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The closing of sites in France: Stop the interference in the economic and social management of subsidiaries

The labour chamber of the "*Cour de Cassation*" (French supreme court) has gained notoriety in recent years in several highly-publicized cases[1] by a series of rulings against foreign parent companies of a group of companies, ordering the payment of redundancy compensation and damages to employees of their French subsidiary following the closing of a site or the opening of insolvency proceedings against the latter.

This liability of parent companies towards employees of their subsidiaries is based on a purely jurisprudential creation: the repressive notion of "co-employment" that emerged on the fringes of the "Florange" law that caused a great stir in industry[2]. Alternately, and after a clampdown by the "*Cour de Cassation"* on the possibility of invoking grounds for "co-employment", dismissed employees of a subsidiary may file suit against the parent company on the basis of fault-based liability.

I. Conditions for co-employment

A relationship of subordination existing between employees of a subsidiary and its parent company can confer upon the parent company the status of employer of the workers concerned. This is referred to as "co-employment", since employees have two employers against whom they can exercise their rights to compensation, increasing their chances of obtaining a more advantageous severance package in case of closure of the site. While it may seem shocking that a thriving parent company should pull out of the French market leaving the employees of its subsidiary in the lurch without paying the legal and contractual indemnities, one must bear in mind that excessive permeability in the corporate veil between the companies, and the too frequent calling into question of the principle of autonomy of corporate entities will have a detrimental impact on foreign investments.

[1] Metaleurop, Flodor, Jungheinrich
[2] Law n. 2014-384 of 29 March 2014 intended to re-conquer the real economy

In the "Jungheinrich"[3] case, the German parent company decided to transfer operations of its subsidiary to another group company, to close the site, and to therefore proceed to an amiable liquidation, that is, outside of any insolvency proceedings[4]. The employees of the French subsidiary, who had previously refused the voluntary transfer of their employment contracts as part of a reorganization of the group, considered that they had been laid off without actual and serious basis. They claimed co-employment on grounds that the German parent company dictated strategic decisions to its subsidiary, including the decision to transfer operations. According to them, the parent company intervened constantly in decisions regarding the financial and social management of its subsidiary which was economically dependent on its parent company which absorbed 80% of its production as well as setting prices. The subsidiary, they argued, had no autonomy in that it was, in reality, the German parent company that had managed the French staff and had taken the decisions concerning the dismissal of the French employees.

The French supreme court concluded that there existed an intermingling of the interests, operations and management of the parent company and its subsidiary, constituting a situation of co-employment between the parent company and the employees of the subsidiary.

In practice, in numerous groups of companies, the common strategy controls a rather centralised organisation of the group, including, sometimes, in terms of the management of personnel. One feels that the boundary is close or even shifting for a parent company to risk being qualified as co-employer in a situation where the subsidiary lacks "sufficient means"[5] to deal with its closing.

Recently, probably in response to abuses, the jurisprudential criteria for qualification as co-employer have been specified, if not tightened[6].

Indeed, according to the "Molex"[7] judgment of 2 July 2014, a company that is part of a group can be considered as a co-employer with respect to the employees of its subsidiary only if there exists between them, "beyond the necessary coordination of economic actions between companies of the same group and of the state of economic domination that said affiliation may produce, an intermingling of interests, activities and management manifested by **an interference in the economic and social management of said company**". In this instance, the facts were similar to the Jungheinrich case: employees made redundant by the subsidiary within the framework of a "*plan de sauvegarde de l'emploi*" (PSE) (redundancy plan) contested their redundancy by taking action against the American parent company.

The Molex judgment clearly illustrates the willingness of judges to limit co-employment to specific situations found in exceptional circumstances, particularly during insolvency

[3] Cass. soc., 18 January 2011, n. 09-69.199
[4] A bankruptcy was nevertheless initiated against the French subsidiary
[5] In practice, by "sufficient means", one should figure between EUR40,000 and 50,000 per dismissed employee (approximately one year's salary).
[6] Cass. soc. 18 December 2013, n. 12-25.686
[7] Cass. soc., 2 July 2014, n. 13-15.208, Sté Molex International Inc/ Alunni Bravi

proceedings, quite similar to those allowing to characterise a de facto management in view of filing suit for inadequacy of assets ("*insuffisance d'actif*").

The fact that the management of the subsidiary come from the group, and that the parent company have taken, as part of group policy, decisions affecting the future of the subsidiary, as well as committing to supply the necessary means to finance social measures linked to the closing of the site and the elimination of jobs, are not sufficient grounds to constitute a situation of co-employment.

It is not enough for plaintiffs to raise a simple non-separation in management between parent company and subsidiary. They must prove the existence of interference by the parent company in the economic and social management of its subsidiary, extending beyond general group policy.

It should be noted that this, more restrictive, interpretation of co-employment does not necessarily protect parent companies from disputes. Indeed, the definition of what falls in the realm of group management and that of the subsidiary remains blurry, making it possible to cast sufficient doubt so as to pave the way to a transaction.

Should the parent company of the group be recognised as co-employer, it will be ordered to bear all compensatory damages linked to the termination of the employment contract. The *conseil de prud'hommes* (labour court) will then be competent.

It is true, in practice, that co-employment becomes topical in cases of insolvency of a French subsidiary, often drastically limiting the amount of compensation paid to employees, increasing the temptation for them to approach the parent company with 'deep pockets'.

II. The alternative to co-employment: tort liability

Should employees of a subsidiary be unable to establish co-employment, they can resort to an alternative action to seek damages against the parent company.

By two notable judgments of 8 July 2014 ("SOFAREC")[8], the "*Cour de Cassation"* admitted that the tort liability of a parent company (in this case sole shareholder) be engaged by employees of its subsidiary, if the parent company took **(i) prejudicial decisions aggravating the economic situation of its subsidiary and (ii) having no usefulness to the subsidiary**. This wrongful conduct having contributed to the collapse of the company and the subsequent elimination of numerous jobs.

While, on the one hand, the labour chamber restricts the "way" towards co-employment, on the other hand, it opens the field for the recognition of the tort liability of the parent company in favour of the employees of its subsidiary when the former, through its own fault, has contributed to the failure of the latter. The wrongful behaviour by the parent

[8] Cass. soc. 8 July 2014, n. 13-15.573; Cass. soc. 8 July 2014, n. 13-15.470

company must be different from failures attributable to the employer within the framework of the PSE (redundancy plan) or the obligation to reclassify.

The reparable prejudice is then significantly smaller than in a case of co-employment, and it is limited to damages for loss of chance. In the case at hand, each employee was paid 3,000 Euros, which is, without any doubt, less than what they could have received in a case of co-employment.

In any event, in case of delicate or cavalier behaviour on the part of the group for which they work, employees of French subsidiaries are not lacking in means to pressure the group, and in particular the parent company, to close their French subsidiary "cleanly".

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