the absorbing company, without limit or condition of any kind. This situation includes the risk that all penalties set out under Articles 131-39 of the French criminal code will be transferred to or imposed on the absorbing company (not just fines and confiscation).
2. If a merger by absorption is **not fraudulent** and takes place **after November 25, 2020**, the criminal liability of the absorbed company will be transferred to the absorbing company, but only fines and confiscation penalties may be imposed. Penalties are restricted in this way because transfer of criminal liability following merger by absorption relies on the principle of total transfer of assets and liabilities from the absorbed company to the absorbing company.
3. If a merger by absorption is **not fraudulent** and took place **prior to November 25, 2020**, the criminal liability of the absorbed company will not be transferred to the absorbing company

The summary table below (taken from the French Supreme Court's explanatory note to its ruling of November 25, 2020, and adapted to the new case law) illustrates the different scenarios that may arise with regard to the transfer of a legal entity's criminal liability, in cases where the absorbed company is the subject of a merger by absorption.

	Merger by Absorption Before November 25, 2020		Merger by Absorption After November 25, 2020	
	Merger by absorption undertaken with fraudulent purpose	Merger by absorption undertaken without fraudulent purpose	Merger by absorption undertaken with fraudulent purpose	Merger by absorption undertaken without fraudulent purpose
Possibility of criminal prosecution and conviction of the absorbing company	All corporate forms	No	All corporate forms	All corporate forms
Penalties likely to be imposed	Full criminal liability (all penalties incurred)	No	Full criminal liability (all penalties incurred)	Criminal liability for the purpose of imposing a fine and/or confiscation

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Endnotes

¹ Crim. 22 May 2024, No 23-83.180.

² CJEU, March 5, 2015, Modelo Continente Hipermercados SA c/ Autoridade para as Condições de Trabalho, C-343/13.

³ ECHR, October 24, 2019, No. 37858/14.

⁴ However, the Cour de cassation had already acknowledged that a court of appeal could — after having noted the extinction of criminal proceedings against a convicted legal entity due to its absorption — order the absorbing company to pay damages to the civil claimants (Crim. 28 February 2017, No. 15-81469 P: D. 2017).

⁵ Crim., November 25, 2020, No. 18-86.955.

⁶ Crim. April 13, 2022, No. 21-80.653.