Chapter 5
Corporate Criminal Liability in France

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Contents

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5.1 Introduction

Since the coming into force of the new Penal Code *(Code pénal)* on March 1, 1994, French law recognizes corporate criminal liability. The very large majority of French legal scholars accept today the necessity and the value of recognizing corporate criminal liability.

The first subsection of art. 121-2 Penal Code provides that "legal persons, with the exclusion of the state, are criminally liable according to the distinctions in arts. 121-4 to 121-7 for offenses committed on their behalf by their organs or by their representatives". The French legislator opted for a relatively wide scope of corporate criminal liability: corporate criminal liability applies, in principle, to all offenses and to all legal persons, thus to companies, but it is required that an organ or representative of the legal person commits the offense "on the behalf of" this entity.

Penalties for legal persons may be of a pecuniary and a non-pecuniary nature. There are penalties that can be incurred only by legal persons. No general principles exist in French criminal law that the judge must respect when deciding the penalties incurred by a convicted legal person. However, it is possible to derive some guiding principles when it comes to sanctioning them.

The French legislator also established specific procedural rules concerning legal persons. However, the majority of the rules of criminal procedure applicable to natural persons also apply, in principle, to legal persons, with the exception of particular statutes, which provide the contrary.

5.2 Forms of Corporate Liability in French Law

Legal persons, and thus companies, can incur three different forms of liability in French law: civil, administrative, and – since 1994 – criminal liability.

5.2.1 Civil Liability

Legal persons, and thus companies, may incur civil liability, a principle affirmed well before 1994. Thus, art. 1123 French Civil Code *(Code civil)* provides that "[e]very person may contract who has not been declared by the law incapable of doing so". The rule assumes that all persons with capacity are capable of contracting. The counterpart of this rule is that each person declared capable of contracting under law is responsible for and must assume the consequences of his/her acts. This principle is applicable to legal persons and thus to companies as well. Hence, a company can be held liable, notably for breach of contract, in French law.

Companies may also be liable in tort. As a legal person, a company may be held responsible under arts. 1382 and 1383 Civil Code for damages caused by one of its representatives who is acting as such.[1] If the legal representative is considered as an organ of the company and he/she committed the tort in the exercise of his/her functions, the tort is considered a tort of the company itself for which the victim may demand compensation. The company's liability is not conditioned on the establishment or implication of the personal liability of the organ.[2] Further, according to art. 1384 Civil Code, a person is responsible, not only for the damage that is caused by that person's own acts, but also for damage caused by others for whom the person must answer. Notably art. 1384(5), provides that masters *(maître)* and principals *(commettant)* are liable for the torts committed by their servants *(domestiques)* and agents *(préposées)* while performing the functions for which they were employed or engaged.

Thus, the company is responsible for the persons it oversees,[3] though the agent at fault must have committed the tort while employed by, and working for, the company. This makes corporate civil liability particular. A company cannot be held civilly liable for a tort committed by one of its agents when acting without the authorization to perform functions outside of those usually attributed to him. The act would be considered as committed outside the scope of the functions for which the agent was employed.[4] However, the company will still be liable if the victim shows that it could have reasonably believed that the agent was acting within the scope of his authority.[5] Lastly, it is important to note the victim does not have to invoke

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[1]Cass. 2e civ., July 17, 1967, Gaz. Pal. 1967. 2e sem., Jur. 235, n. Blaevoet. – Cass. 2e civ., April 27, 1977, Bull. civ. II, No. 108.

[2]Cass. 2e civ., July 17, 1967, see above n. 1.

[3]Cass. ass. plén., March 29, 1991 *(Blieck)*, *D.* 1991, 324, n. Larroumet; JCP éd. G. 1991.II. 21673, n. Ghestin; RTD civ. 1991, 541, n. Jourdain.

[4]Cass. ass. plén., November 15, 1985, Bull., No. 9, 12.

[5]Cass. 2e civ., May 29, 1996, Bull. civ. II, No. 118.

the agent's personal responsibility in order to bring suit against a company under art. 1384(5) Civil Code.[6] At its core, this rule is a type of vicarious liability.

In principle, one cannot sue the directors of a company under art. 1384(5) Civil Code because directors are not considered agents.[7] However, the *Cour de cassation* has sometimes allowed this type of suit.

5.2.2 Administrative Liability

In certain cases, the administrative liability of legal persons, and thus companies, can be invoked. A legal person's administrative liability, unlike its civil liability, depends on the type of the legal person, and, in certain cases, on the qualification of the contract.

5.2.3 Criminal Liability

Finally, companies, and more generally legal persons, have been exposed to criminal liability since 1994. Article 121-2 Penal Code sets out the principle. The first subsection, which was introduced by the Law No. 92-683 of July 22, 1992, concerning reform of the Penal Code's general provisions, provides that "legal persons, with the exclusion of the state, are criminally liable according to the distinctions in arts. 121-4 to 121-7 for offenses committed on their behalf by their organs or by their representatives". The details of this particular type of liability will be examined more closely in this chapter.

5.3 The Introduction of Corporate Criminal Liability

Corporate criminal liability was introduced in France by the New Penal Code, promulgated March 1, 1994.[8] Before the promulgation of the 1994 Penal Code, corporate immunity from criminal liability was the dominant principle in French criminal law. Thus, legal persons were only civilly and,

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[6]Cass. 2^{e} civ., April 21, 1966, Bull. civ. II, No. 454. – Cass. 2^{e} civ., June 17, 1970, Bull. civ. II, No. 212.

[7]Cass. crim., May 20, 2003, Bull. Joly 2003, No. 11, 1166, n. de Massart.

[8]In 1994, art. 121-2 Penal Code provided that "legal persons, with the exclusion of the state, are criminally liable according to the distinctions in articles 121-4 to 121-7, and in the case of instances provided for by law or regulations, offences committed on their behalf by their organs or by their representatives".

in certain cases, administratively liable,[9] several judicial and legislative exceptions notwithstanding.[10] Before the modification of the 1994 Penal Code, legal scholars in France debated the possibility and value of recognizing corporate criminal liability principles.[11] This debate is still relevant today, even if, over time, the majority of French legal academics have come to accept the necessity of corporate criminal liability and to craft arguments to support its introduction into law.[12]

The French legislator introduced corporate criminal liability predominantly for practical reasons.[13] Corporate criminal liability was seen as necessary to improve law enforcement and, in particular, as targeting a real form of criminality. It was also thought to allow a more just imputation of criminal liability than personal liability. Indeed, with the 1994 reform, the French legislator wished to establish more than just limits on the personal responsibility of directors. In so doing, it hoped to ensure greater respect for the general principle of *personnalité des peines* under art. 121-1 Penal Code, according to which a person is only criminally responsible for his/her own conduct.[14]

Nonetheless, certain French legal scholars questioned the constitutionality of corporate criminal liability. More precisely, they asked whether this liability did not itself threaten the principle of *personnalité des peines*, as well as the principle of equality before the law (certain legal persons were excluded from the scope of art. 121-2 Penal Code). The *Conseil constitutionnel* did not hand down a decision on this important question when the law came into force. It first had occasion to consider this matter and hand down a ruling 4 years later when scrutinizing the law of May 11, 1998 concerning the entrance and residency of foreigners into France.[15] The law in question, which penalized the aiding of immigrants who entered and resided illegally in France, granted immunity from prosecution to certain humanitarian associations. The *Conseil constitutionnel* held that this immunity was contrary to the constitution, not only because it only benefitted some associations who were arbitrarily chosen by the Minister of

[9] See, e.g., Cass. crim., March 8, 1883, S. 1885 I, 470; DP 1884, I, 428. – Cass. crim., February 27, 1968, Bull. crim., No. 61, 147.

[10] Desportes, 2002, para. 4.

