Country Reports
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Updates from France, Lithuania, The Netherlands and Russia

France: Co-employment is strictly defined, but the notion is applied on a case-to-case basis

Co-employment, which allows employees to obtain the recognition of two employers instead of one, was treated by the Supreme Court (Cour de Cassation Soc. 30 November 2011 No. 10-22964) which changed the definition in a restrictive way, especially about the involvement of the parent company in the management of its subsidiary.

In 2014 (Cass. Soc. July 2, 2014 No. 13-15208), the Supreme Court asked the judges to establish that "*beyond the existence of a relationship of subordination, a company belonging to a Group cannot be considered as a co-employer in respect of staff employed by another company of the Group, if a conflict of interests, activities and management manifested by interference in the economic and social management of the latter appears between them, surpassing the necessary coordination of economic actions between companies belonging to the same Group and the state of economic domination that membership in the Group may cause.*"

It is thus for the judges of the Court of first instance and Court of appeal to characterise the interference of the parent company in the economic and social management of its subsidiary, situations often used by the employees of companies in difficulty in their challenging petitions.

Two decisions of the French Supreme Court rendered on 6 July 2016 attest the difficulty of obtaining the recognition of co-employment, and therefore, the liability of companies in a Group towards the employees of a subsidiary. See the two cases below: (1) Co-employment is recognised; (2) Co-employment is not recognised.

1. Co-employment recognised in the Group "3 Suisses International" case (Cass. Soc. 6 Jul. 2016, N° 15-15481)

"3 Suisses France" was owned in the proportion of 51% by the German "Otto Group". Group "3 Suisses International" was structured into four business areas including trade for individuals, served by the company "Commerce BtoC", which controlled several shops and companies, among which "3 Suisses France".

In December 2010, the management of "3 Suisses France" met with its employees committee for the submission of a reorganisation plan announcing the closure of some of the shops and the redundancy of all employees who worked in them.

It is in these conditions that sixty-five employees, dismissed in January 2012 because of the closures, have challenged the validity of the redundancy plan for failure of the back-up plan of employment, and asked for the

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> THE CONCENTRATION OF POWER IN THE HANDS OF THE PARENT COMPANY MAY LEAD TO A COMPLETE LOSS OF ITS AUTONOMY

condemnation *in solidum* of "3 Suisses France", "3 SI Trade" (formerly "SI 3 BtoC") and "Argosyn", (formerly "3 Suisses International"). They got satisfaction before the Court of Appeal.

This decision was approved by the Supreme Court which found that the concentration of power in the hands of the parent company in the economic and social management of the company, particularly in the field of human resources of its French subsidiary, may lead to a complete loss of its autonomy "*(...) at the time of the reorganisation, when "3 SI Commerce" (formerly named "Commerce BtoC") was one and the same with "3 Suisses International", of which it was only a branch initially, existing only for the purpose of facilitating the transformation of "3 Suisses France" and of other similar companies to become simple "business units" directly depending on the Group).*"

The Supreme Court also decided that:

- "*this reorganisation has led to the interference of "Commerce BtoC" in the economic and social management of "3 Suisses France" by transferring its IT, accounting and especially human resources teams, which dealt with the training, mobility and recruitment of the staff*";

in addition,

- "*Commerce BtoC" took charge of all the contractual, administrative and financial problems encountered by "3 Suisses France", through its accounting client-service and banking service*"; and
- "*considering these facts, the Court of Appeal has shown, beyond the necessary coordination of economic actions between companies belonging to the same Group and the state of economic domination, that this membership in the Group can lead to a confusion of interests, activity and management, manifested by the interference of "Argosyn" (formerly "3 Suisses International") and of "3 SI Commerce"(formerly "Commerce BtoC") in the economic and social management of "3 Suisses France*".

(2) Co-employment not recognised in the Continental Group case (Cass. Soc., 6 Jul. 2016, No. 14-27266)

Following the decision of closure of a tire-production site for passenger vehicles operated in Clairoix where over a thousand employees were employed, the company Continental France, part of the Continental Group and French subsidiary of the German company Continental Aktiengesellschaft (AG), implemented in 2009 a redundancy procedure for economic reasons with a plan to safeguard employment for the entire facility staff.

The procedure included that the employment contracts of the employees who were not proposed another job were to be terminated by letters sent in majority on January 15, 2010, or by amicable termination agreements signed on 2 January, 2010 for others, while on leave for mobility.

Challenging the legitimacy of the termination of their employment contract, 540 employees have filed a petition before the Labour Court, directed against Continental France, but also against Continental AG, as co-employer, requesting the payment of various allowances.

The Social Chamber of the Court of Appeal of Amiens said that the termination of the employment contracts was made without a real and justified cause, and condemned the two companies, *in solidum*, to pay certain amounts to the employees, as well as to reimburse the social bodies which paid unemployment allowances equivalent to six-months salaries to the employees since the termination, without real and justified cause, of their employment contract.

On July 6, 2016, the Court of Cassation partially changed these decisions of the Court of Appeal by removing the responsibility of the German parent company on applications invoking co-employment.

The fact that the policy of the Group determined by the parent policy has an impact on the economic and social activity of its subsidiary, and that following this policy the parent company has taken decisions affecting the future of its subsidiary while guaranteeing its obligations related to the site closure and the loss of jobs, is not sufficient to characterise a situation of co-employment.

The Supreme Court stated that "*beyond the existence of a relationship of subordination, a company belonging to a Group cannot be considered as a co-employer in respect of staff employed by another company of the Group if a conflict of interests, activities and management manifested by interference in the economic and social management of the latter appears between them, surpassing the necessary coordination of economic actions between companies belonging to the same Group and the state of economic domination that the membership in the Group may cause*."

Conclusion

Do not hesitate to plead your case!