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Complainant status in criminal procedure following a merger

Milestone victory (to be confirmed) for the acquiring company

Par Romain Dupuis le 31 October 2023

In a recent decision, the Criminal Appeal Court of the Vaud Cantonal Court confirmed the plaintiff status of a company taking over a company following a merger by absorption (decision Jug/2023/314 of May 4, 2023, published on October 23, 2023). This is a deliberate departure from the strict case law of the Swiss Federal Supreme Court.

The ruling in question is not final. It is therefore possible that the matter will be brought before the Federal Court in the near future.

The case concerns the theft and concealment of several hundred laptops by an employee of a Swiss-based multinational and a director of a small hardware resale company. We do not dwell on this in this commentary.

As a result of these facts, the company directly affected filed a criminal complaint on January 24, 2018.

A year later, while the proceedings were still in progress, this company was absorbed by company P under a merger agreement dated May 27, 2019. It is thus dissolved and deleted from the commercial register (art. 3 al. 2 LFus).

At the beginning of 2021, P quantifies its civil claims in the amount of almost CHF 120,000.

In a judgment handed down on September 8, 2022, the Tribunal correctionnel de l'arrondissement de l'Est vaudois convicted both the offending employee and the hardware reseller, the former for theft and receiving stolen goods by trade, the latter for receiving stolen goods by trade only. The court also awarded P compensation for his civil claims.

Both defendants appealed against this judgment. However, only the appeal lodged by the reseller remained, the employee having finally reached a settlement with P.

Among other grievances, the appellant contests P's status as plaintiff, basing his argument on the case law of the Swiss Federal Supreme Court, in particular ATF 140 IV 162 and decision 1B_537/2021 of January 13, 2022 (commented in cdbf.ch/1221/).

First of all, the Court of Appeal recalls that the status of plaintiff is granted only to those directly

injured by the offence (art. 115 and 118 al. 1 CPP). Consequently, when an offence is perpetrated to the detriment of a legal entity, only the latter suffers damage and can claim the status of injured party, to the exclusion of shareholders or creditors.

The Court went on to point out that the successors of an injured legal entity must also be considered as indirect injured parties, who may not bring a claim, subject to the exception of legal subrogation provided for in art. 121 para. 2 of the Swiss Code of Criminal Procedure.

Whereas in ATF 140 IV 162, the Swiss Federal Court held that a merger did not constitute a case of legal subrogation insofar as the merger contract was to be considered a voluntary act, the Vaud Court of Appeal reached a diametrically opposed solution, basing itself in particular on the criticisms of legal doctrine.

These criticisms are sometimes pragmatic, based on the lack of practical interest in a restrictive approach, and sometimes teleological, based on the absence in the travaux préparatoires of any indication that art. 121 al. 2 CPP should not be applied when the subrogation has a contractual background.

It is also argued that subrogation in favour of insurance under art. 72 aLCA (art. 95c nLCA) – which the Federal Court considers to be a typical example of the application of art. 121 para. 2 PCC – also has a voluntary basis, since it presupposes the conclusion of an insurance contract in the first place.

Taking a literal approach, the Court also looks at the wording of art. 22 para. 1 of the Merger Act, according to which all the assets and liabilities of the transferring company are transferred “by law” to the acquiring company as soon as the merger is entered in the commercial register.

Finally, for practical reasons, the Court distinguishes between the case of a transfer of assets and liabilities (examined in the above-mentioned judgment 1B_537/2021), following which the transferring entity continues to exist, so that a transfer of its rights is not necessary, and that of a merger, which involves the dissolution and striking off of the transferring company, so that a transfer of its rights within the meaning of art. 121 para. 2 of the Swiss Code of Criminal Procedure is justified.

For all these reasons, the Court confirms P’s status as plaintiff, so as to enable him to assert his civil claims in the criminal proceedings.

Interestingly, the Court lastly justifies its departure from federal case law – which, in its view, stems from “a better understanding of the purpose of the Code of Criminal Procedure” – by citing the recent merger of Switzerland’s two largest banks, which was “based on state intervention and not on the initial will of the companies concerned”. This change in circumstances is all the more reason to reverse the case law.

The Vaud Court of Appeal’s decision has the merit of being pragmatic, and of sparing Company P the obligation of bringing a separate civil action.

In the event of an appeal, however, it is by no means certain that this decision will be followed by the Federal Court, which had clearly concluded after a detailed analysis in ATF 140 IV 162 that the merger did not fall within the scope of art. 121 al. 2 CPP. However, a slightly more

nuanced position seems to emerge from ruling 1B_537/2021, so that a change in jurisprudence cannot be ruled out just yet.

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