

Corporate liability

Succession in criminal matters

Par Katia Villard le 16 September 2024

The question has long been posed by legal scholars : what happens to a criminal prosecution brought against a company when the latter, in one way or another, disappears ? The Court of Appeal of the Federal Criminal Court addressed this issue in a decision dated August 19, 2024 ([CN.2024.18](#)). It ruled that the takeover of one company by another – i.e., a merger by absorption within the meaning of [art. 3 para. 1 let. a FusG](#) – did not extinguish the criminal proceedings against the former, but that the acquiring company took the place of the transferring company in the criminal proceedings. At the time of writing, the decision of the Court of Appeal of the Federal Criminal Court is not yet final.

In matters of individual criminal liability, the death of the defendant means that the proceedings are closed. The transfer of any liability to the heirs is excluded, by virtue of the principle of the individuality of penalties. But a company, even if it ceases to exist, obviously does not die in the strict sense of the term. The application by analogy of the procedural provisions applicable to individuals to companies is therefore limited. In the same vein, the principle of the personality of penalties cannot be interpreted strictly in the same way between natural and legal persons, due to the intrinsic differences between the two legal personalities and the resulting constructions of (penal) liability.

In our opinion, the Federal Criminal Court is right to distance itself from a purely formal vision of the notion of the disappearance of the company, and to reason in terms of the continuity of the company's economic and functional activity. Merger by absorption leads to the dissolution (without liquidation) of the transferring company, whose entire assets are transferred by universal succession to the acquiring company. This case involved the takeover of one bank by another, so the corporate purpose pursued by the two companies was similar. All the transferring bank's customers and all its business activities were absorbed by the acquiring bank. The economic activity of the dissolved bank has therefore not ceased to exist, but is being perpetuated in a new form. In this case, the criminal proceedings must continue against the bank that took over the business activity.

This approach is in line with that recently adopted by the French Court of Cassation (cf. [decision](#) of May 22, 2024, pourvoi no. 23-83.180 and the two other decisions cited). The case law of the ECtHR, for its part, has confirmed, from the angle of [art. 6 ECHR](#), that such a position did not violate the principle of the personality of penalties, since, in the constellation of a merger-takeover, the absorbing company could not truly be considered as an "other" in relation to the absorbed company (cf. ECtHR [decision](#) Carrefour France v. France of October¹, 2019,

application no. 37858/14, § 47).

Reproduction autorisée avec la référence suivante: Katia Villard, Succession in criminal matters, publié le 16 September 2024 par le Centre de droit bancaire et financier, <https://cdbf.ch/en/1371/>