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Co-employment within corporate groups: A new definition for an exceptional situation

In a ruling issued on November 25, 2020[1], the *Cour de Cassation* (French Supreme Court) reaffirmed the exceptional nature of co-employment by giving a new definition of its constituent elements.

This more restrictive definition, which reinforces the exceptional nature of the situation of co-employment, should have a deterrent effect on employees wishing to rely on this concept in court.

Co-employment within corporate groups is a concept developed by French courts, in particular in the context of disputes with a view to having a company belonging to a group (the parent company) be held jointly and severally liable for the financial consequences of the dismissals on economic grounds (redundancies) implemented by its subsidiary.

Indeed, the parent company of a group may become involved in the management of its subsidiaries to such an extent that the employees of the subsidiary – most often when redundancies are implemented – invoke, apart from the relationship of subordination, the status of co-employer of the parent company and claim that the latter must, therefore, perform the obligations resulting from such status. The employees' aim is thus to have a new debtor liable for the payment of the damages they claim, thereby improving their chances of compensation, in particular when their employer has entered into insolvency/bankruptcy proceedings, which limits the possibilities for challenging the ground(s) put forth to justify the dismissals, or when the recognition of the existence of a situation of co-employment affects the validity of the dismissals, for example when a lay-off plan is not properly implemented.

As dismissed employees frequently invoke the concept of co-employment, the *Cour de cassation* had already limited the recognition of the existence of a situation of co-employment to exceptional situations.

As such, apart from the existence of a relationship of subordination, a company belonging to a group could be considered as a co-employer with respect to the staff employed by another group company, **only if there existed between them**, beyond the coordination of economic actions which is necessary between companies belonging to the same group and the economic dominancy that such belonging to the same group may create,

an intermingling of (i) interests, (ii) activities, and (iii) management that resulted in an interference in the economic and social management of this other group company.[2]

The *Cour de Cassation* has, for example, ruled that the following could not be used as criteria to establish the existence of a situation of co-employment:

- the existence of common managers, a head office located at the same place, the need for the employer to take into account decisions taken at group level, the financial assistance that a holding company may be led to grant, in particular to help finance social-related measures[3];
- common commercial and administrative services, as well as cash or clearing agreements[4];
- technical assistance and cash management agreements[5] ;
- close cooperation between companies in the same group under a support agreement that provides for a consideration for such support[6] ;
- commitments made to guarantee the obligations of the subsidiary[7].

On the other hand, a situation of co-employment could result from the permanent power of action exercised by the group's human resources director to the detriment of the subsidiary's manager, the parent company's interference in the economic and social management of the subsidiary, the control of the administrative, contractual and financial activities by another entity, all of these elements establishing that the employer was totally subject to joint management and no longer had any power of its own in the conduct of the business[8].

In its decision of November 25, 2020, the *Cour de cassation* abandoned these three traditional criteria and enshrined a new definition of co-employment that is intended to be more explicit and more restrictive.

In that particular case, a company had dismissed its employees on economic grounds due to the discontinuation of its business operations. The employees challenged their dismissal, initiated proceedings before the labor court and brought claims for damages against their employer as well as against the parent company, arguing that the latter had the status as co-employer.

The Court of Appeals acknowledged the existence of a situation of co-employment on the ground that the employer had delegated to the parent company the management of its human resources at the time of the discontinuation of its business operations, the financing of the dismissal procedure, and the cash and support agreements in return for payment.

The parent company lodged an appeal before the *Cour de Cassation*, arguing that the requirements for co-employment to be established were not met.

The *Cour de Cassation* quashed the appellate decision on the grounds that the trial judges had failed to characterize "*the permanent interference of the* [parent] *company in the economic and social management of the employer* [i.e. the subsidiary]*, resulting in the total loss of autonomy of action* [of the subsidiary]".

As such, it hold that from now on, apart from the existence of a relationship of subordination, a company that is part of a group can therefore be considered as co-employer of the staff employed by another company only if there is, beyond the coordination of economic actions which is necessary between companies belonging to the same group and the economic dominancy that such belonging to the same group may create, a **permanent interference** of this company in the economic and social management of the employer, **resulting in the total loss of autonomy of action** of the latter.

In other words, the Labor Chamber of the *Cour de Cassation* makes the permanent interference of one company in the economic and social management of another, resulting in the total loss of autonomy of the latter, the sole criterion to establish the existence of a situation of co-employment.

This more restrictive definition, which reinforces the exceptional nature of the situation of co-employment, should have a deterrent effect on employees wishing to rely on this concept in court.

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[1] Labor Chamber of the *Cour de Cassation*, November 25, 2020 18-13.769

[2] Labor Chamber of the *Cour de Cassation*, July 2, 2014, 13-15.208

[3] Labor Chamber of the *Cour de Cassation*, July 2, 2014

[4] Labor Chamber of the *Cour de Cassation*, October 9, 2019 n° 17-28.150 FS-PB

[5] Labor Chamber of the *Cour de Cassation*, May 24, 2018 n° 16-18.621 FS-PB

[6] Labor Chamber of the *Cour de Cassation*, March 7, 2017 n° 15-16.865 FS-PB

[7] Labor Chamber of the *Cour de Cassation*, July 6, 2016 n° 14-27.266 PB

[8] Labor Chamber of the *Cour de Cassation*, June 6, 2016 n° 15-15.481 FS-PB