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The concept of eco-employer under french law or how the whole group can be exposed to liability

French labor and employment law was initially structured around the concept of company as a legal autonomous entity. This is through that lens that are primarily assessed the rights and obligations of the employer and employees.

Case law has gradually adjusted this first approach. French courts have defined the notion of *Unité Economique et Sociale* (Economic and Social Unit or UES) designed to improve employee representation and employee savings plans and introduced the notion of corporate group that is taken into account for the definition of the obligations imposed on employers in case of redundancies.

While the concept of co-employer is not a new thing under French case-law, it has been increasingly referred to by French courts over the past few years. Many Courts of Appeals have indeed relied upon this concept not only to thwart the implementation of business shutdowns and redundancy plans within groups but also to seek the liability of parent companies. In 2011, the *Cour de Cassation* (French Supreme Court) handed down several decisions addressing this concept.

The risk is real for corporate groups. The legal characterization of the status as co-employer meets, however, relatively strict criteria. This article will show that when such criteria are fulfilled, the status as co-employer is logically (under a French labor law perspective of course!) acknowledged. Corporate groups must, therefore, be extremely vigilant as they may face serious financial consequences.

The applicable criteria for a company to be considered as co-employer:

The judge will consider that a company is a co-employer if there is an "*intermingling of interests, activities and management*" between that company and another one, most of the time between a subsidiary and its parent company.

This criterion is certainly a cause of concern as it implies a subjective assessment of the organization existing within a group of companies and, therefore, may lead to varying interpretations. Hence, a greater legal uncertainty. In practice, corporate groups usually comprise companies that have common interests, activities and management.

Yet, this commonality of interests, activities and management must not result in the **intermingling** of the same, otherwise the status as co-employer can be established.

The judge will assess, on a case-by-case basis, whether the subsidiary is autonomous or not. He will examine a series of elements in order to appraise the level of dependency of the subsidiary. These elements are:

- The identity of the managers,
- The determination of the subsidiary's strategy, pricing policy, economic and labor-related choices unilaterally by the parent company,
- The existence of a centralized management of labor- and employment-related issues,
- The full or quasi-full ownership of the capital,
- The financial control,
- The lack of autonomy in the operational and administrative management,
- The complete dependency of the subsidiary's economic activity from the group to which it belongs.

In short, the risk exists when an autonomous economic entity is, in practice, a mere establishment deprived of any decision-making authority and management powers and does not have any autonomy.

According to current case-law, a mere economic dominancy over a company is not sufficient for the status as co-employer to be established.

In this respect, a decision rendered on June 22, 2011 by the *Cour de Cassation* (Cass. Soc. N°09-69021) is noteworthy as a group company sued by the French employees made redundant was held a co-employer while the same claim against another group company was dismissed.

Indeed, while the *Cour de Cassation* concluded that the first company directly interfered in the management of its subsidiary by telling it precisely how to behave and exactly what to do – including with respect to human resources management -, it dismissed the claim against the second group company as the latter had never interfered in the human resources management of the subsidiary.

The *Cour de Cassation* specified in its ruling: *"Yet, the Court of Appeals noted, on appropriate grounds, that since the company Novoceram has taken control over the company BSA, BSA* ***has lost all autonomy in the management of its activities,*** *is* ***completely dependent from this company that has become its exclusive client and defines the prices of its products, shares with it the products, materials, general services, operating equipment and manufacturing process, BSA's administrative accounting, financial, commercial, technical and legal management is performed by Novoceram that also manages BSA's staff as BSA's managing executives merely execute decisions made by Novoceram's CEO with respect to staff management as well as industrial and technical issues;*** *the Court of Appeals inferred therefrom that* ***there existed between these two companies an intermingling of interests, activities and management that resulted in Novoceram interfering in BSA's human resources management and this was sufficient to establish the existence of the status as co-employer."*** .

