Ruling no. 2333 of 25 November 2020 (18-86.955) - Cour de cassation (*Court of Cassation*) - Criminal Chamber
ECLI:FR:CCAS:2020:CR02333

Merger: new liability for the acquiring company; time-delayed effect of the new interpretation in application of the principle of legal predictability (evolution of national law in application of EUCJ and ECHR case law).

Only the french version is authentic

Criminal liability

Partial dismissal

Summary

1. Article 121-1 of the Criminal Code, interpreted in the light of Council Directive 78/855/EEC of 9 October 1978 on the mergers of public limited liability companies, last codified by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 and Article 6 of the European Convention on Human Rights infers that in the case of a merger where a company is acquired by another company falling within the scope of the above mentioned Directive, the acquiring company may be sentenced to a fine or to seizure measures for acts constituting an offence committed by the company being acquired prior to its acquisition.

Since the legal person being acquired is continued by the acquiring company, the acquiring shall enjoy the same rights as the acquired company and may rely on all means of defence that the acquired company could have relied upon.

Accordingly, in the event of a merger by acquisition falling within the scope of the above-mentioned directive leading to the winding-up of the acquired company, and provided the facts which are the subject of the proceedings have been characterised, a court can declare the acquiring company guilty of those facts and impose a fine or seizure measures on the acquiring company.

This new interpretation, which constitutes a reversal of case law, will only apply to merger transactions concluded after 25 November 2020, the date of notice of this ruling, so as not to undermine the principle of legal certainty in accordance with Article 7 of the European Convention on Human Rights.

2. Regardless, however, of the date of the merger or the nature of the company concerned, the criminal liability of the acquiring company may be incurred if the sole purpose of the merger by acquisition was to exempt the company being acquired from its criminal liability thereby constituting a fraudulent evasion of the law.

Appellants: Iron mountain France SAS

Facts and procedure

1. According to the ruling under appeal and the submissions:

2. Following the opening of a judicial investigation following a fire on 28 January 2002 at the archive storage warehouses of Intradis, the latter was summoned to a hearing before the tribunal correctionel (*Criminal Court*) on 23 November 2017 by a deed of service dated 24 July 2017 on charges of involuntary destruction of property belonging to others by fire caused by failure to comply with legal obligations in relation to safety and vigilance.

3. On 31 March 2017, Recall France and its subsidiary Intradis were acquired by Iron Mountain by way of a merger by acquisition transaction.

4. The company Ebenal, Mr A... X..., Mr B... Y... and Kering, civil parties to the case, summoned Iron Mountain to appear at the hearing on 23 November 2017. In addition, the latter company intervened voluntarily in the proceedings following the launching of a judicial investigation.

5. By judgment dated 8 February 2018, the tribunal correctionel (*Criminal Court*) fixed the amounts to be deposited by the civil parties pursuant to Article 392-1 of the Criminal Procedure Code and issued a additional information order to determine the circumstances of the merger by acquisition in order to obtain any information relevant to the proceedings at issue, in particular with regard to the criminal charge of involuntary destruction against Intradis.

6. Iron Mountain appealed this decision.

7. By order dated 22 February 2018, the President of the Chamber of Criminal Appeals ordered the immediate consideration of the appeal.

Reviewing plea

On the first and second pleas

Statement of pleas

8. The first plea is based on the violation of Articles 1844-5 and 1844-7 of the Civil Code, 2, 3, 6, 151 to 155, 388, 463, 591 to 593 of the Criminal Procedure Code.

9. This plea criticises the ruling under appeal to the extent that it dismissed Iron Mountain France's application for the declaration of nullity of the additional information order handed down by the Tribunal correctionnel (*Criminal Court*) of Amiens to audition Mr C... Z..., manager employed by the companies merged March 31, 2017 and the criminally responsible person of Iron Mountain France:

Whereas:

"1°/ All judgments or rulings must provide legal reasoning. In the event such reasoning is insufficient or contradictory it shall be considered absent.

Pursuant to Article 121-1 of the Criminal Code, criminal proceedings are prohibited against the acquiring company for acts committed by the acquired company before the latter ceases to legally exist.

In this case, Recall France, a subsidiary of Intradis, was merged with Iron Mountain France.

In confirming the investigative measure aimed at auditioning Mr C... Z..., the person in charge employed by the companies merged on 31 March 2017 and the person criminally responsible for Iron Mountain France, on the inoperative grounds that this would make it possible to determine whether the merger had been vitiated by fraud, thereby holding Iron Mountain France criminally liable for the involuntary destruction by fire of property belonging to another person for which the acquired company Intradis was charged, even though such the criminal proceedings could not be brought against Iron Mountain France, the cour d'appel (Court of Appeal) deprived its decision of any legal ground in view of the aforementioned texts;

2°/ All judgments or rulings must provide legal reasoning. In the event such reasoning is insufficient or contradictory it shall be considered absent.