[11] For a presentation of arguments, see Desportes, 2002, paras. 5 et seq. See also Delmas-Marty 1990, 108 et seq.; Donnedieu de Vabres, 1947, paras. 262 et seq.; Faivre, 1958, 547; Merle/Vitu 1997, paras. 605 et seq.

[12] For a presentation of these arguments, see Desportes, 2000, para. 7. See also Mathey 2008, 205 and Maréchal 2009b, paras. 5 et seq.

[13] Desportes 2002, paras. 10 et seq.

[14] For an analysis of the principle of *personnalité des peines* applied to legal persons, see Serlooten 2010, § 66, 306 et seq.

[15] Decision No. 98-399 DC, May 5, 1998, JO May 12, 1998.

Interior, but also because the objectives of the legislator, in this case regulating immigration, "could justify a system of criminal sanctions applicable to both natural persons and legal persons".[16] The law could, thus, "establish, while still respecting constitutional principles, rules concerning the characterization of felonies and misdemeanours created by the legislator, as well as the applicable sentences".[17] The *Conseil constitutionnel* admitted that certain natural and legal persons could benefit from criminal immunity granted by the legislature provided that the principles of legality and equality were not violated. So, indirectly, the *Conseil constitutionnel* recognized the constitutionality of corporate criminal liability.

5.4 Characterization of the French Concept of Corporate Criminal Liability

Two theories would seem to characterize the concept of corporate criminal liability in France. The first theory recognizes the possibility of such liability and the second defines the nature of the liability.

First, criminal corporate liability owes its existence to the "reality theory" of corporate personality *(théorie de la realité)*,[18] which presents the legal person as a "sociological phenomenon". This conception is defined by French scholars by taking into account two different aspects of legal personality: as a matter of law, the legal person only benefits from legal recognition and protection if several conditions are satisfied; as an institution, legal persons are bodies acting according to a collective will. Second, the reality theory is traditionally juxtaposed to the "fiction theory" *(théorie de la fiction)*, which is based on an opposition between legal persons and natural persons.[19] According to this theory, legal persons are fictions created by the law and thus artificial beings, to which the legislator may grant or deny legal personality at its will.

French case law has recognized the legal personality of certain entities who were not explicitly granted such legal status by statute on several occasions, seemingly due to the *théorie de la realité*.[20] But this line of cases has had only a marginal impact on the granting or removing of such legal personality. However, according to some French academics, it may have implications for criminal law because the principle of corporate

[16] Decision No. 98-399 DC, May 5, 1998, JO May 12, 1998.

[17] Decision No. 98-399 DC, May 5, 1998, JO May 12, 1998.

[18] See, in particular, Mathey 2008, 205.

[19] See, in particular, Mathey 2008, 205.

[20] See, in particular, Cass. ch. req., February 23, 1891, S. 1892.1.72. – Cass. 2e civ., January 28, 1954, D. 1954, 217, n. Levasseur.

criminal immunity was mainly based on the *théorie de la fiction* and the recognition of criminal liability is founded *a priori* on the *théorie de la realité*.

In addition, corporate criminal liability is, according to the *Cour de cassation* in its early decisions[21] and supported by several legal scholars, a representative liability ("indirect" liability[22] or liability *"par ricochet"*[23]), which still retains personal character since it can only be invoked through the intervention of an organ or a representative of the legal person. Indeed, the French legislator has not instituted a mechanism that allows for the direct imputation of criminal acts to legal persons.[24] The judge must therefore establish the existence of an offense committed by a corporate organ or representative; he/she cannot directly impute an offense to a legal person. However, following other scholars[25] and local courts, it is a direct liability, by representation or identification, and it seems that the *Cour de cassation* in its recent decisions has also adhered to this interpretation.[26]

In any case, corporate criminal liability is not a liability for the acts of another person: French criminal law emphasizes the principle of personal criminal responsibility, which applies to legal persons as well as natural persons who are criminally tried.[27] To respect this principle, the French legislature provided that legal persons may only be held liable through their organs and representatives who, from a legal point of view, express the will of the legal person.

5.5 The Entities That May Be Held Criminally Liable

One of the principle questions before the *Assemblée nationale* and the Revision Commission of the Penal Code was which entities should be considered capable of criminal liability.[28] Criminal liability of legal persons with commercial, industrial, or financial objectives was accepted very quickly. However, the classification of nonprofit private law legal persons

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[21] Cass. crim., December 2, 1997, Bull. crim. 1997, No. 408; JCP éd. G 1998, IV, 1820; JCP éd. G 1998, II, 10023, rapp. Desportes; JCP éd. E 1998, 948, n. Salvage; Rev. sc. crim. 1998, 536, n. Bouloc. See also Cass. crim., April 29, 2003, Bull. crim. 2003, No. 91; Dr. pén. 2003, comm. 86, n. Robert; Rev. sc. crim. 2004, 339, Fortis; D. 2004, 167, n. Saint-Pau.

[22] Desportes, 2002, para. 106.

[23] Robert, 2005, 381.

[24] For a critique, see Maréchal 2009a, 249.

[25] See, e.g., Saint-Pau 2006, 1011 et seq.

[26] Cass. crim., June 20, 2006, JurisData No. 2006-034775. – Cass. crim., September 29, 2009, JurisData No. 2009-049707. – Cass. crim. March 9, 2010, No. 09-80.543.

[27] Cass. crim., June 20, 2000, Bull. crim., No. 237, 702.

[28] Desportes 2002, paras. 21 et seq.

and public law entities as legal persons under the Penal Code's corporate liability provisions was hotly debated.[29] Finally, the principle of equality under the law won out.[30] The *Assemblée nationale* thus established a broad concept of "legal persons": art. 121-2 Penal Code states that "legal persons, with the exclusion of the state, are criminally responsible". It therefore applies to all legal persons that have full legal personality with the exception of the state.

5.5.1 Private Law Legal Persons

Private law legal persons may be held criminally liable. In fact, corporate criminal liability was introduced into French law principally with this type of person in mind. It would not seem to matter whether such groups were created voluntarily or came into existence by virtue of legal rules.[31] So, the law would cover voluntarily created for profit and nonprofit groups, such as civil and commercial companies, economic interest groups *(groupement d'intérêt économique)*, associations that regularly declare themselves to the *préfecture*, including religious congregations, foundations, trade associations *(syndicat professionnel)*, and political parties and groups. Groups of legal origin include institutions representing workers, associations of co-property owners, meetings of bondholders, and professional associations *(ordre professionnel)*.

Although all private law legal persons can be held criminally liable, a certain number of them enjoy a privileged status under the law *vis-à-vis* criminal sanctions. These are political parties and groups, trade associations, and, to a lesser extent, institutions representing workers. Indeed, the last subsection of art. 131-39 Penal Code provides that the harshest sanctions do not apply to these types of legal persons or to some of them: political parties and groups as well as trade associations cannot come under judicial surveillance or be forcibly dissolved; and institutions representing workers cannot be forcibly dissolved.

5.5.2 Public Law Legal Persons

Public law legal persons may be held criminally liable for the totality of their activities. However, an exception to this rule exists for the state and

[29] On the question of the criminal legal liability of public law entities, see Caille 2009, paras. 4 et seq.

[30] Picard 1993, 263.

[31] Desportes 2002, para. 50.

a limit is applied to the prosecution of territorial collectives (i.e., local governments).

According to the principle, public law legal persons may be held criminally liable for the totality of their activities.[32] Legal scholars and the courts through case law have placed legal persons of both a private and public law nature, such as companies with a mixed status,[33] nationalized companies,[34] and professional associations into this category.[35] But criminal liability of public law legal persons is limited insofar as certain sanctions cannot be imposed on them according to the last subsection of art. 131-39 Penal Code. In fact, constitutional principles do not permit these entities to come under judicial surveillance or to be forcibly dissolved.

