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Legal standing of the plaintiff

What about the acquiring company ?

Par Yannick Caballero Cuevas le 8 February 2022

In the 1B_537/2021 ruling, the Federal Court examines the question of whether, in the context of a transfer of assets within the meaning of art. 69 et seq. LFus, the acquiring company acquires the legal standing of the transferor's plaintiff.

On 15 December 2017, a foundation filed a criminal complaint against its former secretary general for acts committed in the management of the foundation from 2012 to 2017. The public prosecutor's office then opened an investigation for unfair management (art. 158 PC), forgery of documents (art. 251 PC) and unfair management of public interests (art. 314 CO).

On 30 June 2020, the foundation transferred all its assets and liabilities to a public limited company, in accordance with the asset transfer agreement and according to an inventory dated 31 December 2019.

On 12 January 2021, the supervisory authority for the BVG and foundations of Western Switzerland contacted the central public prosecutor's office of the canton of Vaud regarding the transfer of assets from the foundation to the company. The latter informed the supervisory authority that the transfer of assets did not pose a problem in the context of the ongoing investigation.

By decision of 12 March 2021, the supervisory authority approved the transfer of assets, which resulted in the liquidation of the foundation.

Despite the transfer of assets, the public prosecutor's office refused, by order of 18 June 2021, to recognise the status of complainant to the acquiring company. The latter referred the matter to the Vaud Cantonal Court, which rejected the appeal and confirmed the order.

The company then lodged an appeal in criminal matters before the Federal Court. It requested that it be recognised as the complainant following the transfer of assets.

The Federal Court first examined the concepts of complainant (art. 118 para. 1 CPP) and injured party (art. 115 CPP). In the context of an offence against the assets of a legal person, only the latter suffers damage, so that it alone can claim the status of injured party. Subject to Article 121 CPP, the successors of an injured legal person are considered to be indirect injured parties and cannot act as complainants. Therefore, the acquiring company is not directly affected by the offences at the time of the events. It therefore does not have the original

capacity of party.

The Federal Court then examines whether the transfer of assets results in a *ex lege* subrogation of the capacity of complainant within the meaning of art. 121 para. 2 CPP. This provision states that 'the person who is subrogated by law to the rights of the injured party is only entitled to bring a civil action and can only avail himself of the procedural rights that relate directly to the civil conclusions'. A voluntary assignment of rights (art. 164 et seq. CO) is therefore excluded.

The Federal Supreme Court reiterates its case law on the acquisition of the status of plaintiff following a merger, and refers in particular to ATF 140 IV 162. Despite the transfer of all the assets of the injured party, this transfer is based on the will of the parties. Consequently, the merger does not imply a legal subrogation within the meaning of art. 121 para. 2 CPP. However, this position is criticised by some legal scholars, who consider that the merger entails universal succession by law (art. 22 LFus). Therefore, art. 121 para. 2 CPP would be applicable regardless of the underlying contractual relationship.

After examining its case law and the relevant doctrine, the Federal Supreme Court concluded that there was no concrete and decisive element to justify a reversal of case law, namely that a merger would result in universal succession, thus allowing for the assertion of a legal subrogation within the meaning of art. 121 para. 2 CP. Moreover, the Federal Supreme Court points out that the case in question concerns a transfer of assets within the meaning of Art. 69 et seq. LFus, and not a case of merger. Thus, this contract does not strictly speaking constitute a case of universal succession, since the transfer of assets only relates to the assets and liabilities listed in the inventory accompanying the transfer contract (Art. 73(2) LFus).

Although the transfer contract covers all the assets and liabilities of the foundation, the scope of this transfer is defined by the will of the parties. Therefore, the Federal Court denies the status of plaintiff to the acquiring company, and confirms its case law at the same time. The appeal is therefore rejected.

It is necessary to take note of the (questionable) solution adopted by the Federal Court. The parties will therefore have to take appropriate measures to avoid any loss of rights in criminal proceedings following a merger or transfer of assets.

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