No ruling was pronounced against the second group entity sued by the French employees as the *Cour de*

Cassation held that "the company *Gruppo concorde did not substitute itself to the employer in the management of the information procedure initiated with the representatives of BSA's employees, there was* ***no intricate connection*** *between these two companies,* ***nor any interference of the former in the latter's management****, nor any commingling of their assets; the Court of Appeals inferred therefrom that there was no intermingling of interests, activities and management between these two companies and, consequently, that Gruppo could not be considered as co-employer and, accordingly, could not be summoned before the court by the employees challenging the validity of the redundancies*".

In light of the above, the primary criterion to characterize the status as co-employer is indisputably the lack of decision-making autonomy.

A decision rendered on January 18, 2011 by the *Cour de Cassation* (Cass. Soc. N° 09-69199) had already addressed the issue of "*the common management of companies' staff*" and the fact that the parent company "*imposed to the company MIC its strategic choices*" and "*permanently interfered in decisions concerning the management of the financial and labor-related aspects of the shutdown (…) and staff redundancies*". "*It assumed the operational and administrative management of its subsidiary that was deprived of all autonomy*".

The consequences for a company held as co-employer:

A co-employer is subject to the same obligations and exposed to the same liabilities as an employer.

As such, a company held to be a co-employer can be ordered to:

- Pay any and all sums due by the subsidiary to its employees (wages and remuneration, termination indemnities, etc.),
- Pay the damages awarded to the employees as a reparation for the harm suffered as a result of the redundancies,
- Reinstate the employees whose redundancy is considered null and void,
- Finance an Employment Preservation Plan within the subsidiary.

Based on current case-law, all the consequences that can be associated with the recognition of the status as co-employer have not yet been identified. While today disputes mostly focus on redundancies and dismissals on economic grounds, we can fear that the concept of co-employer will be put forth in the future to claim other rights (such as the equality of treatment between the employees of the companies considered as co-employers).

How to prevent the risk of being held a co-employer:

According to an established case-law, it seems that the lack of autonomy of the subsidiary puts the parent company at risk.

Consequently, the parent company must preserve the existence of real decision-making bodies within its

subsidiary and such bodies must be granted the powers and authority attached to the status as employer. While the group will always be able to give instructions to its subsidiaries, the subsidiary's managers must never become mere executors of orders and decisions on organizational issues taken at the level of the parent company. If the commercial strategy of the subsidiary will legitimately be in line with that defined by the group, its implementation must not be performed directly and in details by the parent company. The same applies to the administrative and financial management policies. Concerning the management of labor- and employment-related issues that judges closely examine, it is important to ensure that such management will be fully performed by the subsidiary: if it is established that the parent company has determined the number of employees made redundant, or even the nominative list of concerned employees, there is a clear risk that this practice may be considered as an interference likely to lead the judge into considering that the parent company is co-employer.

In light of the above, it is recommended to ensure that subsidiaries are managed by executive officers and managing executives vested with all effective management powers. While they can be assigned objectives and targets, required to follow policies or to fulfill obligations, they must remain autonomous in the implementation of their duties, failing which the judge will systematically turn to the real decision makers and seek their liabilities, in particular in relation to labor and employment issues.

Recruiting or appointing subsidiary managers to confine them solely to the role of mere executors without any autonomy is likely to expose the group to liability as co-employer of the subsidiary's employees.

The consequences of the recognition of the status as co-employer can extend to other law areas:

Corporate groups must be all the more vigilant since French commercial courts and Courts of Appeals also take into account a company's level of autonomy in the framework of insolvency and bankruptcy proceedings. In a judgment rendered in March 2011, the Court of Appeals of Reims held that "*this company does not have any autonomy vis-à-vis its parent company and is merely a production unit, and the motion filed for the initiation of insolvency proceedings is in fact a misuse of procedure aimed at escaping the provisions of the Labor Code*".

In a nutshell, for the judge, those who make decisions must pay the bills.