There is one crucial exception to the rules regulating public law legal persons: the state enjoys full immunity. This exception has been justified, in particular, by reference to state sovereignty and the principle of the separation of judicial and administrative authorities:[36] the introduction of state criminal liability would in particular result in administrative activities being regulated and monitored by the judiciary.[37] Another justification for full state immunity in criminal matters was that the state itself is the enforcer: as it has a monopoly on the power to punish, it cannot punish itself.[38] Other scholars have argued, however, that state criminal immunity creates an inequality among public agents.[39]

The criminal liability of public law legal persons has also its limits. Article 121-1(2) Penal Code provides that territorial authorities are criminally responsible for "offenses committed in the course of activities, which can be the subject of an agreement delegating a public service".[40] The purpose of this limitation was to prevent unjustified discrimination in favor of public

[32]For an in-depth study, see, in particular, Caille 2009, paras. 23 et seq.; Gartner 1994, 126; Hermann 1998, 195; Moreau 1995, 620; Moreau 1996, 41; Picard 1993, 261 et seq.

[33]Cass. crim., November 9, 1999 *(Sté SATA)*, Bull. crim., No. 252, 786; Rev. sc. crim. 2000, 600, obs. Bouloc; Dr. pén. 2000, comm. 56, n. Véron; Bull. Joly 2000, § 85, obs. Barbiéri.

[34]E.g., Cass. crim., January 18, 2000 *(SNCF)*, Bull. crim., No. 28, 68; D. 2000, I.R., 109.

[35]Desportes, 2002, para. 48.

[36]Marchand, Rapport sur la réforme du Code pénal, Doc. AN No. 896, 1ère session ordinaire, 1989–1990, 221. However, some legal scholars argue that these principles do not justify the large exception carved out in the statute Caille 2009, paras. 17 et seq.; Desportes 2002, para. 24; Picard 1993, 261 et seq.

[37]Hermann 1998, para. 23.

[38]Gartner 1994, 126; (questioning) Caille 2009, para. 19.

[39]Desportes 2002, para. 25; Rapport du groupe d'étude sur la responsabilité pénale des décideurs publics, presided over by M.-J. Massot 1999.

[40]For a detailed study, see Maréchal 2009b, paras. 21 et seq.

sector entities.[41] Indeed, the French legislator felt that territorial authorities should be criminally liable to the same extent as private law legal persons when they perform private sector activities that are competitive even if they should benefit from a form of immunity when performing their non-competitive activities.[42] In the absence of a definition of "delegating of public services", the provision is difficult to apply.[43] However, it would seem that the real question does not concern the determination of what is a delegation of public services but, rather, what type of activities may be delegated to perform the service at issue.[44]

5.5.3 Foreign Legal Persons

Article 121-2 Penal Code does not make any distinctions between legal persons on the basis of nationality. Therefore, it seems that foreign legal persons also fall within the scope of the statute. French law is clearly applicable to foreign entities that have committed offenses in France under art. 113-2(2) Penal Code or abroad if the conditions contained in arts. 113-1 et seq. Penal Code are met. Certain issues concerning foreign legal persons are debated nonetheless.[45]

5.5.4 Fully-Formed Groups Benefitting From Legal Personality

Article 121-2 Penal Code only covers legal persons; entities and groups that do not possess a legal personality do not come within the purview of the statute.[46] *Sociétés en participation* and *sociétés créées de fait* are therefore excluded from French corporate criminal liability principles: these entities are not registered and thus do not enjoy legal personality according to arts. 1871 and 1873 Civil Code. Affiliated companies are also excluded from

[41] Caille 2009, paras. 4 et seq.

[42] Desportes 2002, para. 26.

[43] Caille 2009, paras. 30 et seq.

[44] Desportes 2002, paras. 28 et seq. See Cass. crim. April 3, 2002, Bull. crim. 2000, No. 77, defining the notion of activities, which may be delegated.

[45] For an in-depth study, see Desportes 2002, paras. 55 et seq. and Maréchal 2009b, paras. 51 et seq.

[46] For a presentation of the reasons for exclusion of groups not having legal personality, see Desportes 2002, paras. 62 et seq.

criminal liability because it is difficult to determine which of the affiliated companies has committed the offense.[47]

Companies and groups that have yet to be constituted or are restructuring, as well as companies that are dissolving or are in the process of winding-up, are special cases.[48]

5.6 Offenses for Which Legal Persons May Be Liable

Since the entry into force of Law No. 2004-294 of March 9, 2004 concerning the adaptation of justice to the changes in criminality (the Perben II Law) on December 31, 2005, corporate criminal liability applies, in principle, to all offenses.[49] Previously, France had adhered to the principle of specialty according to which legal persons could only be held criminally liable if a special provision provided as such.[50] Indeed, art. 121-2(1) of the former Penal Code provided that "legal persons... are criminally liable... in the cases provided for in the law".[51] The legislator was thus given responsibility for determining the scope of corporate criminal liability. It opted for a broad notion of corporate criminal liability by providing that legal persons could be held liable for the majority of offenses found in the Penal Code, as well as a significant number of offenses not found in that code.[52] The principle of specialty and its application by the French legislator were highly debated among scholars in France.[53] However, it was not until Law No. 2004-204 of March 9, 2004, that it removed the specialty principle and

[47] Cass. com., April 2, 1996, Bull. Joly 1996, 510, n. Le Cannu. On this question, see Pariente 1993, 247. See also Segonds 2009, paras. 5 et seq.

[48] For an in-depth analysis, see Desportes 2002, paras. 67 et seq.

[49] Concerning this question: Ducouloux-Favard 2007, para. 5. See also Delage 2005, étude 2.

[50] For a detailed study, see Maréchal 2009b, paras. 57 et seq.

[51] E.g., Cass. crim., October 30, 1995, Bull. crim., No. 334, 966.

[52] Desportes 2002, paras. 82 et seq.

[53] The principle of specialty and its application by the French legislator were heavily criticised by some legal scholars. Others argued that the principle of specialty was necessary in light of the fact that certain offenses could not be imputed to legal persons (Bouloc 1993, 291), though many others remained unconvinced (Desportes 2002, paras. 94 et seq.). Another justification for the principle of specialty was that of prudence. Scholars argued the legislator should only hold companies liable in those cases in which it was the most effective and necessary (Desportes 2002, para. 97). Some scholars agreed with this justification, upon the condition that the offenses specified were limited, which was not the case. It also seemed paradoxical to some scholars that the French legislator neglected to specify criminal corporate liability for offenses, for which corporate accountability would seem natural (Desportes 2002, para. 97). Legal scholars pointed out other drawbacks of the principle of specialty (see, in particular, Desportes 2002, paras. 98 et seq.).

replaced it with a general corporate criminal liability principle, which covers all offenses. Nonetheless, the principle of generality was made subject to exceptions, for example for crimes involving the press.[54] Further, if the offense provision implicates qualities that only a natural person could have, it is up to the judge to decide if such an offense could or could not be imputed to a legal person. Otherwise, all (intentional and unintentional) offenses committed after December 31, 2005, may be committed by a corporation.[55]

5.7 The Persons Who Trigger Corporate Criminal Liability

Corporate criminal liability is a form of personal responsibility meaning that the offense must have been committed through an organ or a representative of the legal person. The principle of personal responsibility is an important pillar of French criminal law and it applies to natural as well as legal persons.[56] To ensure that the principle of personal responsibility is respected in the case of legal persons, the French legislature has provided that criminal liability may only be triggered by actions taken by the organs and representatives who legally express the legal person's will. Its criminal liability will not be triggered by the actions of an agent whether he/she is an employee, a senior manager,[57] or another person.

Thus, the persons who could trigger a company's corporate liability are its organs and representatives.

5.7.1 Organs

An important distinction in French law is between de facto organs and de jure organs.