Criminal courts are only competent to hear civil actions for compensation for damage arising from an offence ancillary to criminal proceedings when a decision on the merits of the criminal proceedings has already been handed down. In this case, since no decision on the merits of the criminal proceedings had been handed down, the tribunal correctionnel (Criminal Court) could not hear the civil action against Iron Mountain France. In refusing to declare the nullity of the additional information order on the inoperative grounds that it would make it possible to determine whether the merger had been vitiated by fraud, thereby holding Iron Mountain France criminally liable for the involuntary destruction by fire of property belonging to another person for which the acquired company Intradis was charged, the cour d'appel (Court of Appeal) once again deprived its decision of any legal ground in view of the aforementioned texts."

10. The second plea is based on the violation of Articles 463, 512, 538, 591 to 593 of the Criminal Procedure Code.

11. The plea criticises the judgment under appeal whereby, prior to ruling on the merits, it issued an additional information order with a view to auditioning Mr C.. Z..., a manager employed by the companies merged on 31 March 2017 and the criminally responsible person of Iron Mountain France, concerning the reasons, terms and conditions of the merger and the acquisition of Intradis, Recall France and Iron Mountain France, the existence of the takeover

operation in other European countries where Iron Mountain France operates, as well any elements relating to the current proceedings and in particular the offence of involuntary destruction charged against Intradis, whereas:

"*An additional information order should only concern the facts and persons against whom proceedings are directed. In this case, by confirming the judgment ordering the additional information aimed at determining the criminal liability of Iron Mountain France, despite noting that it related solely to the investigatory proceedings concerning Intradis, the cour d'appel (Court of Appeal) violated the aforementioned texts and principles*".

Court's response

12. The pleas are joined.

13. The pleas raise the question as to the conditions under which, in the case of a merger through acquisition, the acquiring company may be criminally convicted for acts committed prior to the merger by the acquired company.

14. To answer this question, it is important to determine whether there is a general principle of transfer of criminal liability in the event of a merger (paragraphs 15 to 37) and, if so, whether this principle applies immediately (paragraphs 38 and 39). Only when one or other of these two sub-questions can be answered in the negative is it necessary to determine whether the answer should be different in the event of fraud (paragraphs 40-42).

15. Pursuant to Article 121-1 of the Criminal Code, no one is responsible except on his own.

16. According to consistent case-law of the Cour de cassation (*Court of Cassation*), this principle, that must be interpreted in compliance with Article 6 of the European Convention on Human Rights, precludes that the acquiring company be prosecuted and convicted for acts committed prior to the merger by the acquired company, the latter company being wound-up following the merger (Crim.., 20 June 2000, appeal no. 99-86.742, Bull. crim. 2000, no. 237; Crim. 14 October 2003, appeal no. 02-86.376, Bull. crim. 2003, no. 189).

17. The Cour de cassation (*Court of Cassation*) maintained its case law even after the CJEU ruled that the provisions of Article 19 §1 of Council Directive 78/855/EEC of 9 October 1978 on the merger of public limited liability companies, codified in Article 105 §1 of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law, must be interpreted as meaning that a merger by acquisition results in the transfer to the acquiring company of the obligation to pay a fine imposed after the merger by acquisition in respect of violations of employment law committed by the acquired company prior to that merger. (ECJ, judgment of 5 March 2015, Modelo Continente Hipermercados SA v Autoridade para as Condições de Trabalho, C-343/13).

18. The Cour de cassation (*Court of Cassation*) considered that, on the one hand, Article 121-1 of the Criminal Code could only be interpreted as prohibiting criminal proceedings from being brought against the acquiring company for acts committed by the acquired company before the latter ceased to legally exist following the merger by acquisition and, on the other hand, the said article could not be set aside as being contrary to the Directive of 9 October 1978 since a directive cannot produce a direct effect against an individual (Crim, 25 October 2016, appeal no. 16-80.366, Bull. crim. 2016, no. 275).

19. This interpretation of Article 121-1 of the Criminal Code is based on the view that a merger, resulting in the winding-up of the acquired company, causes the acquired company to lose its legal personality and results in the extinction of the criminal proceedings pursuant to Article 6 of the Criminal Procedure Code. Consequently, the acquiring company, a separate legal entity, cannot be prosecuted for the acts committed by the acquired company.

