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Parent Company Liability in French Redundancy Cases

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Although the *Cour de cassation* (France's Supreme Court) still limits the application of the concept of "co-employment" between parent companies and their subsidiaries to exceptional cases, its rulings do not preclude a finding of liability on the part of a parent company when it has placed its subsidiary in increased difficulty.

While this is not a new development, it was confirmed most recently by four decisions rendered by the Supreme Court on May 24, 2018.

Co-Employment and Parent Company Liability

The criteria by which the Supreme Court recognizes an instance of "co-employment" between a parent company and its subsidiaries are limited.

Consequently, in two of its decisions, the Supreme Court dismissed the notion of "co-employment" on the grounds that

- the subsidiary's decision-making autonomy in relation to the parent company concerning the social and financial management of the organization, as well as the existence of a separate clientele, would suggest that there was no overlap of management, interests, or commercial activity between the two companies; and
- a certain level of economic coordination is necessary between two companies belonging to the same group, including the parent company's involvement in the appointment and supervision of senior management and the granting of extraordinary bonuses, as well as in the financial management of the subsidiary through a treasury management and technical support agreement.

Nonetheless, the Supreme Court recognizes that a parent company may be liable when it commits a fault that exacerbates the financial situation of a subsidiary that is already experiencing difficulties. Consequently, this allows for damages to be awarded to employees.

In 2012, the *Pétroplus* case drew widespread attention when it brought about the adoption of a new law in record time. This law set a new tone: the parent company must take responsibility for the financial consequences of a subsidiary's bankruptcy when the parent company has contributed to bringing this about. The Pétroplus group's holding company had withdrawn the entirety of the funds in its subsidiary's current account (around €171 million) in order to establish the refinery at Petit-Couronne. A fault had been committed—and so the new law provided the means for liquidators to recover capital from the liable parent company. After a significant decision was rendered on January 16, 2001, the case law followed suit, as was confirmed by the three decisions of the Supreme Court discussed in this article.

Three Recent Decisions of the *Cour de cassation*

In the first case, a former employee who had been made redundant maintained that the parent company of the group had acted with *légèreté blamable* (a term in French law describing a level of carelessness or thoughtlessness which can be considered misconduct on the part of management) by increasing dividends in proportions that did not take into consideration the level of cash flow needed for the subsidiary to continuously finance its operations. This significant increase in dividends carried out by the shareholders reduced the equity capital of the subsidiary and went beyond mere "management failures." The parent company was liable, and was obliged to take responsibility for the financial consequences of the subsidiary's insolvency for the employee.

In the second case, an investment fund and principal shareholder of a company enforced operations that were not in the interests of the French subsidiary, such as (1) transferring for free the right to use a brand while the fees provided under the license agreement were charged to the subsidiary (2) using a building belonging to the subsidiary as collateral in a loan intended exclusively for another company in the group; and (3) carrying out services for the other companies in the group for free. According to the judges, the fact that the subsidiary had to be partially liquidated was due in large part to the actions of the parent company.

In the third case, however, employees that had been dismissed in 2010 summoned the German parent company before the court, arguing that the "management fee" agreements between the subsidiary and the parent company had not been justified, along with the parent company's refusal to provide financing. The employees also maintained that a better strategy, as well as a better human resources management policy, should have been put in place. According to the judges, once it was established that the parent company was also experiencing difficulties, the parent company's passivity and failure to take certain measures, as well its refusal to finance an employment protection plan for the subsidiary, did not constitute misconduct.

Key Takeaways

These rulings allow us to draw a distinction between simple management failures, which do not imply the liability of a parent company, and misconduct that is—according to the aforementioned rulings—characterized by the parent company's interference in the financial management of the subsidiary, rather than involvement in its operational management, which is the case with co-employment.

Therefore, it is our view that rather than compelling parent companies to finance subsidiaries that find themselves in difficulty, these rulings simply prohibit parent companies from taking decisions that might worsen such difficulties. It seems then that a tenuous balance has been struck between the interests of employees and those of shareholders. This should not, however, set the precedent that a parent company's passivity towards a subsidiary constitutes a fault likely to render it liable, except in cases where the passivity disrupts the aforementioned balance between the interests of employees and those of shareholders. In this way, the concept of *légèreté blâmable* should be restricted to exceptional cases that go well beyond “management failures”; as indicated in the decision rendered by the Supreme Court on January 16, 2001, failure to renew a lease cannot be considered misconduct.

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