The notion of de jure organ covers all persons invested, either individually or collectively,[58] by the laws or the by-laws of a legal person with powers of direction.[59] In general partnerships *(société en nom collectif)*

[54]Article 43-1 of the Law of July 29, 1881, on the freedom of the press and art. 93-4 of the Law No. 82-652 of July 29, 1982, on audiovisual communication. For a detailed study of the exceptions, see Maréchal 2009b, paras. 65 et seq.

[55]Note that if the offense committed is unintentional, the legal person's criminal liability is triggered independently of any causal link.

[56]Cass. crim., June 20, 2000, see above n. 27.

[57]For a detailed study, see Desportes 2002, paras. 149 et seq.; and Caille 2009, para. 72.

[58]Maréchal 2009b, para. 77 and Caille 2009, para. 64.

[59]Cass. crim., July 7, 1998 *(Romain R. et Sté Zavagno-Riegel)*, Bull. crim. 1998, No. 216; Rev. sc. crim. 1999, 317, obs. Bouloc, obs. Giudicelli-Delage.

and limited liability companies *(société à responsabilité limitée)*, the organ is the manager *(gérant)*. A public limited company *(société anonyme)* may be established with a board of directors *(conseil d'administration)* or with a management board *(directoire)* and a supervisory board *(conseil de surveillance)*. If a public limited company has been established with a board of directors, then the board is recognized as an organ along with its president and the general directors. If the public limited company's founders have opted for a management board, then its organs are the management board, the president of the board, the directors who are endowed by the supervisory board with the power to represent the company, as well as the supervisory board. The general meeting of shareholders is always considered an organ of the company. In practice, however, it is improbable that a decision made by the general meeting or the supervisory board would trigger the criminal liability of the company as these organs are not responsible for its daily management.

The question remains whether criminal liability may be triggered by the actions of the legal person's de facto organs. The *Cour de cassation* has not yet handed down a decision on this question, though several courts have been prepared to recognize that corporate criminal liability is triggered by an apparent representative[60] or a de facto director.[61] On this question, French legal scholars are divided. A majority is in favor of the possibility of prosecuting legal persons for offenses committed by their de facto organs,[62] and, indeed, there are several arguments in favor of treating de facto directors the same as de jure directors.[63] In practice, however, this question is of little importance:[64] de jure strawmen directors are often accomplices of de facto directors and therefore also commit offenses on behalf of the company so triggering the company's responsibility in criminal law.[65]

5.7.2 Representatives

The term "representative" first appeared in the text of the 1986 draft Penal Code, the 1978 and 1983 drafts only referring to "organs". Neither the parliamentary debates nor the circular clarify the notion of a representative.

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[60] Cass. crim., November 9, 1999, see above n. 33. See also Cass. crim., December 17, 2003, No. 00-87.872 (de facto representative).

[61] T. corr. Strasbourg, February 9, 1996, Les annonces de la Seine 1996, No. 24, 10.

[62] E.g., Delmas-Marty 1990, 119.

[63] Delmas-Marty 1990, 119; Desportes 2002, paras. 119 et seq.; Caille 2009, para. 68.

[64] In this regard, Roujou de Boubée 2004, 539.

[65] Desportes 2002, para. 118.

However, it would seem that the notion of a representative should not be confused with legal representatives – its organs – because it has a specific meaning.[66] Thus, it is necessary to determine who are the representatives of a legal person other than its organs.[67]

It emerges, first, that a person, other than a corporate officer who is designated by law to manage the company is considered a representative of the legal person distinct from its organs. Second, it would seem that someone who has been granted the right to represent the company in certain situations by a judicial decision is recognized as a representative. This category would include provisional administrators of a company or of an association named by a court or a company liquidator.

Third, persons who have been delegated powers from the directing organ of the legal person should be considered as its representatives. In the area of criminal law, the delegation of powers is the act by which a company's director confers on an employee the responsibility of respecting the laws and regulations in a certain sector of the company's activity.[68] However, the scope of this delegation exceeds the scope of delegation of powers in the criminal law's domain of labor law.[69] The delegation of powers must be "specific" and have been given to an agent *(préposé)* who has the competence, the authority, and the means to accomplish the mission he/she was entrusted with.[70] When it is regular, the delegation transfers to the delegate the power to incur criminal liability in association with the exercise of the delegated powers. The delegator is thus exonerated from any criminal liability for offenses committed within the scope of the delegated activities provided that he/she did not participate in the criminal activities him/herself. After a long period of uncertainty and academic debate, the *Cour de cassation* has clarified, first, implicitly[71] and then explicitly,[72] that the delegate also becomes a representative for the purposes of art. 121-2 Penal Code. Hence, he/she is capable of triggering the company's liability for offenses within the scope of his/her delegated powers

[66] Desportes 2002, para. 123.

[67] For a detailed study, see Desportes 2002, paras. 125 et seq.

[68] Rép. min. No. 57171, JOAN Q, January 24, 2006, 756. – Rép. Min. No. 15771, JO Sénat Q, January 26, 2006, 223.

[69] See, in particular, Cass. crim., March 11, 1993, Bull crim., No. 112, p. 270; Bull. Joly 1993, 666, n. Cartier; Rev. sc. crim. 1994, 101; Dr. pén. 1994, comm. No. 39.

[70] Cœuret/Fortis, 2004, paras. 276 et seq.; Batut, 1996, 131, 136 et seq.

[71] Cass. crim., December 1, 1998 *(Sté Mazzotti)*, Bull. crim., No. 328; D. 2000, 34, n. Houtmann; Rev. sc. crim. 1998, obs. Guidicelli-Delage.

[72] Cass. crim., November 9, 1999, see above n. 33 – Cass. crim., 14 déc. 1999 *(Sté Spie-Citra)*, Bull. crim., No. 306; Rev. sc. crim. 2000, 600, obs. Mayaud; Dr. pén. 2000, comm. 26, obs. Véron; Rev. sc. crim. 2000, 600, obs. Bouloc.

and on the behalf of the legal person.[73] Legal scholars have applauded this decision.[74]

Note that in a recent decision, the *Cour de cassation* admitted that criminal liability for a legal person can even be triggered by a third person who is not a salaried employee, provided that person is authorized to carry out material acts in its name and on its behalf.[75] Thus, the court adopted a broad interpretation of the notion "representative".[76]

5.7.3 A More or Less Demanding Condition

Corporate criminal liability in France requires the intervention of an organ or a representative of the legal person. The condition that the offense be committed by an organ or representative applies to all offenses, however, and according to French scholars, it is more or less demanding depending on the nature of the offense. In particular, certain offenses may be imputed to the legal person simply because it was responsible for respecting, and did not respect, certain rules and regulations, such as those designed to protect public health, security, and sanitation. Human intervention is still required in these cases but, due to the nature of the offense, the condition is automatically satisfied.

5.8 Conditions of Liability

5.8.1 The Commission of Offenses "on Behalf of" the Entity

Article 121-2 Penal Code requires that an organ or representative of the legal person commits an offense "on the behalf of" the entity rather than for its benefit.[77]

The notion, an act or omission "on behalf of" the legal person, was interpreted by a circular *(circulaire)* of the Minister of Justice of May 14, 1993, which commented on the provisions of the legislative part of the new Penal

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[73] TGI Bastia, June 3, 1997, Rev. sc. crim. 1998, 99, obs. Mayaud.

[74] This solution is said to be justified as the delegate replaces the organs of the legal person, for which he exercises his/her prerogative on behalf of the legal person. The delegate also benefits from a sort of transfer of power and representation (Desportes 2002, para. 134). It thus makes sense that the delegating body should be exonerated but not the legal person itself. Scholars also contend that an alternative solution would have stripped the reform of its ability to reach its objective to ensure better enforcement of work accident issues (Desportes 2002, para. 134).

