

# Industrial crimes and the criminal justice system: experiences from continental Europe

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## Abstract

In Europe, victims of occupational accidents and diseases are often entitled to lump sum compensation payments from social security agencies. In France, however, unlike the systems in many other countries, victims can obtain additional compensation through the civil courts by proving 'inexcusable fault' on the part of the employer. At the same time, in both France and Italy, such victims may have standing in criminal trials and be awarded compensation in their capacity as civil parties. This paper presents a socio-legal analysis of recent decisions of the criminal courts in France and Italy which represent genuine progress in efforts to combat corporate crime. Three cases are discussed: one from France, by the Toulouse Court of Appeal; and two from Italy, by the courts in Turin. These cases have resulted in senior managers of the companies involved being sentenced to prison terms varying from three to 18 years. Civil parties played an important role in these proceedings. While each of these cases – one of which was the object of two judgments, one in first instance and one in appeal – is unique with regard to the facts and rationale behind the initiation of the criminal proceedings, they nevertheless share commonalities that have prompted legal analysts, in both Europe and internationally, to examine the directions in which the criminal law may be moving in terms of holding industrial groups and their senior managers liable for occupational or environmental offences.

## Key words

Criminal proceedings, health, occupational hazards, subcontracting, work

## Introduction

In Europe, with few exceptions, fatal occupational accidents and industrial pollution that can cause serious illness – whether occupational or related to environmental contamination, or both – are essentially matters for courts of civil jurisdiction, which can award compensation to victims and their dependants.<sup>1</sup> However, the social movements that succeeded in exposing the health consequences of asbestos and focus on the liability of the industrial players in those events have led to trials<sup>2</sup> in which the goal is no longer simply to have the courts find the companies civilly liable, but also to secure criminal convictions.<sup>3</sup>

This paper aims to identify the principles laid down in recent decisions of the French and Italian criminal courts in this regard. These decisions represent genuine progress in the effort to combat 'industrial crimes'. Three cases are discussed: from France, a decision of the Toulouse Court of Appeal rendered on 24 September 2012, in the AZF case (explosion in a chemical plant on 21 September 2001);<sup>4</sup> and two from Italy, rendered by courts in Turin, on 16 April 2011 and 28 February 2013, in the Thyssen case (fire at a steel mill),<sup>5</sup> and on 13 February 2012, in the Eternit case (victims of asbestos).<sup>6</sup> The decisions in these cases, in which the civil

parties played an important role, led to the imposition of prison sentences on senior managers, varying from three to 18 years.

In France, victims of occupational accidents or diseases are entitled to flat-rate compensation payments from social security agencies. The victims report an occupational accident or disease to the social security agency, which decides whether the health problem is occupational in nature. If a finding of an occupational accident or disease is made, the social security agency will determine the level of permanent partial disability (PPD) based on the *sequelae*, and pay the victim a lump sum in compensation if the PPD is less than 10 per cent, or an adjusted pension if the PPD rate is equal to or greater than 10 per cent.<sup>7</sup>

Victims may also be awarded additional compensation if they are able to prove ‘inexcusable fault’ (‘faute inexcusable’) on the part of the employer in the civil courts (the social security court). In decisions dated 28 February 2002,<sup>8</sup> the Court of Cassation (‘Cour de cassation’) redefined ‘inexcusable fault’ as the employer’s breach of the duty to guarantee safety, subject to two conditions: that the employer was or should have been aware of the danger; and that they failed to take the necessary measures to protect the employee. Where inexcusable fault is found, the victim can hope to increase their pension, as well as receive compensation for other damages, including their physical and mental suffering, loss of enjoyment of life, or disfigurement.<sup>9</sup>

Victims may, at the same time, file a complaint against ‘X’ or against named persons. In France, the prosecutor (the ‘parquet’), who reports to the political authorities, may institute proceedings or close the case. If the prosecutor closes the case, the victim may then bring the matter before the criminal courts by initiating proceedings as a civil party and circumventing the closure. The victim may, of course, as was the case in the AZF trial, be a party with standing in the criminal trial. Where the accident or disease is found to be occupational in nature, victims are eligible to take action in the criminal courts, but compensation for damages may be claimed only in the social security tribunals, which have exclusive jurisdiction in such cases as stipulated in section L. 452-3 of the Social Security Code. In the other cases, victims are eligible to take action in the civil or criminal courts to obtain compensation for the harm they have suffered.