20. It likens the situation of a wound-up legal person with that of a deceased natural person.

21. This anthropomorphic approach to a merger by acquisition must however be challenged because, on the one hand, it does not take into account the specificity of the legal person that changes form without being liquidated, and on the other hand, it is removed from the economic reality.

22. In accordance with Article L.236-3 of the Commercial Code, a merger by acquisition results in the winding-up of the acquired company but not its winding-up. Similarly, the assets and liabilities of the acquired company are universally passed to the acquiring company and the shareholders of the former become shareholders of the latter. Moreover, pursuant to Article L.1224-1 of the Labour Code, all employment contracts in force at the date of the transaction continue between the acquiring company and the company's employees.

23. Consequently, the economic activity carried out within the framework of the acquired company, which constitutes the accomplishment of its corporate purpose, continues within the framework of the company that benefited from this operation.

24. The European Court of Human Rights, relying on the economic continuity existing between the acquired company and the acquiring company, infers that acquired company is not really “another” in relation to the acquiring company and therefore holds that a civil fine, to which the criminal limb of Article 6 of the European Convention on Human Rights applies, imposed on the acquired company in respect of an infringement prior to the merger, does not affect the principle whereby punishment should only be applied to the offender. (ECHR, decision of 24 October 2019, Carrefour France v. France, no. 37858/14).

25. The economic and functional continuity of the legal person results therefore in the acquiring company not being considered as distinct from the acquired company. Accordingly Article 6 of the European Convention on Human Rights does not prevent Article 121-1 of the Criminal Code from now being interpreted in such a way as to allow the acquiring company to be criminally liable for acts constituting an offence committed by the latter prior to a the merger by acquisition.

26. Article 6 of the Criminal Procedure Code, which does not expressly provide the extinction of criminal proceedings upon the takeover of a company, does not preclude this interpretation either.

27. If the new interpretation of Article 121-1 of the Criminal Code is now possible, it is necessary to draw the conclusions of the above-mentioned decision of the Court of Justice of 5 March 2015 in the context of domestic law.

28. It should be noted that national courts are obliged to interpret national law in a way that is consistent with Union law to the extent that this interpretation does not result in the provisions of a directive having direct effect against an individual (EUCJ, judgment of 26 Sept. 1993,

Arcaro, C-168/95; EUCJ, judgment of 3 May 2005, Berlusconi and others, C-387/02, C-391/02 and C-403/02). This limit is respected when the national text can be interpreted within the meaning of the Directive, so that it is not necessary to depart from the national order to give full effect to the Directive.

29. In the aforementioned judgment of 5 March 2015, the Court of Justice of the European Union notes that a merger by acquisition automatically results not only in the universal transfer of all the assets and liabilities of the company being acquired to the acquiring company but also in the fact that the acquired company ceases to exist. It infers from this that liability for an administrative offence would be extinguished if it were not transferred to the acquiring company.

30. That court holds that extinguishing such a liability would run contrary to the very notion of merger by acquisition as defined in Article 3(1) of Directive 78/855 to the extent that, in accordance with that provision, such an acquisition consists in the transfer to the acquiring company of all the acquired company's assets and liabilities as a result of the latter being wound up without going into winding-up.

31. It adds that this interpretation is consistent with the purpose of directive with respect to the protection of third parties, including entities, which though not yet creditors or debenture holders at the date of the acquisition may become such post-acquisition as a result of situations antedating the acquisition. This is the case of a Member State whose authorities may impose a fine for an offence committed prior to the merger by acquisition.

32. It further notes that, if such liability were not transferred, a company could use a merger by acquisition as a means of escaping the legal consequences of offences it has committed to the detriment of the Member State concerned or other potential interested parties.

33. According to the Court of Justice of the European Union, this conclusion is not called into question by the argument according to which, in the case of a merger, the transfer of an acquired company's liability for an administrative offence would prejudice the interests of the creditors and shareholders of the acquiring company, since the creditors and shareholders of the acquiring company would not be able to evaluate the economic consequences of that merger. First of all, such creditors are, in accordance with Article 13(2) of Directive 78/855, entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and, where appropriate, are authorised to apply to the appropriate administrative or judicial authority in order to obtain such safeguards. Secondly, the shareholders of the acquiring company can be protected notably through the inclusion of terms of representations and warranties in the merger agreement. Thirdly, in addition to the documents and information available according to the relevant legislative provisions, an acquiring company is not precluded from conducting a detailed due diligence of the economic and legal situation of the company to be acquired before the merger by acquisition in order to obtain a more complete picture of that company's liabilities.

