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# For a legal entity to be held criminally liable, it is necessary to identify said entity's body or representative who has committed the offense

## In a decision issued on June 21, 2022[1], the Criminal Chamber of the *Cour de Cassation* (French Supreme Court) recalled its case law according to which it is necessary, in order to seek the liability of a legal entity, to explicitly identify the body or the representative having committed the offence on behalf of said legal entity.

An employee of a company specialized in the production of cotton wool suffered an accident at work on a "opener-crusher" machine.

Said company, hereinafter referred to as "Company A" for the purpose of this article, was owned by a holding company.

Company A, the holding company and the site manager of Company A were prosecuted for unintentional injury resulting in a total incapacity for work of more than 3 months and for failure to comply with measures relating to health, safety or working conditions.

Company A, the holding company and the site manager of Company A were convicted by the first instance court but appealed against the judgment.

In a decision dated November 24, 2020, the Paris Court of Appeals imposed a 20,000 euro fine on Company A and a 40,000 euro fine on the holding company for unintentional injury, and two fines of 5,000 euros each on Company A for breaches of applicable health and safety regulations.

Company A and the holding company appealed against this decision before the *Cour de Cassation*.

Two questions arose: Can a legal entity be considered as a body or representative of another legal entity and thus allow for the latter to be convicted? Also, can a holding company for which judges have not identified any body or representative be held criminally liable?

In its decision of June 21, 2022, the *Cour de Cassation* considered that a holding company of a prosecuted company can be considered as an organ of the latter and that the Court of Appeals does not disregard the requirements set forth in Article 121-1 of the French Criminal Code when it convicts the prosecuted company for breaches committed by its organ or representative. However, the *Cour de Cassation* overturned the part of the decision that concerned the liability of the holding company due to the lack of identification of said company's organ or representative.

In order to grasp the rationale of the *Cour de Cassation*, it is necessary to define the elements which are required to hold a legal entity criminally liable (**I**), which will lead to note that the judges of the *Cour de Cassation*, in their decision, strictly applied the provisions set forth in Article 121-2 of the French Criminal Code (**II**).

## I. Seeking the liability of a legal entity

It should be preliminarily recalled that under French law any and all legal entities, with the exception of the State, can be held criminally liable, as specified by Article 121-2 of the French Criminal Code[2].

Therefore, it is perfectly possible to seek the liability of a private law legal entity such as a company.

For this purpose, two requirements must be met:

- The offence must have been committed by a body or a representative of the legal entity;
- The offence must have been committed "*on behalf of the legal entity*".

Concerning the first requirement, it should be emphasized that the body or representative can be a legal representative such as the general manager[3], a *de facto* manager[4] or even a court-appointed agent (such as a receiver) or a contractually appointed representative (such as the holder of a delegation of powers[5]).

Concerning the second requirement, it should be noted that if the offence was committed exclusively on behalf of the body or representative, then only its/his liability will be incurred. On the other hand, if the offence was committed for the benefit of the legal entity, then the latter will be liable whenever the natural person acted in the course of his/her activities aimed at organizing the operation or the objectives of the legal entity.

If the legal person is held liable, the offence will be punished in accordance with Articles 131-38 and 131-39 of the French Criminal Code[6].

## II. Strict application of Article 121-2 of the French Criminal Code

In addition to the above-mentioned requirements, case law considers that it is necessary to explicitly identify the body or representative who has committed the offence on behalf of the legal entity.

However, French courts have not always been so affirmative on this point.

Indeed, while it had first adopted an extremely rigorous position according to which legal entities could only be found criminally liable if it was established that the offence was committed on their behalf by their bodies or representatives[7], the *Cour de Cassation* subsequently considered that the presumption of the involvement of the organ or representative was sufficient.

It then ruled that a court of appeals could not be blamed for holding a company criminally liable without specifying the identity of the author of the breaches that gave rise to the offence, provided that the offence could only have been committed on behalf of the company by its bodies or representatives[8].

Since then, the *Cour de Cassation* seems to have reverted to its original position, i.e., in order for a legal entity to be held criminally liable, it is necessary to identify precisely the body or representative who has committed the offence on behalf of said legal entity[9].

In the decision commented herein, the *Cour de Cassation* reaffirmed this strict position and confirmed the need for a precise identification of the body or representative.

It thus held that it is perfectly possible for a legal entity to be the body or representative of another legal entity, which in the case at hand allowed to seek the liability of Company A.

But above all, it recalled its case law, which has now become established, and ruled that the criminal liability of the holding company could not be established because the Court of Appeals failed to explicitly identify its body or representative.

By adopting this position, the *Cour de Cassation* took a stand that appears to be consistent with Article 121-2 of the Criminal Code,and adhered to the principle of criminal legality and its related Latin adage *Nullum Crimen, nulla poena sine lege*[10].

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[1] Criminal Chamber of the *Cour de Cassation*, June 21, 2022, No. 20-86.857

[2] Article 121-2 of the French Criminal Code: "*Legal entities, with the exception of the State, are criminally liable, according to the distinctions set forth in Articles 121-4 to 121-7, for offences committed, on their behalf, by their bodies or representatives.*

*However, regional and local authorities and their groupings are only criminally liable for offences committed*

*in the course of activities that may be the subject-matter of public service delegation agreements.*

*The criminal liability of legal entities does not exclude that of natural persons who are perpetrators or accomplices to the same acts, subject to the provisions set forth in the fourth paragraph of Article 121-3.*"

[3] Criminal Court of Versailles, December 18, 1995

[4] Criminal Chamber of the *Cour de Cassation*, June 15, 2016, No. 14-87.715

[5] Criminal Chamber of the *Cour de Cassation*, December 14, 1999

[6] Article 131-38 of the French Criminal Code: "*The maximum fine applicable to legal entities is equal to five times that provided for natural persons by the law that punishes the relevant offense.*

*In the case of a crime for which no fine is provided for natural persons, the fine incurred by legal entities is 1,000,000 euros.*"

[7] Criminal Chamber of the *Cour de Cassation*, December 2, 1997, No. 96-85.484

[8] Criminal Chamber of the *Cour de Cassation*, June 20, 2006, No. 05-85.255

[9] See for example Criminal Chamber of the *Cour de Cassation*, April 11, 2012, No. 10-86.974

[10] Which literally means "*No crime, no punishment without law*"