In Italy, the prosecutor is independent of the political authorities; prosecutors’ duties include instituting criminal proceedings on their own initiative, in light of situations brought to their attention. It was on this basis that an Italian prosecutor initiated the prosecution of Thyssen and Eternit. In the phase of the investigation opened by the prosecutor’s office, the victims are able to appear before the prosecutor, who may hear them or accept any document that they may provide. The prosecutor’s office then submits the findings of the investigation to a judge, who decides whether the requirements for a trial have been met or whether further investigation is needed, after a hearing at which defence counsel and counsel for the victims are heard. In the event that the matter is referred to the criminal courts, only natural persons may be found criminally liable. On the other hand, the victims may seek a finding of civil liability against legal persons in a criminal trial, in order to obtain compensation for the harm suffered, provided that the court grants them standing. Victims who obtain standing as civil parties may be either natural persons or legal persons, but they may not claim for anything other than compensation for the harm they have suffered.

Now that we have outlined these fundamental differences, and noted that in both France and Italy there are three levels of court, we will focus on each of these three significant cases and what the trials reveal about the law.

### **A fatal occupational accident: the Thyssen fire; Court of Turin, 16 April 2011**

Seven workers in the ThyssenKrupp steel mill in Turin died on a night in December 2007, killed by a fire started by an explosion. This was a situation where a ‘double standard’ had been applied. Unlike what had been done in the German plant, senior management of the Thyssen group had decided not to continue investing in safety at the Italian company, which was slated to close within a few years. The day after the accident, a huge demonstration of outrage took place in the streets of Turin to express support for the victims’ families and demand justice. Death on the job, what the Italians call ‘white death’, is the most unjust and infamous violence of the industrial powers.

On 16 April 2011, the Turin criminal court sentenced Harald Espenhahn, aged 45, CEO of the steel works of the German ThyssenKrupp group and a native of Essen in western Germany, to 16 years and six months in prison for ‘voluntary homicide’. Forty-eight former workers had joined the proceeding as civil parties, along with the municipality of Turin, the Piedmont region, unions and community groups. Harsh sentences, for ‘involuntary homicide’,<sup>10</sup> were also imposed on the other five managers of the Italian ThyssenKrupp plant: Gerald Priegnitz, Marco Pucci, Raffaele Salerno and Cosimo Cafuerri were sentenced to 13 years and six months; Daniele Moroni was sentenced to 10 years and 10 months.

The recurring difficulty in this kind of case is in identifying the individuals who are criminally responsible when there is a failure to apply safety measures in the workplace. Such failures are not the result of occasional or simply operational lapses; they are structural dimensions of corporate policy and are attributable to choices made by senior managers.

The first lesson that can be drawn from the Thyssen trial is that the delegation of power within the organisation does not preclude liability on the part of the employer when occupational safety deficiencies are the result of the general choices made in a corporate policy or of structural deficiencies over which the holder of the delegated authority had no real power to act.

The Italian prosecutor took action on the day of the fire itself and immediately initiated searches, which produced evidence essential for charging the various Thyssen senior managers. In addition, in the case of the Thyssen trial, and, as we will see, in the case of the Eternit trial, the judges sought to hold liable executives at the industrial group level, as well as members of the board of directors.

The accused were cited to trial by the court on charges of voluntary homicide and intentional failure to apply safety measures, an offence for which there is a more severe penalty when the failure causes a disaster; that is, any extraordinarily large-scale destructive event that could endanger the lives or physical security of an undetermined number of persons. As well as receiving a prison sentence, the CEO of Thyssen was permanently banned by the Italian authorities from holding public office and temporarily banned from holding government contracts. The accused appealed to the Turin Court of Appeal, however, and in a decision dated 28 February 2013, the court substituted the offence of conscious manslaughter<sup>1</sup> and reduced the sentence to 10 years in prison. The sentences of two other executives who were convicted at trial were also reduced to seven years and eight years, for the plant manager and safety manager respectively.

The position taken by the Italian courts can be compared to that taken by the Cour de cassation in France in the Erika case (marine pollution), in which Total Corporation was convicted in its capacity as charterer of the ship.<sup>11</sup> In that case, the Cour de cassation dismissed the appeal from the decision of the Paris Court of Appeal, which had sanctioned the defendants for an accidental

oil spill by a foreign vessel in the French economic zone in 1999 that resulted in serious damage to its territorial waters and coastline. The Court of Appeal had upheld the judgment of the correctional court, which had convicted not only the ship owner, but also Total, the charterer of the ship, of the offence of water pollution, basing that judgment on the power of control that Total had exercised in the management of the ship.