[75] Cass. cim., October 13, 2009, Dr. pén. 2009, comm. 154, n. Véron.

[76] Maréchal 2009b, para. 83.

[77] For a detailed study, see Maréchal 2009b, paras. 99 et seq.

Code. The circular clarified that "a legal person will not be held liable for offenses committed by a director in the exercise of his functions, if the director acts on his own behalf and in his own personal interest, sometimes even at the expense of the legal person". This formula is to be understood broadly to mean that a director or representative's act need only "present a link with the organization, the functioning or the accomplishment of the legal person's mission".[78]

According to French scholars, the organ or representative who acts in the name and in the interest of the legal person also acts on behalf of the legal person; this interest can consist in the realization or anticipation of a financial profit. It also seems that the corporate criminal liability of the legal person is triggered when the organ or representative is performing activities that have, as their object, maintaining and securing the organization and functioning of the legal person. This is true even if the offense does not benefit the legal person. In some situations, legal persons will additionally profit from an offense but this is not a requirement for holding the legal person criminally liable.

One issue raised by legal scholars is whether a company should be criminally liable if the offense was only committed in the interest of a minority of the legal person's members. Scholars have argued that this situation is similar to the one in which the agent or director acts on his/her own behalf and in his/her own interest. According to this line of thinking, since several people have acted – by an intermediary member – in their own self-interest and not in the interest of the company, the company cannot be held accountable for their actions.[79]

5.8.2 Conviction of a Natural Person as a Condition for Corporate Liability?

Though an offense must have been committed on behalf of the company by one of its organs or representatives,[80] the prosecution of a natural person for the same offense is not a requirement for bringing criminal charges against a company.[81] This seems to be an appropriate solution given that

[78]Caille 2009, para. 82. See also Cass. crim., April 6, 2004 *(Assistance Publique-Hôpitaux de Paris)*, Bull. crim. 2004, No. 84; Dr. pén. 2004, comm. 108, obs. Robert.

[79]Desportes 2002, para. 187.

[80]Cass. crim., May 23, 2006 *(SNC Norisko Coordination)*, Dr. pén. 2006, comm. 128, n. Véron; D. 2007, 399, obs. Roujou de Boubée; D. 2007, 617, obs. Saint-Pau; D. 2007, 1624, obs. Mascala; Rev. sc. crim. 2006, 825, obs. Mayaud; Rev. sociétés 2007, 1624, obs. Bouloc.

[81]TGI Chambéry, October 11, 1996, cited by Saint-Pau, 2006, 1016. For a detailed study, see Maréchal 2009b, paras. 115 et seq.

one of the legislator's objectives in introducing corporate criminal liability was a more just imputation of liability for offenses committed in a corporate context. This would not be possible if the prosecution was not free to charge, as it deems fit, the company rather than the natural persons who actually committed the offense. This requirement does not imply the conviction of the natural person who committed the offense in order to bring charges against the legal person.[82] There are, moreover, cases in which the conviction of a natural person, organ or representative, is impossible.

Nonetheless, the criminal courts must designate the organ or representative who has triggered the legal person's criminal liability.[83] There are, however, limits to this obligation. Indeed, according to the *Cour de Cassation*, it suffices that the court can establish with certitude that all the elements of an offense were committed by a natural person (i.e., an organ or representative of the legal person).[84] Judges can thus find the legal person criminally liable without identifying the precise perpetrator from the moment that this offense could "only" have been committed by its organ or representative.[85] That said, when intent is an element of the offense, identification of the natural person is often a practical necessity: it is difficult, if not impossible, to prove that the law was violated, with the full knowledge of the organ or representative, if the physical perpetrator was not identified.

5.8.3 Defective Organization, Lack of Supervision, and the Relevance of Corporate Compliance Systems

In French law, corporate criminal liability is not dependent on fault on the part of the legal person. It is thus not necessary to establish fault on the part

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[82]Cass. crim., December 2, 1997 *(Sté Roulement Service)*, Bull. crim. 1997, No. 420; JCP éd. G 1999, I, 112, obs. Véron; D. affaires 1998, 225, 432; Rev. sc. crim. 1998, 536, obs. Bouloc; Rev. sociétés 1998, 148, n. Bouloc; RJDA 1998, obs. Rontchevsky; Bull. Joly 1998, 512, n. Barbiéri; Dr. et patrimoine 1998, No. 2011, obs. Renucci.

[83]Cass. crim., April 29, 2003 *(Assoc. commerçants centre La Thalie)*, Bull. crim. 2003, No. 91; Rev. sc. crim. 2004, 339, obs. Fortis; Dr. pén. 2003, comm. 86, n. Robert; D. 2004, 167, n. Saint-Pau; D. 2004, somm. 319, obs. Roujou de Boubée.

[84]Cass. crim., December 1, 1998, see above n. 65 – Cass. crim., May 24, 2000 *(Sté Mac Donald's France)*, Bull. crim. 2000, No. 203; Rev. sc. crim. 2000, 816, obs. Bouloc. See also the Report for 1998 of the Cour de cassation, 303.

[85]Cass. crim., June 20, 2006, Bull. crim. 2006, No. 188; D. 2007, 617, n. Saint-Pau; JCP éd. G 2006, II, 10199, n. Dreyer; Dr. pén. 2006, comm. 128, n. Véron; D. 2007, 1624, obs. Mascala; Rev. sc. crim. 2006, 825, obs. Mayaud; Rev. sociétés 2006, 895, obs. Bouloc. Cass. crim. June 25, 2008, Bull. crim. 2008, No. 167; Dr. pén. 2008, comm. 140, n. Véron; Rev. sociétés 2008, 873, n. Matsopoulou; Rev. sc. crim. 2009, 89, obs. Fortis; JCP éd. E 2009, 1308, n. Sordino. See also Maréchal 2009b, para. 90 and Caille 2009, para. 77.

of the legal person in addition to the fault of the natural person, whether an organ or a representative of the legal person.

Nonetheless, some legal scholars and certain local courts[86] have preferred the view that corporate criminal liability is subject, not only to the requirement that an offense is committed by an organ or representative with the requisite mental state on behalf of the legal person, but also to the requirement that the fault of the legal person itself be established.[87] This type of fault could be established when the commercial or social policy of the legal person, or its "defective" organization, played a role in the commission of the offense.

This line of reasoning has been criticized for a number of reasons.[88] First, the principle laid down in art. 121-1 Penal Code does not seem to imply that it is necessary to establish fault on the part of the legal person, distinct from the fault of the organs or representatives.[89] Second, and most importantly, the need to establish a separate fault on the part of the legal person has explicitly been rejected by the *Cour de cassation.*[90] And, there are still other arguments that argue against a "double fault" requirement.[91]

In addition, the legal person is not given the means with which to exonerate itself from criminal liability, i.e., a special excuse or defense. Under art. 121-2 Penal Code, the commission of an offense by the organ or representative on behalf of the legal person, i.e., within the framework of the legal person's activities, suffices to trigger corporate criminal liability, whatever the behavior of the legal person itself. The only possibility for the legal person to avoid criminal liability is to demonstrate that the organ or the representative was not acting on its behalf. However, in so doing, the legal person does not really exonerate itself from criminal liability because it is showing that a condition of corporate criminal liability found in the text has not been met. The only real exceptions are provided in arts. 122-1 through 122-8 Penal Code. Yet, in reality, these could only conceivably apply to natural persons and do not include sound corporate governance in any case. It may still be possible for a company to benefit from the immunity of one of its directors.[92]

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[86] See, e.g., T. corr. Versailles, December 18, 1995, Dr. pénal 1996, 71, obs. Robert; JCP 1996, II 22640, n. Robert.

[87] For a presentation of their arguments, see Desportes 2002, para. 165.

[88] Delage 2005, No. 4 et seq.; Desportes 2002, No. 166 et seq.