34. In the current state of domestic law, the interpretation of Article 121-1 of the Criminal Code authorising the transfer of criminal liability between the acquired company and the acquiring company is the only way to financially sanction the acquiring company for acts committed by the acquired company prior to the merger.

35. It follows therefore that in the case of a merger by acquisition of a company by another company falling within the scope of the above mentioned Directive, a criminal sentence of a fine or seizure may be pronounced against the acquiring company for acts constituting an offence committed by the acquired company prior to the operation.

36. As the legal person being acquired is continued by the acquiring company, the acquiring company shall enjoy the same rights as the acquired company and may rely on all means of defence that the acquired company could have relied upon.

37. Accordingly, in the event of a merger by acquisition falling within the scope of the above-mentioned directive leading to the winding-up of the acquired company, and provided the facts which are the subject of the proceedings have been characterised, a court can declare the acquiring company guilty of those facts and impose a fine on the acquiring company or a seizure.

38. This new interpretation, which constitutes a reversal of case-law, cannot be applied to mergers occurring prior to this decision without affecting the principle of legal certainty pursuant to Article 7 of the European Convention on Human Rights, from which it results that a person must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission.

39. It will therefore only apply to merger transactions concluded after the delivery of this ruling and will consequently not apply to this case.

40. It nevertheless appears necessary to determine whether a special regime applies in the event of an additional information order intended to reveal possible fraud.

41. To this end, it must be considered that where there is fraud, the court may hand down a criminal sanction when it is evident that the sole purpose of the merger by acquisition was to exempt the company being acquired from its criminal liability. This possibility is independent of the implementation of the aforementioned Directive of 9 October 1978.

42. Although the Cour de cassation (*Court of Cassation*) has not as yet had the chance to rule on this specific point and, accordingly, it cannot be construed a reversal of case law, its doctrine is not unexpected. It therefore applies to mergers and acquisitions concluded prior to this ruling.

43. It follows that by issuing an additional information order to determine, in particular, whether the transaction was fraudulent, the cour d'appel (*Court of Appeal*) applied the applicable law in its decision.

44. The pleas are therefore dismissed.

On the third plea

Statement of the plea

45. This plea is based on the violation of Articles 463, 512, 591 to 593 of the Criminal Procedure Code.

46. The plea submits that, before judging on the merits, the ruling under appeal issued an additional information order and appointed the commander of the Versailles gendarmerie company to carry it out, whereas:

"*the court that issues additional information orders must appoint one of its members who handed down the decision to carry it out ...; by refusing to cancel the additional information ordered issued by the tribunal correctionnel (Criminal Court), which had appointed the commander of the Versailles gendarmerie company to proceed with the order rather than one of its members, the cour d'appel (Court of Appeal) has disregarded the rules of public order and violated the above-mentioned texts*".

Court's response

In view of articles 463 and 512 of the Criminal Procedure Code:

47. In accordance with these texts, if an additional information is required, the cour d'appel (*Court of Appeal*) shall, by judgment, appoint one of its members who has the necessary powers under Articles 151 to 154-1 of the Criminal Procedure Code. This additional information order shall comply with the rules laid down in Articles 114 and 119 to 121 of this code.

48. The cour d'appel (Court of Appeal) confirmed the additionnal information ordered by the first instance court, as well as the provisions of the judgment designating the commander of the Versailles gendarmerie company to proceed.

49. In so ruling, when it was bound to appoint one of its members to carry out the additional information ordered by it, the cour d'appel (*Court of Appeal*) violated the aforementioned texts and the principle referred to above.

50. The quashing is therefore incurred.

ON THESE GROUNDS, the Court:

QUASHES AND SETS ASIDE the above-mentioned ruling of the Cour d'appel of Amiens (*Amiens Court of Appeal*) dated 26 September 2018, but only with regard to those provisions designating the commander of the Versailles gendarmerie company to proceed with the additional information order.

And for a new ruling, in accordance with the law, within the limits of the reversal hereby pronounced,

REFERS the case and the parties to the Cour d'appel of Amiens (*Amiens Court of Appeal*), otherwise composed, to be designated by special deliberation in chambers;

CONFIRMS that the application of Article 618-1 of the Criminal Procedure Code is not required;

President: Mr Soulard

Reporting Judge: Ms Fouquet, Judge Referee

Advocate-General: Mr Salomon

Lawyer(s): SCP Ricard, Bendel-Vasseur, Ghnassia - SARL Meier-Bourdeau, Lécuyer et associés - SCP Célice, Texidor, Périer - SCP Lyon-Caen and Thiriez