### **The asbestos health disaster materialises and is finally judged by its consequences: Court of Turin, 13 February 2012**

For 30 years, Casale Monferrato, the Italian asbestos cement capital, has had its life measured by deaths from mesothelioma, not just among the workers, but also as a result of contamination of the workers' families and the environment. This town of 30,000 has been in mourning for thousands of people who are ill or who have died, and a strong social movement has been fighting for justice since the early 1980s.<sup>12</sup>

The Eternit criminal trial in Turin, which began at the initiative of Italian prosecutor Raffaele Guariniello, marked the first time in the world that the issue of the liability of the multinational corporation, Eternit, had been brought before the criminal courts, in a case characterised as an 'intentional disaster'.

How could such a disaster have happened? Asbestos is a mineral whose effects on respiratory function have been known since the end of the 19th century. In the 1930s, the asbestos industry completed studies that proved the carcinogenic nature of asbestos. The decision was made at the time to keep the results secret, knowing that there would certainly be deaths, but believing that, because they would occur 30 years after exposure, it would be difficult to prove that the affected individuals died as a result of this exposure. It was not until research by Selikoff in the 1960s, on the high levels of lung cancer among insulation workers in the USA, that the toxicity of asbestos began to be made public.

The asbestos industry's strategy of concealing the health effects of asbestos was then transformed into a proactive offensive. On 24–25 November 1971, The First International Conference of Asbestos Information Bodies was held in London, at the industry's initiative. It was attended by 35 'information bodies' from 11 different countries. The objective was to maintain control of the scientific information relating to the health effects of asbestos and to organise pressure on the governments of the various asbestos-producing and -consuming countries to prevent drastic regulations for preventing and compensating asbestos-related diseases from being adopted, such regulations being perceived as absolutely unacceptable 'attacks' on the asbestos industry. A global disinformation strategy was constructed by the world's leading multinational asbestos firms that enabled the industry to continue in Europe until the beginning of the 21st century.<sup>3</sup>

Rather than basing the prosecutions on the offences of homicide or interference with physical security, the prosecutor's office chose to prosecute for the intentional failure to apply safety controls – such as installing protective measures or eliminating hazards – for which sentences are harsher when the failure causes a 'disaster' that threatens the safety and security of workers and/or the public.

The court upheld these charges against Eternit's corporate executives, citing their reckless misrepresentation. In Italy, the case law makes a distinction between the offence of knowing carelessness and fraudulent intent. The latter is subdivided based on the degree of seriousness: reckless misrepresentation, direct misrepresentation and, the more serious of the three, intentional misrepresentation. The court convicted the accused on the charge of reckless misrepresentation,

an offence based on the idea that perpetrators can foresee the possibility that the result will materialise as a consequence of their conduct. If they do not have the intent to cause the result, they accept the result as a consequence of their conduct, which is comparable to accepting the risk.

In Turin, on 13 February 2012, Stephan Schmidheiny, the former CEO of Swiss Eternit, and Louis Cartier de Marchienne, the former CEO of Belgian Eternit, were convicted of crimes against the victims of asbestos and sentenced to 16 years in prison. The two CEOs were also banned permanently from holding public office and from holding government contracts for three years, and were ordered to pay large compensation awards to the civil parties. On 03 June 2013,<sup>13</sup> the Court of Appeal of Turin confirmed this judgment, including the finding that Stephan Schmidheiny was guilty of the offence of environmental disaster. Schmidheiny's prison sentence was increased to 18 years and he was ordered to pay €30,000 to each person exposed, in acknowledgement of the prejudice of exposure. The court also acknowledged the death of Louis Cartier de Marchienne during the course of the proceedings.

The main legal principle that should be retained from the Eternit trial in Turin is the criminal characterisation of the facts found by the judges. In Italy, the finding was that the offences of involuntary homicide and involuntary bodily harm are not appropriately applied to corporate crimes.

Raffaele Guariniello, the prosecutor, therefore based his prosecutions on the offence of 'environmental disaster', which was originally enacted to allow for prosecutions for the consequences of buildings falling into ruin. He believed, and the court agreed, that the Eternit managers, and also the Thyssen managers, had committed 'reckless misrepresentation': the perpetrators foresaw the possibility that the result would materialise as an additional consequence of their conduct. In Italy, reckless offences are classified as intentional offences, which attract longer prison sentences given that offenders are seen as having knowingly breached the law.

