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c.nommick@soulier-avocats.com

Tel.: + 33 (0)4 72 82 20 80, + 33 (0)1 40 54 29 29

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Tribune de Lyon 2021 Legal Guide: “Merger by acquisition transactions: What is the impact of the recent decision on the transfer of criminal liability?”



The 2021 Legal Guide published by [Tribune de Lyon](#) offers precise and pragmatic answers to concrete issues faced by business owners/managers.

[Catherine Nommick](#) contributed to this Guide through an article entitled “**Merger by acquisition transactions: What is the impact of the recent decision on the transfer of criminal liability?**”.

This article is reproduced below and a courtesy English translation follows.

Fusion-absorption : quel est l'impact de la jurisprudence récente en matière de transfert de responsabilité pénale ?



Maître Catherine Nommick
AVOCAT ASSOCIÉ, SOULIER AVOCATS

Depuis un arrêt rendu le 25 novembre 2020 par la chambre criminelle de la Cour de cassation, en cas de fusion-absorption d'une société par une autre, la société absorbante peut désormais être condamnée pénalement pour des faits commis par la société absorbée avant la fusion.

Cette solution met à mal le principe de la personnalité des peines énoncé à l'article 121-1 du Code pénal, sur la base duquel la Cour de cassation, par assimilation de la dissolution de la personne morale au décès d'une personne physique, s'opposait jusqu'alors à la condamnation pénale de la société absorbante.

Une condamnation pénale désormais possible

Prenant appui sur une décision de la Cour européenne des droits de l'homme du 24 octobre 2019, le juge français a tiré les conséquences de la continuité économique existant entre la société absorbante et la société absorbée pour ne pas les considérer comme distinctes l'une de l'autre.

Un revirement substantiel, mais toutefois limité dans ses effets. Ainsi, il ne s'applique pas aux fusions-absorptions réalisées avant le 25 novembre 2020 afin de ne pas porter atteinte au principe de prévisibilité des peines, sauf à démontrer que l'opération concernée, même réalisée antérieurement à cette date, avait pour objectif de faire échapper la société absorbante à sa responsabilité pénale. Enfin, seules les fusions-absorptions de sociétés anonymes ou assimilées (qui entrent dans le champ d'application de la directive 78/855/CEE) sont concernées par cette jurisprudence.

“Merger by acquisition” transactions: What is the impact of the recent decision on the transfer of criminal liability?[1]

Catherine Nommick, Partner, Soulier Avocats

Since a decision issued on November 25, 2020 by the Criminal Chamber of the *Cour de Cassation* (French Supreme Court), in a “merger by acquisition” transaction (i.e., when a company is merged into another), the acquiring company may now be held criminally liable for an offence committed by the acquired company prior to the merger.

This decision undermines the principle of the personal nature of offences and penalties set out in Article 121-1 of the French Criminal Code, on the basis of which the *Cour de Cassation*, which until then had equated the disappearance of a legal entity with the death of a natural person, refused that the acquiring entity be held criminally liable.

Relying on a decision handed down on October 24, 2019 by the European Court of Human Rights, the French judge drew the consequences of the economic continuity that exists between the acquired company and the acquiring company to hold that they were not to be considered as distinct from each other.

A substantial reversal of case-law, but nevertheless limited in its effects. It does not apply to mergers completed before November 25, 2020, in order not to infringe the principle of predictability of penalties, unless it can be demonstrated that the transaction in question, even if carried out prior to that date, was intended to have the acquiring company escape criminal liability. Finally, Lastly, the decision only applies to mergers that involve the acquisition of public limited companies (*sociétés anonymes*) or similar entities (which fall within the scope of Directive 78/855/EEC).

[1] An extended version of this article is available on our Blog: [Transfer of criminal liability in merger transactions: A major reversal of case law](#)

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