[89] See Desportes 2002, paras. 166 et seq.

[90] Cass. crim., June, 26, 2001 *(Sté Carrefour)*, Bull. crim. 2001, No. 161; Dr. pén. 2002, comm. 8, n. Robert; *D.* 2002, somm., 1802, n. Roujou de Boubéé; JCP éd. E, February 21–28, 2002, Nos. 8–9, Jurisprudence, 375, n. Ohl.

[91] Desportes 2002, No. 166 et seq.

[92] On this question, Desportes 2002, para. 199.

5.9 Sanctions

French law categorizes criminal acts or omissions as felonies, misdemeanors, and minor offenses, and sanctions as pecuniary or non-pecuniary penalties. Whilst certain sanctions, such as imprisonment, may only be imposed on natural persons, others, which deprive or limit corporate rights or jeopardize proprietary interests, may be imposed on natural persons and legal persons alike. The penalties that can be imposed on a legal person are enumerated in arts. 131-37 through 131-49 Penal Code, the content and conditions of applicability of certain penalties being provided for in arts. 131-45 through 131-49 Penal Code. These provisions distinguish between penalties for felonies and misdemeanors, on the one hand (arts. 131-37 through 131-39 Penal Code),[93] and penalties for minor offenses, on the other (arts. 131-40 through 131-44 Penal Code).[94] A further distinction is made between pecuniary and non-pecuniary penalties.

5.9.1 Pecuniary Penalties

Legal persons principally incur fines whether they commit felonies, misdemeanors, or minor offenses. According to the *Conseil constitutionnel*, in its decision No. 82-143 DC of July 30, 1982, the imposition of a fine on a legal person is not opposed by any constitutional principle. In addition, according to art. 131-39 Penal Code, legal persons may be subject to other pecuniary sanctions. The principal pecuniary penalty incurred by legal persons, for all types of offense, is still the fine, however.

Note that there is no provision in French law that would authorize a legal person to sue its organs or representatives for the amount of the pecuniary penalties, which it had incurred due to that individual's or organ's offense.[95]

5.9.1.1 Fines for Felonies and Misdemeanors

The general and principal penalty for a felony or misdemeanor is the fine. In fact, according to art. 131-37 Penal Code, a fine is always available against

[93] For a detailed study, see Le Gunehec 2001 and Maréchal 2010a.

[94] Maréchal 2010b.

[95] This would also constitute a negation of the legal rule, which identifies legal persons with their organs and representatives. Above all, this possibility seems to be in direct conflict with the French principle of *personnalité des peines* (Le Gunehec 2001, para. 14). Even when the penalty takes the form of a fine, the criminal sanction does not constitute damage that can be sued for in civil court (Cass. crim., October 28, 1997, Bull. crim. 1997, No. 353, 1203; D. 1998, No. 20, 268, n. Mayer and Chassaing).

legal persons, even in the absence of an express provision in the text providing for the criminal liability of the legal person for the offense.[96] Further, though the French legislature has provided for alternative sanctions for most felonies or misdemeanors, there are some misdemeanors for which only a fine may be incurred.

The amount of the fine incurred by a legal person for felonies and misdemeanors is established by art. 131-38 Penal Code, which sets a maximum fine for legal persons of five times the rate provided for natural persons. When the law does not establish a rate for natural persons, the maximum fine is set at €1 000 000 by subsection 2. The quintuple limit is also applicable when the rate for natural persons is proportionate.

Though some French legal scholars heavily criticized these fines as too high,[97] they would seem be to justified by the fact that legal persons may have access to more wealth than natural persons.[98] A proposition to calculate the corporate fine as a multiple of a legal person's turnover was contemplated but rejected during Parliamentary debates. Such a solution would have encountered difficulties in proving a legal person's turnover and would have led to the introduction of several exceptions in the law due to the nature of certain legal persons; this would have been incompatible with the French principle of equality under law.[99]

5.9.1.2 Fines for Minor Offenses

Article 131-40 Penal Code contains the provision on penalties for minor offenses committed by legal persons. It provides for the systematic fining of legal persons even in the absence of an express provision in the regulatory texts specifying corporate criminal liability for such an offense. The fine is the form of penalty, which can be imposed in the first place in case of minor offenses.

The method for calculating the fine is identical to that applied to misdemeanors and felonies: by art. 131-41 Penal Code, a legal person may be required to pay no more than five times the amount applicable to natural persons in the offense provision.

Offenses are divided into five classes according to the maximum fine that could be imposed on a natural person under art. 131-13 Penal Code. Hence, the maximum fine applicable to a legal person for each of the five categories of offenses is €190 (€5 × 38) for the first class of offenses, €750 (€5 × 150) for the second class, €2 250 (€5 × 450) for the third, €3 750 (€5 × 750) for the fourth, and €7 500 (€5 × 1 500) for the fifth.

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[96] Le Gunehec 2001, para. 10.
[97] Boizard 1993, 332.
[98] Le Gunehec 2001, para. 12.
[99] Le Gunehec 2001, para. 12.

These fines are smaller than the fines incurred for felonies and misdemeanors. However, the fines for offense are cumulative according to art. 132-7 Penal Code.

5.9.1.3 Other Pecuniary Penalties for Felonies and Misdemeanors

Pecuniary penalties, other than fines, applicable to felonies and misdemeanors are listed in art. 131-39 Penal Code. This article establishes a non-exhaustive catalogue of penalties that may be imposed on a legal person. The listed penalties include the prohibition, for a term of 5 years at most, on the making of payments by check and the use of credit cards (art. 131-39(1), No. 7, Penal Code), as well as the confiscation of any object used or designated to commit the offense (art. 131-9(1), No. 8, Penal Code). Unlike fines, however, these penalties can only be imposed if the statute establishing corporate criminal liability specifically provides for the sanction.

5.9.1.4 Other Pecuniary Penalties for Minor Offenses

For minor offenses, alternative pecuniary penalties and complementary penalties may replace, or be imposed in addition to, a fine.[100] Thus, when a minor offense in the fifth class has been committed, art. 131-42 Penal Code grants courts the ability to replace the fine with an alternative or substitute penalty including the prohibition on writing checks or using credit cards for a maximum of 5 years and the confiscation of property used or designated to commit the offense or obtained through commission of such an offense. Complementary penalties for minor offenses are an innovation in French criminal law. Only two pecuniary, complementary penalties for minor offences targeting legal persons are provided for in the Penal Code: the confiscation of objects linked to the commission of the offense and, only concerning fifth class offenses, the prohibition against check payments for a period of no more than 3 years (art. 131-43 Penal Code). Under art. 131-44 Penal Code, a criminal court may also impose these as principle penalties when an offense may be sanctioned by one or more complementary penalties provided for in art. 131-43.

Lastly, the court can, in the case of fifth class minor offenses, impose, in lieu of, or in addition to, fines, a *sanction-réparation* according to the modalities set out in art. 131-8-1 Penal Code.[101] In this case, the court determines the amount of the fine, which may not exceed €7 500. In the case the legal person does not fulfill its obligations to remedy, the court can

[100] For an in-depth study, see Maréchal 2010b, paras. 6 et seq.

[101] For a detailed study, see Maréchal 2010b, paras. 27 et seq.

order the execution of such a fine, in toto or in part, according to art. 712-6 Code of Criminal Procedure *(Code de procedure pénale)*.

5.9.2 Non-pecuniary Sanctions

Penalties applied to felonies and misdemeanors incurred by legal persons are listed in art. 131-39 Penal Code. This article establishes a non-exhaustive[102] catalogue of penalties that can be incurred by legal persons. Unlike fines, which are systematically incurred, these penalties can only be imposed on a legal person if the statute providing for the criminal liability of a legal person explicitly provides for the sanction in question.

Penalties for minor offenses are only of a pecuniary nature; however, they can be aggravated by recidivism.