In the Thyssen case, the finding of acceptance of the risk was based on the fact that investment in improving the plant's firefighting equipment had been postponed for a few years and that in the workshop, where the fire had broken out, work required to bring it into compliance had been deferred.

It is worth noting the difference in the treatment of the asbestos issue in France and Italy. The contribution by the French industrialists to the concealment of the health effects of asbestos is equal to what was done by those who were convicted in Turin, particularly in the case of those running the two major fibre cement firms in France, Eternit and Saint-Gobain. They and many other corporate executives were found to have committed an 'inexcusable fault of the employer' and had contributed to what is determined in Italy to be an 'intentional disaster'. We should also remember the corporate behaviour of the Eternit mine in Corsica, Société Le Nickel in New Caledonia, the naval shipyards, the nuclear, chemical, steel, auto and aerospace industries, the big construction firms, public transit, and so on. But in France, prosecutors do not operate at arm's length from the political (and thus economic) authorities. The prosecutor's office did not initiate a judicial investigation into this social crime on its own initiative. The victims laid a complaint against the asbestos industrialists in France and had been waiting since 1995 for the trial to finally begin.

In other cases in France, however, criminal convictions have been delivered based on the offence of 'endangering the lives of others'. For example, in a decision dated 30 October 2007, the Cour

de cassation found a corporation that was responsible for industrial lead pollution guilty of the offence of endangering the lives of others.<sup>14</sup> The penalty was therefore imposed for the company's conduct at the time when it committed the acts, without waiting for the damage to occur. This decision is particularly relevant for cases involving exposure to carcinogenic substances where the damage will only become apparent well after the initial exposure has occurred.

### **An industrial accident: the AZF plant explosion; Toulouse Court of Appeal, 24 September 2012**

On the morning of 21 September 2001, a violent explosion at the AZF site in Toulouse, La Grande Paroisse, of the TotalFinaElf group, resulted in several dozen dead and thousands injured. The chief executive officer of the Total group plant, who was contacted by telephone by a journalist several minutes later, solemnly stated: 'It can't be an accident; we are ISO 14000 certified!' This international standard is issued by a private standard-setting institution (ISO) that audits companies and grants them quality labels. The ISO 14000 standard relates to environmental compliance. The industrial group then immediately put out its line of defence: refuse to accept the theory of a chemical accident, and use the fact that this was so close to 11 September 2001, the date of the attacks on the World Trade Center in New York, to adopt a terrorist attack scenario.

The prosecutor decided to charge the head of the Grande Paroisse corporation, a natural person, as well as the corporation, for the offences of involuntary homicide (section 221-6 of the Penal Code), involuntary bodily harm (section 222-19 of the Penal Code), involuntary destruction of the property of others (section 322-1 of the Penal Code) and failure to take the necessary measures to protect the health of the workers. The correctional court acquitted the senior manager on the count relating to the last offence, and the prosecution did not appeal the acquittal, which is therefore now final. On the other hand, the prosecutor's office did appeal the discharge by the correctional court on the other offences and the Toulouse Court of Appeal ultimately entered a conviction.

It took 10 years of trial, this time at the initiative of the prosecutor, to arrive at the judgment of the Court of Appeal, on 24 September 2012. In an extensively documented book, Gérard Ratier, who lost a son in the disaster and chairs the Association de familles endeuillées AZF Toulouse (association of bereaved families), highlights the efforts of the Total group to avoid criminal liability *at all costs*: by concealing facts identified by an internal investigative committee, in contempt of the judicial requirement that the facts be disclosed; by denying the evidence of the chemical accident;<sup>15</sup> and by making an unconscionable accusation against Mr Jandoubi, a temporary subcontractor on the Grande Paroisse site in Toulouse on 21 September 2001, who died in the accident.

In releasing their decision dated 24 September 2012, the judges of the Toulouse Court of Appeal stated:

Mr. Biechlin, plant manager of a Seveso II high-threshold site built in an urban zone, could not have been unaware of the risks resulting from mixing nitrates and chlorine products.  
(Translated from the French)

After rejecting the other scenarios, which were considered to be 'without basis', the president of the Toulouse Court of Appeal read the list of offences on which the judges convicted. He stressed Biechlin's 'lack of interest' in the risks to which employees of the subcontractor at the

AZF plant site were subjected, the fact that the organisation of waste management was lacking in rigour, and the lack of oversight in failing to ensure the effective separation of spaces in which dangerous and mutually incompatible chemicals were used. The Toulouse Court of Appeal concluded its judgment by stressing the lack of training and information on the dangers of chemical waste given to employees of companies to which work was subcontracted:

