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Bonus for added-value sharing (draft social security financing correction bill for 2011)

The draft social security financing correction bill for 2011 was presented to the Council of Ministers on 25 May 2011 and adopted by the Assemblée Nationale (lower house) on 21 June 2011.

The draft bill provides in particular that commercial companies with over 50 employees which, in application of article L.232-12 of the French Commercial Code, allocate dividends to their shareholders in an amount per share greater than the average of the two preceding fiscal years, must pay a bonus to all employees.

If the company belongs to a group required to set up a group works council in application of the French Labour Code, it is the increase of the dividend paid by the parent company to its shareholders which would result in the bonus payment.

The draft bill sets forth the conditions relating to the setting up and payment of the bonus. Thus, the bonus should be instituted within three months of the general meeting deciding the allocation of dividends to shareholders. It would be set up according to the same modalities of an in-house or a group profit-sharing agreement provided by articles L.3322-6 and L.3322-7 of the French Labour Code. Failing agreement, the bonus amount would be unilaterally set by the employer after consultation of the works council or staff representatives, as the case may be.

However, the draft bill provides that companies that granted their employees, for the current year, a non-mandatory pecuniary advantage by virtue of a law, agreement or collective bargaining agreement, in exchange for the increase of the dividend, would not have to pay the bonus.

The bonus paid according to the conditions set forth by the draft bill would be exempted, within a limit of 1,200 euros per employee/per year, from any taxes or legal or contractual contribution except for the CSG, CRDS and fixed social contributions (forfait social). To benefit from such exemption, the agreement should be registered with the Labour authority.

Commercial companies ordinarily hiring less than 50 employees and complying with the conditions set forth above may voluntarily pay the bonus to their employees and also enter into a one-year optional profit-sharing agreement until 31 December 2014.

Finally, this draft bill provides that negotiations at the national level should be entered into concerning added-value sharing.

This draft bill will be discussed in the Sénat (upper house) on 5 and 6 July 2011 (Draft social security financing correction bill for 2011, No. 3459).

Where an employee is seconded by the parent company to a subsidiary, does the strict repayment of wages by the subsidiary to the parent company avoid the qualification of the arrangement as an illegal supply of workers?

An employee was hired by the company John Deere by an agreement dated 6 November 2000. The same day, the employee was seconded to John Deere Crédit, its subsidiary. The employee was subject to an all inclusive working time remuneration (forfait-jours), in accordance with the collective bargaining agreement applicable to the parent company. The latter being the one remunerating the employee, the subsidiary fully repaid the wages and related social charges. Several years later, the employee refused a modification of his remuneration, reintegrated the parent company then claimed constructive termination of his employment agreement. He then brought an action against both companies before the Labour Court (Conseil de prud'hommes) seeking the requalification of the termination of his employment contract as a dismissal without real and serious cause and the payment of overtime and other sums in relation to undeclared work. The Court of Appeal dismissed the claims relating to the undeclared work, ruling, on the one hand, that the secondment had no profit-making purpose as the subsidiary exclusively charged the remuneration of the employee to the parent company; and, on the other hand, that the employee failed to prove that he was deprived from the application of a bargaining agreement that would have entitled him to a more advantageous remuneration through the payment of overtime.

The French Supreme Court (Cour de cassation) reversed the decision of the Court of Appeal, ruling that 'any profit-making transaction whose exclusive purpose is to supply workers is forbidden; such prohibition also concerns the using company and the profit-making character of the transaction might result from a better flexibility in the staff management and the economy of charges for the latter'. The Criminal Division of the Supreme Court had already adopted the same wording (Cass. crim. 10 February 1998, No. 97-81.195). The French Supreme Court further notes that 'the company John Deere Crédit did not incur any staff management costs other than the strict repayment of the wages and social charges' paid by the parent company; and that ' the agreement setting a fixed annual working time in days (convention de forfait-jours) which has been applied to the employee was illegal, as the collective bargaining agreement of financial companies which was applicable to the employee, in accordance with article L.8241-2 of the French Labor Code, does not provide for this possibility. Thus the employee has been deprived of the payment of the overtime effectively worked'. The offences of illegal supply of workers and undeclared work were thus established. Consequently, to avoid such offences, the subsidiary must not limit itself to repaying the parent company the remuneration of the employee (social charges included), but also the costs it incurred for staff management.

Furthermore, the collective bargaining agreement applied to the employee seconded to the subsidiary must be the one of the host company and not of the original company.

NB: the French Supreme Court has also specified in that case that 'employees for whom claims for constructive termination of their employment agreement is justified and who are released from working out their notice, are entitled to be indemnified for the loss of opportunity to benefit from the rights they acquired in connection with the individual right to training (DIF)' (***Cass. soc.*** 18 May 2011, No. 09-69.175).

Does a trade union that, during the transitional period, cancelled its membership from a representative trade union at the national level and affiliated with a non-representative trade union at the national level still benefit from the presumption of representativeness?

