

## INCREASED RISK OF CRIMINAL LIABILITY FOR PARENT COMPANIES

*The Criminal Division of France's Court of Cassation (Cour de Cassation) ruled, in its decision of 16 June 2021, that the criminal liability of a holding company could be engaged by the acts committed by a body that does not have a legal or statutory existence. It also considered that employees of a foreign subsidiary could be assimilated to de facto representatives of the parent company, and thus engage its criminal liability.*

*This decision illustrates the courts' willingness to seek the criminal liability of parent companies through a questionable interpretation of the provisions of Article 121-2 of the French Criminal Code, even though the alleged facts were committed by the executive teams or employees of one of their subsidiaries.*



In this decision (Crim. 16 June 2021, no. 20-83.098, published in the *Bulletin*), the Criminal Division of the Court of Cassation extends the scope of the criminal liability of parent companies, which may be incurred on the basis of Article 121-2 of the Criminal Code, under which the latter are criminally liable "for offences committed on their behalf by their bodies or representatives".

In this case, several employees of one of the subsidiaries of a group's holding company had paid commissions to Costa Rican public officials in order to help them obtain contracts for telephone equipment, using consulting contracts signed by another subsidiary of the group.

Convicted of active bribery of a foreign public official by the Paris Court of Appeal<sup>1</sup>, the holding company argued that the employee of a subsidiary company could not be a representative of the parent company, within the meaning of Article 121-2 of the Criminal Code, in the absence of a delegation of powers to him or her.

**The Criminal Division - and this is the major input of this decision - considers that the employees of a subsidiary of the parent company can be considered as representatives of the latter within the meaning of Article 121-2 of the Criminal Code and thus engage its criminal liability.**

To reach this conclusion, the Court took into account the organisation of the group into business divisions, holding that "as these acts were committed within the framework of a group of companies, of which the convicted company is the holding company, the active bribery of a foreign public official was committed on behalf of the parent company by the combined actions of three employees of the company's subsidiaries, who were the de facto representatives of the company due to the existence of the group's transversal organisation and the tasks entrusted to them, irrespective of the fact that there was neither a legal link nor a delegation of powers in their favour".

This decision is explained by the existence of strong hierarchical control by managers or employees of the French parent company over their counterparts in the foreign subsidiary, which the appeal decision described as a "*matrix organisation [...] involving hierarchical links within business groups and geographical areas*".

This reality - common in international groups - leads the Criminal Division to favour a functional approach over a purely legal one that would take into account the absence of any "*legal link*", and would therefore make it more difficult to characterise the representative role of the foreign subsidiary by its employee or manager.

While this solution can be explained by a particular factual context, it is nonetheless a highly questionable interpretation of Article 121-2 of the Criminal Code, which does not allow a legal entity to be held liable for acts committed by persons with whom it has no connection in the strict meaning of the term (no employment contract, no delegation of power or mandate, etc.) beyond the simple capital link - direct or otherwise - with their employer.

**As regards defining which body can engage the liability of the legal person, the Criminal Division is in line with previous decisions that have already adopted a more flexible approach to the concept.**

In particular, in 2018, the Court of Cassation had already held that the executive committee of a large French international group could constitute, despite its lack of legal or statutory existence, a "*body of the group*" within the meaning of Article 121-2 of the Criminal Code, whose actions made it possible for the legal person to incur liability<sup>2</sup>.

In the case that resulted in the judgment of 16 June 2021, the Criminal Division similarly considered that the group's central Risk Assessment Committee that approved documents for the payment of commissions and the use of consultants abroad, was a body of the company that could incur its criminal liability.

The Court of Cassation takes into account the consequences of the intervention of the body at issue and the importance of its decisions concerning the consultants, rather than its status or the powers delegated to it by the legal representatives or statutory bodies of the company.

It appears, however, that the factual context of this specific case helps explaining the meaning of the decisions in appeal and *cassation*. The holding company whose liability was sought had in fact admitted the facts at issue (as well as several other acts of corruption committed in other countries) as part of transactional agreements with the US authorities, which led the Paris Court of Appeal to characterise a "*group policy*" leading to the "*multiplication of illicit payments, in different geographical areas*".

This decision illustrates the impact that the conclusion of an agreement negotiated abroad can have on the decisions of French courts due to lack of effective protection, given the restrictive application of the *non bis in idem* principle. This decision invites groups of companies to be particularly alert as to the consequences deriving from the implementation of their central control mechanisms.

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<sup>2</sup> [Crim., 14 March 2018, no. 16-82.117.](#)

The decision dated 16 June 2021 is part of a more general trend towards easing the conditions under which the criminal liability of parent companies can be invoked. After having requested that the courts determine precisely the body or representative of the legal entity through which the latter's criminal liability can be held<sup>3</sup>, if necessary by ordering additional information in this regard<sup>4</sup>, the Criminal Division now seems to take a more flexible approach of the concepts of parent company body or representative.



Further reading: the decision of the Criminal Chamber is accessible [here](#) (in French).

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<sup>3</sup> [Crim., 6 September 2016, n. 14-85.205](#); [Crim., 17 October 2017, no. 16-87.249](#).

<sup>4</sup> [Crim., 31 October 2017, no. 16-83.683](#).

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