This is the most serious of all the offences of which they are guilty, since the decision was made, with full knowledge of the consequences, to put the employees in a situation where they were at risk without giving them the resources to deal with it, with the consequence, as the facts of 21 September 2001 have amply demonstrated, that they put not only those employees, but the entire plant and even beyond that, the population of Toulouse, in a situation of permanent danger. (Translated from the French)

Biechlin was sentenced to three years in prison, with one year in closed custody, and also was sentenced to pay a fine of €45,000; the Grande Paroisse company was fined €225,000, the maximum allowed by law. These sentences are a pittance, given the consequences of the negligence involved in the case. However, in addition to the criminal penalty, there are millions of euros in compensation to be paid to the civil parties. Contracting-out the work, the risk and responsibility for the accident – the widespread subcontracting that is commonplace on high-risk industrial sites – has now been strongly condemned. The case has been appealed to the Cour de cassation.

The decision of the Toulouse Court of Appeal on 24 September 2012 is of historic importance. First, it seems to be the first time in France, since 1976, that a plant manager has been sentenced to prison because of his criminal liability for an industrial accident. Second, this trial opened up a chink in the wall of impunity enjoyed by primary contractors, who are often sheltered from legal liability by the architecture of labour law that makes the subcontracted employer solely responsible.

This decision also lays down other principles concerning the way the causal link is to be characterised in cases of this nature. In the AZF case,<sup>4</sup> the Tribunal de grande instance (High Court), at trial, had positively ruled out a number of scenarios (terrorism, meteorite, electrical arcing and so on), but had not held the company liable, on the ground that the causal link was probable rather than certain, and thus was hypothetical, falling between gross organisational negligence and the ‘strong’ possibility of a chemical accident. French criminal law, which must be narrowly construed, requires that a definite causal link be proven between the wrongful act and the harm. However, the Toulouse Court of Appeal concluded that because the other causes of the explosion had been ruled out:

... there is not the slightest remaining doubt that it ultimately appears that the cause of the explosion... is a mixing of incompatible products in the circumstances described above. (Translated from the French)

## Conclusions

While each of these cases can be considered to be unique because of the facts and the rationales behind the institution of the criminal proceedings, they have commonalities that have prompted legal analysts both in Europe and internationally to examine the directions in which criminal law may be moving so that in the case of occupational or environmental hazards, executives of industrial groups, who are natural persons, and corporations, can be held liable, and convictions can be secured.

First, in all three cases, charges were brought against industrialists responsible for choosing industrial strategies, not against ‘underlings’. On this point, the complete contempt for the law and the justice system demonstrated by the strategies advanced by the defendants in all three trials is noteworthy. Second, the judgments were not confined to the issues of involuntary homicide or injury, aimed at compensating the victims and their heirs. The Italian criminal justice system, for example, grants standing to civil parties such as regional authorities, responsible for decontamination in the case of asbestos, and the public health insurance plan, which bears the economic burden of the health consequences.

Finally, the Italian and French courts have recognised in their decisions the structural and organisational wrongdoing that results from the strategic choices made by the directors of industrial groups. The Turin courts found structural failures in relation to safety that were attributable to choices made by senior corporate executives, and the decision of the Toulouse Court of Appeal in the AZF case characterised the lack of training and information given to employees of subcontractors as grave misconduct on the part of the primary contractor.

The progress made in these cases, which open a crack in the wall of impunity enjoyed by those responsible for industrial disasters in Europe, provides food for thought in the search for alternatives to ordinary criminal charges to address the issues involved in punishing corporate crimes. Mobilisation is underway, in some countries of continental Europe, to establish a European criminal court that would have jurisdiction over social and environmental crimes. Others, within Interforum – a non-governmental organisation dedicated to identifying and preventing industrial crimes that negatively affect the health of workers, the public and the environment – advocate for reform of both national and European criminal justice systems and are proposing a new definition of the element of intent, which would be abolished and replaced by simple consent. A distinction must be made between intent, defined as the informed awareness and free will to transgress the prohibitions of the criminal law, and consent, which is defined as acceptance of the known consequences of the acts of the corporation; consent can be seen to be close to acquiescence. Such a distinction would allow for punishment of those responsible for any organised action whose consequences were intentionally consented to. The decisions presented above open the door to this kind of change, which is what the unions and community groups that mobilised throughout the trials have been fighting for.

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