5.9.2.1 Dissolution

The dissolution of the legal person, provided for by art. 131-39(1), No. 1, Penal Code is the harshest non-pecuniary sanction. Due to the gravity of this penalty, the legislator opted to limit its application according to certain conditions and to limit the number of offenses to which this penalty may apply.[103] It also excluded certain legal persons from its scope altogether.

Article 131-39(1), No. 1, Penal Code sets out the conditions for the imposition of dissolution as a penalty: the offense may only be punished with such a penalty if the legal person was created with the purpose of committing the offense or – in the case of a felony or misdemeanor punished with at least 3 years of imprisonment in the case of a natural person – if it was perverted from its purpose in order to commit the offense. Thus, the mere fact that the statute establishing the possibility of corporate criminal liability provides that legal persons may be sanctioned with dissolution is not sufficient for the court to impose such a penalty.

This article foresees two scenarios. In the first scenario, it must be shown that, at the moment of its creation, the legal person's objective was to commit this offense. This requirement raises several questions and challenges of proof.[104] Thus, legal scholars have applauded Law No. 2001-504 of June 12, 2001, which limited its scope. The second scenario applies if the felony and misdemeanor in question could be sanctioned by a term of imprisonment of at least 3 years were the defendant a natural person. In such cases, it is sufficient that the legal person was perverted from its purpose at the time the offense was committed. Some legal scholars argue that this

[102] Le Gunehec 2001, para. 15.

[103] Maréchal 2010a, para. 38 and paras. 44 et seq.

[104] For a detailed analysis, see Le Gunehec 2001, para. 23.

is not a real condition: from the moment that the legal person commits an offense – if it is not established that it was founded to pursue this objective – the purpose of the legal person is necessarily perverted.[105]

In both scenarios, it seems necessary to establish some sort of intention on the part of the legal person to commit the offense. Indeed, the law requires that the legal person was created with the purpose of committing the offense or, when a legal person's purposes are perverted, in order to commit an offense. It implies, according to some scholars,[106] that the sanction of dissolution is reserved for intentional offenses. However, this penalty had also been provided for in relation to certain unintentional offenses.

Further, it would seem that dissolution should be imposed only in the gravest cases or when the offense presents a particular danger; not surprisingly, the majority of cases that end in dissolution are intentional felonies or intentional misdemeanors. That said, dissolution is not provided for in relation to certain grave offenses for which the criminal responsibility of the legal person has been established, such as aggravated theft, criminal theft, and criminal destruction of property, and dissolution may be imposed for offenses of lesser gravity, such as the drafting of an attestation or certificate stating materially inaccurate facts (art. 441-7 Penal Code). This seems incoherent and unjustified.

Finally, dissolution is impermissible in relation to public law legal persons, political parties or groups, trade associations, and institutions representing workers on constitutional grounds (art. 131-39(3) Penal Code).

5.9.2.2 Prohibiting the Direct or Indirect Exercise of One or More Professional or Social Activities

Article 131-39(1), No. 2, Penal Code provides for a further harsh penalty: the "prohibition, permanently, or for a term of 5 years at most, on the performing, directly or indirectly, of one or several professional or social activities". This sanction can have as the indirect consequence the dissolution of the legal person, particularly a company, if the forbidden activity is the objective of the company or if the prohibition renders the company financially untenable. The sanction can be imposed definitely or for a maximum term of 5 years. The court can thus opt for a determinate penalty of no more than 5 years.[107] For certain offenses, however, only a determinate penalty of less than 5 years can be imposed, and thus the court has no choice. This penalty applies, at least in theory, to an important number of offenses.

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[105] Le Gunehec 2001, para. 23.

[106] Le Gunehec 2001, para. 24.

[107] Le Gunehec 2001, para. 33.

The features of this penalty are set out in art. 131-28 Penal Code. The prohibition can target the social or professional activity in the exercise of which or on the occasion of which the offense was committed or any other professional or social activity defined by the law punishing the offense.[108] Certain scholars contend that this leads to ambiguity: the majority of these statutes specify that only the social or professional activity exercised in the commission of the offense may be prohibited, and a small minority remain silent.[109] In the latter cases, scholars contend courts are able to impose whatever penalty they see fit; a different interpretation would render the distinctions found in special criminal law provisions meaningless.[110]

Unlike dissolution (or judicial surveillance, discussed next) there are no exceptions *ratione personae* to the scope of this penalty's application: all legal persons can be stripped of the right to perform these types of activities. Legal scholars have asked if it would not be preferable to exclude public law legal persons: it seems contrary to the principle of continuity of public services that a court may prohibit a territorial authority or an establishment under public law from continuing to perform its functions.[111] Further, we should note that the third subsection of art. 131-27 Penal Code excludes prohibitions for crimes concerning the press, though the exact boundaries of this exception are sometimes difficult to ascertain.

5.9.2.3 Placement of the Entity Under Judicial Surveillance

Judicial surveillance is provided for by art. 131-39(1), No. 3, Penal Code. This penalty is attached to a significant number of offenses. It only applies to legal persons; however, due to its invasiveness, it cannot be imposed on public law entities, political parties or groups, or trade associations (art. 131-39, last subsection, Penal Code). Moreover, the penalty cannot be imposed for more than 5 years. Finally, a number of scholars would prefer that the legislator or, in the default, the executive or judiciary through regulations or case law, further determines the boundaries of this penalty.[112]

The nature of the judicial surveillance as a penalty is elaborated in art. L. 131-46 and art. R. 131-35 Penal Code. Article L. 131-46 Penal Code states that the decision to place a legal person under judicial supervision should permit the appointment of a judicial supervisor whose mission is defined by the court. This supervisory mission is limited to the activity during the exercise of which, or in the course of which, the offense was committed.

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[108] Le Gunehec 2001, para. 34.
[109] Le Gunehec 2001, para. 34.
[110] Le Gunehec 2001, para. 34.
[111] Le Gunehec 2001, para. 35.
[112] Le Gunehec 2001, para. 43.

The mission is also limited to the surveillance of the legal person's activities. Every 6 months, the judicial supervisor must inform and report on the progress of his/her mission to a judge.

Legal scholars often classify this penalty as a substitute suspended sentence in cases where the surveilling judge in the area of the offender's habitual residence lacks jurisdiction. Indeed, this penalty allows the judicial authorities to monitor the future behavior of a legal person that has committed a crime to prevent recidivism.[113]

5.9.2.4 Closing of One or More Establishments

Article 131-39(1), No. 4, Penal Code enables the court to order the closure of one or more establishments operated by the corporation and used to commit the criminal conduct in question. This sanction may be permanent or, if temporary, imposed for a maximum period of 5 years. According to art. 131-33 Penal Code, the closing of one or more establishments is achieved through the prohibition on the exercise, on those premises, of the activity that occasioned the commission of the offense; thus, the code does not call for the closing of the establishment, pure and simple.

5.9.2.5 Exclusion From the Public Marketplace

The sanction of exclusion from the public market for legal persons is provided for by art. 131-39(1), No. 5, Penal Code. This penalty can be imposed indefinitely or for a maximum period of 5 years.

According to art. 131-34 Penal Code, this penalty prohibits the convicted entity from participating, directly or indirectly, in any contract concluded with the state and its public bodies, companies hired or monitored by the state, and territorial authorities, including their associations and public bodies. Depending on their business, this can be a very harsh penalty for companies.

5.9.2.6 The Prohibition Against Public Offerings or Listing of Securities on a Regulated Market

Article 131-39(1), No. 6, Penal Code outlines the penalty by which legal persons are prohibited, permanently or for a maximum of 5 years, from publically offering securities or listing securities on a regulated market.

According to art. 131-47 Penal Code, this prohibition disallows appeals for the placement of securities to any banking institution, financial establishment, or stock market company, as well as any form of advertising for the placement of securities.