In 2009, the Syndicat des transports et des activités aéroportuaires sur les aéroports parisiens (STAAAP – transportation and airport operations on Parisian airports trade union) cancelled its membership with the CFTC, a trade union, representative at the national level, to affiliate with the UNSA which is not representative at the national level. The trade union was then renamed STAAAP-UNSA. Following the affiliation, the STAAAP-UNSA appointed a trade union delegate in a company in a transitional period at that time, i.e., when the results of the first elections following the law of 20 August 2008 were still unknown.

The Magistrates' Court cancelled the disputed appointment.

The STAAAP-UNSA lodged an appeal on the grounds that as it had been affiliated with a representative trade union at the national level on 20 August 2008, it conserved the benefit of the incontestable presumption of representativeness throughout the transitional period.

The French Supreme Court rejected the appeal : 'the new legal provisions, construed in light of paragraphs 6 and 8 of the Preamble to the Constitution of 27 October 1946, exclude that a trade union that benefited from such presumption by reason of its affiliation with a representative confederation at the interprofessionnal national level conserves it in this regard after it cancelled its membership from said confederation'. As the STAAAP trade union cancelled its membership with a representative trade union to affiliate with a non representative trade union and failed to evidence its own representativeness on 20 August 2008, it could thus no longer benefit from the incontestable presumption of representativeness during the transitional period. (***Cass. soc.*** 18 May 2011, No. 10-60.264).

In case of cancellation of membership with a trade union after the last professional elections were held at a company, or where elected employees leave their confederation to join another trade union, who among the confederation or trade union members may take advantage of election results?

The French Supreme Court answered this question in four decisions on the same day.

In the first two cases, the STAAAP-CFTC presented candidates in professional elections and received over 10% of the votes. The STAAAP later cancelled its membership in the CFTC, and appointed a trade union delegate. The matter was then referred to the Magistrates' Court which confirmed the appointment in the first case, on the grounds that it was the STAAAP that presented candidates to the election, and that the appointed trade union delegate herself gathered 10% of the votes expressed in its favor.

In the second case, on the contrary, the Magistrates' Court cancelled the appointment made by the STAAAP-UNSA, noting that the minutes showed that the votes had been allocated to the CFTC. Consequently, the STAAAP-UNSA could not benefit from them.

The French Supreme Court, on appeal, overruled the decision of the first case, and confirmed the decision in the second case considering that 'the confederal affiliation under which a trade union has presented candidates at the first round of elections of permanent members to the works council constitutes an essential element of the vote of the voters. Consequently, in case of cancellation of membership after such elections, the trade union can no longer continue to benefit from the votes thus obtained to allege to be representative'. The Court thus considered that the voters had certainly voted for the CFTC rather than for the STAAAP. Consequently, the STAAAP-UNSA could not appoint a trade union delegate based on the results obtained when it was affiliated with the CFTC.

In the third case, it was the CFTC which, after the cancellation of membership by the STAAAP, appointed a trade union delegate by taking advantage of the results obtained by the STAAAP at the prior elections, claiming that the STAAAP was still affiliated with it at that time. The Magistrates' Court cancelled the appointment on the grounds that the CFTC had not participated in the last elections.

The French Supreme Court logically condemned this decision. The confederal affiliation being an essential element of the vote of the voters, the Court held that 'in case of cancellation of membership by [a] trade union, the confederation or any of its federations or trade unions may, if it proves that, on the day of appointment, a trade union section created under its name existed within the company, appoint a trade union delegate in order to maintain within the company the presence of the trade union movement to which the voters granted at least 10% of their votes'.

Finally, in a fourth and final case, the Court confirmed the importance of the confederal affiliation of a trade union for the vote of the voters. In that case, elected candidates to the works council under the union label of the FO confederation left the confederation after the first elections to create a trade union section affiliated with a trade union called Sud Industrie Rhône Alpes (the Sud trade union). FO then informed the employer it revoked all the terms of offices of its representatives within the company. The Sud trade union later appointed two trade union representatives to the company's works council, taking advantage of the quality as elected individuals of the employees who joined the Sud trade union after the elections.

The employer brought suit in the Magistrates' Court, which cancelled the disputed appointments. The Sud trade union then lodged an appeal, which was rejected by the French Supreme Court on the grounds that the confederal affiliation constitutes an essential element of the vote of the voters, 'to appreciate the conditions

under which a trade union is entitled to appoint a trade union representative to the works council in accordance with article L.2324-2 of the French Labor Code, employees who were not candidates on the lists presented by such trade union during the last elections cannot be considered as its elected staff'. The Sud trade union could thus not consider the former elected individuals who ran as candidates on the list of the FO trade union became its own elected individuals by the sole fact they cancelled their membership and joined a new trade union. The Sud trade union thus failed to meet the legal requirements for appointment of a trade union representative to a works council (***Cass. soc.* 18 May 2011, No. 10-21.705, No. 10-60.069, No. 10-60.300 and No. 10-60.273**)

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