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Guest Post: The New French Ruling on Successor Liability Gives French Prosecutors New Leverage to Fight Corruption and Other Corporate Crime

Posted on [March 9, 2021](#) by [Matthew Stephenson](#)

For today's guest post, GAB is delighted to welcome back [Frederick Davis](#), a member of the New York and Paris Bars and a Lecturer in Law at Columbia Law School:

Commentators have aptly [observed](#) that US prosecutions of firms for foreign bribery and similar crimes has developed into a “US model of corporate crime deterrence,” a model that is based on aggressive pursuit of corporate entities to induce them to cooperate by “detecting, reporting, and helping prove” criminal acts by individuals in return for a negotiated resolution of the criminal charges against the corporation itself, one that avoids a corporate criminal conviction.

Earlier posts on this blog [by myself](#) and by [others](#) have noted the absence of this model in France, and the relative ineffectiveness of French prosecutors in pursuing corruption and other forms of corporate crime, in significant part because of the difficulty of proving corporate criminal responsibility under French law. As [I noted last year](#), though, efforts by the Legislature to provide new investigative and prosecutorial tools, by the National Financial Prosecutor to use them, and by the courts in clarifying the principles of corporate criminal responsibility have produced encouraging results. French prosecutors have pursued, and French courts have [convicted](#), both French and non-French corporations for serious crimes. On November 25, 2020, the French

Supreme Court (*Cour de Cassation*) took an important additional step by ruling, for the first time, that in an acquisition situation the successor corporation will generally be criminally responsible for acts committed by the acquired company. The [decision](#) closes a significant gap in French corporate criminal deterrence, and will have an immediate and positive impact on corporate criminal investigations in France.

When one corporation acquires another, French courts have generally held that the acquiring corporation cannot be held responsible for acts committed by the acquired company. This reasoning was primarily based on a literal interpretation of [Article 121-1](#) of the French Penal Code, which provides that a person (including a legal person, such a corporation) is only criminally responsible “for its own acts.” The courts considered the acquiring company to be a different “person” from the acquired one, which in a technical sense ceased to exist after the acquisition. For this reason, French courts traditionally reasoned, the criminal responsibility of the acquired firm expired when that firm ceased to exist. French courts permitted successor liability only in a very limited set of cases, where it could be proved that the acquisition was a fraudulent attempt to escape criminal responsibility.

Though the recent Supreme Court decision applied this fraud exception to the facts of the particular case before it, the Court’s ruling announced a very different rule to apply to future cases. The Court held that, going forward, successor corporations will now be generally responsible for pre-acquisition criminal acts by the companies that they acquire. The Court reasoned that a change in corporate form does not typically affect “the economic and functional continuity of a business,” and thus “an acquiring company is not really distinct from an acquired one.”

The opinion will have an immediate impact on merger and acquisition activity in France, because acquiring companies now have a clear incentive to do extensive pre-acquisition due diligence into the operations of a target company. The Court emphasized this point, noting that acquiring companies can protect themselves by appropriate representations and warranties in the acquisition documents, and by conducting a “detailed audit” of the acquired company’s activities. In a clear effort to encourage lawyers to conduct corporate internal investigations for use in criminal investigations, in June 2020 the French National Bar Council [clarified](#) the professional obligations of attorneys conducting such investigations, which had had until recently been considered an improper activity for a lawyer.

The Court’s ruling may contribute to moving France a bit closer to the “US model” because it comes at a time of increased interest in the so-called *Convention Judiciaire d’Intérêt Publique* (CJIP), a negotiated outcome similar to, and unmistakably imitative of, the American (and, since 2014, [British](#)) Deferred Prosecution Agreement. The CJIP mechanism was [added](#) to French criminal procedures by the so-called *Loi Sapin II* in December 2016. Twelve CJIPs (including the

pathbreaking [agreement with Airbus](#) resolving overseas corruption charges reached in 2020) have already been [approved](#) by the courts, and recently issued official “[guidelines](#)” for implementation of the CJIP procedure emphasize their value to encourage “self-reporting” and “cooperation with judicial authorities.” Now that it is clear that companies are criminally responsible for the acts of acquired entities, French prosecutors may be persuaded to adopt a strategy previously [employed by the US DOJ](#): promising an acquiring company not to prosecute it on a successor liability theory if, but only if, the acquiring company commits to conduct a post-acquisition internal investigation of the acquired company and to report the results to the prosecution service, which then has the option of prosecuting individuals based on evidence in the report. As noted recently in this [blog](#), the most recent version of the DOJ’s *FCPA Resource Guide* provides an updated and flexible approach to this issue, which French authorities may well consider.

The French Supreme Court decision aligns French law with the [approach](#) taken in the United States and adds a significant tool to the French prosecutorial toolbox. Taken together with significantly increased corporate penalties, much more aggressive corporate criminal investigations, and increased use of the CJIP negotiated outcome, it reflects what can only be called a gradual and partial “Americanization” of corporate criminal procedures in France, taken in response to the perceived threat that US prosecutors were filling a void left by French non-prosecutions by pursuing French companies themselves.

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About Matthew Stephenson

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1 THOUGHT ON “GUEST POST: THE NEW FRENCH RULING ON SUCCESSOR LIABILITY GIVES FRENCH PROSECUTORS NEW LEVERAGE TO FIGHT CORRUPTION AND OTHER CORPORATE CRIME”



astridmedianero

on **March 18, 2021 at 11:53 am** said:

Amazing initiative of the French courts! My only concern is related to how this will also affect corporate law. Should the French courts apply successor liability to any acquisition or should it depend on how the acquisition is designed? Should it not make a difference which type of company acquires, is acquired and is formed after the merger or acquisition?

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