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[113] Le Gunehec 2001, para. 38.

5.9.2.7 Notification or Publication of the Decision

Finally, under art. 131-39(1), No. 9, Penal Code, a company may be ordered to post a notice of the sentence pronounced against it or to publicize the sentence in the press or by any means of telecommunication. The content and terms of application of this sanction are stated in art. 131-35 Penal Code.

Notification or publication of the verdict would seem to be an appropriate and efficacious sanction for legal persons, especially companies. For this reason, it is often provided for by the legislator. However, as scholars regularly point out, this penalty may be no less harsh than the other penalties since it may "have fatal consequences for the survival of a company".[114]

5.9.2.8 Penalties Incurred for Specific Offenses

Certain penalties, specific to certain offenses, are not enumerated in art. 131-39 Penal Code but are presented as complementary penalties in the provision of special criminal laws.[115] These are:

- the confiscation of all or a part of the legal person's goods for crimes against humanity, the trafficking of drugs, and acts of terrorism under arts. 213-3, No. 2, 222-49(2), and 422-6 Penal Code;
- the confiscation of all equipment, materials, and goods used to commit the offense, as well as all products resulting from the offense, if the owner could have known of their fraudulent origins and/or uses for the traffic of drugs under art. 222-49(1) Penal Code;
- the confiscation of all goods, other than real estate, used to commit the offense, as well as any products of the offense possessed by a person other than the persons engaged in prostitution in the case of procuring for prostitution under art. 225-24, No. 1 Penal Code;
- the withdrawal of a liquor or restaurant license or the definitive closure for no more than 5 years of an establishment in which the offenses of drugs trafficking or prostitution were committed under arts. 222-50 and 225-22, Nos. 1, and 2, Penal Code;
- the confiscation of commercial funds in the case of procuring for prostitution under art. 225-22, No. 3, Penal Code;
- the reimbursement of the costs of repatriation of the victim(s) in the case of procuring for prostitution under art. 225-24, No. 2, Penal Code; and
- the confiscation of falsified or counterfeited coins or bank notes in the case of counterfeiting under art. 442-14, No. 3, Penal Code.

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[114] T. corr. Versailles, December 18, 1995, see above n. 86.

[115] For a detailed study, see Le Gunehec 2001, para. 71.

5.9.3 Sanctioning Principles

There are no general principles in French criminal law that the judge must respect when deciding the penalties to be applied to a convicted legal person. The French principle of *personnalité des peines*, set forth in art. 132-24 Penal Code, provides that each penalty depends entirely on the circumstances of the case at hand. With this principle in mind, the court determines, *in concreto*, the apposite sanction. The circular concerning the application of the Perben II Law restates this principle, reiterating that each penalty should take into account the circumstances of the offense and the personality of the author; in the case of legal persons, this would be the charges at hand and its economic resources.[116] Hence, it is impossible to identify a set of clear principles that the court would be obliged to respect in sanctioning corporate offenders.

Nonetheless, it is still possible to derive some guidelines from the Penal Code. First, the penalties enumerated in art. 131-39 Penal Code are specific to legal persons, even if certain sanctions could be applied to legal and natural persons. In fact, it is arguable that sanctions for legal persons should adhere to a proper and exclusive regime due to the particular nature of legal persons themselves and the particularity of corporate criminal responsibility.[117] Further, the selection of the penalties that may be imposed reflects preventive objectives.[118] In addition, it is possible to deduce the principle that the sanctions provided for by arts. 131-39 and 131-43 Penal Code are special penalties in that they may only be imposed if specific regulatory or legislative provisions so provide.

5.10 Procedural Issues

The introduction of corporate criminal liability also supposes specific procedural rules as legal persons cannot be treated the same as natural persons during the course of a trial. This is why Title XVIII was introduced into Book IV of the Code of Criminal Procedure by art. 78 of the Law No. 92-1336 of December 16, 1992, concerning the coming into force of the new Penal Code and the necessary adaptations. The procedural rules concerning legal persons can thus be found in arts. 706-41 through 706-46 Code of Criminal Procedure.[119]

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[116] Le Gunehec 2001, para. 83.

[117] Le Gunehec 2001, para. 3.

[118] Le Gunehec 2001, para. 3.

[119] These provisions should be completed by those in arts. 550 et seq., relative to the citations and meaning, which were the object of certain adaptations, and by those found in Penal Code arts. 131-49 and 131-36, requiring that the staff representatives of the charged legal person are informed of the trial date.

Article 706-41 Code of Criminal Procedure indicates that the provisions of this code are normally applicable to the proceeding, the preliminary investigation, and the judgment of offenses committed by legal persons, subject to the specific rules provided for in arts. 706-42 through 706-46 of that code. Thus, the majority of the rules of criminal procedure applicable to natural persons also apply, in principle, to legal persons; particular rules may, however, provide to the contrary.[120]

5.10.1 The Decision to Prosecute

Three points may be made about the discretion of French prosecuting authorities to decide whether to prosecute a legal person, on the one hand, and the differences between its approach to human and corporate suspects, on the other. First, under art. 40 Code of Criminal Procedure, the public prosecutor is free to decide whether to press charges against a legal person just as it is free to decide whether to charge a natural person. That said, in pressing the same charges against a natural and a legal person, the prosecutor may evaluate the case differently. Second, the principle of cumulative liability, found in art. 121-1 Penal Code, allows for proceedings against both the natural person, who is allegedly responsible for the crime, and the legal person; however, the prosecutor is free to decide to only charge one or the other suspect. Third, if it is provided by law, the prosecutor may propose a *procédure de transaction*, which is an exchange similar to a plea bargain, with the legal person.

5.10.2 Jurisdiction

Article 706-42 Code of Criminal Procedure establishes specific rules on jurisdiction for legal persons. The article provides that, when a legal person is investigated or prosecuted, the jurisdiction(s) in which the offense was committed, or in which the legal person's head office is located, has/have jurisdiction. However, the first subsection of art. 706-42 Code of Criminal Procedure specifies that, when a natural person is charged along with the legal person with the same or a connected offense, the courts in which the natural person is prosecuted may also hear the case against the legal person. The latter can thus be brought before the jurisdiction of the place of arrest or residence of one of the natural persons charged. However, the general circular of the *Garde des sceaux* of May 14, 1993 observes that the principle does not apply in reverse: a court does not have jurisdiction over a natural person, just because it has jurisdiction over a legal person. It would

[120] Desportes/Le Gunehec 1995.

seem to follow that a jurisdiction in which the head office of a legal person is situated only has jurisdiction over human suspects if it is also competent regarding these natural persons according to the criteria found in arts. 43, 52, 382, and 522 Code of Criminal Procedure.[121] However, a number of legal scholars contest this interpretation.[122]

In addition, the last subsection of art. 706-42 Code of Criminal Procedure states that the specific dispositions laid out in that article do not exclude the application of the rules of jurisdiction outlined in arts. 705 and 706-17 concerning economic, financial, and terrorist offenses. The same applies for the application of the rules in art. 706-27 Code of Criminal Procedure, which created a special trial court for drug and narcotics trafficking crimes.

5.11 Conclusions

The concept of corporate criminal liability was long and extensively discussed in France before it was recognized in French law on March 1, 1994. The vast large majority of French legal scholars accept today the necessity and the value of corporate criminal liability, even if some of its issues are still hotly debated among them. Nonetheless, legal persons, such as corporations, are rarely punished criminally in practice and, from a comparative perspective, there are a number of important differences between the French law, the scope, conditions, penalties, and procedural aspects of its corporate criminal liability rules, and the laws in other countries where corporate criminal liability has been adopted.

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[121] Desportes/Le Gunehec 1995, no. 61.
[122] Desportes/Le Gunehec 1995, no. 61.

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