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The "Viveo" legal saga: the absence of economic grounds does not entail the nullity of the collective redundancy plan

In a much awaited "Vivéo" decision[1] rendered on May 3, 2012, *the Labor Chamber of the Cour de Cassation (French Supreme Court) firmly reaffirmed that a redundancy procedure could not be invalidated "in consideration of the economic grounds put forth to justify the redundancy" since the validity of the collective redundancy plan is independent from such grounds. When the Court announced its decision, law practitioners breathed a huge sigh of relief. Even if the decision leaves open the question of the assessment of the economic grounds put forth to justify redundancies, it must be given credits for maintaining a certain degree of legal stability.*

The company Vivéo Group, specialized in the design, sale and maintenance of banking software programs, was purchased in December 2009 by the company Temenos, one of its competitors. In February 2010, Vivéo France's works council was notified of the initiation of an information-consultation process on a contemplated reorganization that would entail the suppression of 64 jobs out of 180. To this notification were annexed an economic memorandum as well as the terms and conditions of a so-called employment preservation plan[2] (*plan de sauvegarde de l'emploi*, i.e. a collective redundancy plan containing measures aimed at limiting the number of redundancies, hereinafter "PSE"). The works council decided to challenge the economic grounds put forth to justify the contemplated reorganization. It brought the matter before the Paris First Instance Court and requested the nullification of the redundancy procedure.

By judgment dated January 11, 2011, the Paris First Instance Court rejected the claim of Vivéo France's works council and held that "*it is not up to the judge, ruling on a request for nullification of a redundancy procedure for non-compliance with applicable legal provisions, to assess the economic grounds put forth by the employer*". The works council lodged an appeal against this judgment before the Paris Court of Appeals.

Pursuant to Article L. 1235-10 of the French Labor Code, **only the absence of a PSE** or an **insufficient PSE**

(i.e. a PSE that does not contain precise and practical measures to avoid, or at the very least, to limit the number of redundancies) presented to the staff representatives **entails the nullity of the redundancy procedure initiated on economic grounds**.

Yet, despites this clear labor law provision, the Paris Court of Appeals, in a judgment[3] dated May 12, 2011**, made a personal interpretation of the aforementioned Article L. 1235-10 and, considering that the contemplated reorganization lacked economic justification, ordered the nullification of the PSE and thereby invalidated the collective redundancy procedure.**

Pointing out that the absence of true economic grounds "*renders the consultation process meaningless and deprives the company's economic reorganization from its legal basis*", the Paris Court of Appeals held that the legislator implicitly but necessarily meant that in this type of scenario, the applicable sanction was the nullification of the PSE.

This judgment, much talked and written about, sparked an outcry among legal practitioners who did not fail to alert public authorities[4] on the risks generated by such a decision, i.e.:

- a surge in legal actions for nullification of PSEs (including through summary court proceedings), which would have created a great deal of legal uncertainty;
- contrary to a nullification for insufficient measures contained in the PSE, a nullification for lack of economic grounds would have led to the impossibility for a company to submit a new PSE within a short period of time as the economic grounds, by principle, may not be altered. As such, we would have faced a situation where only the PSEs submitted on the eve of bankruptcy would have been likely to be considered as "valid", which offers very limited chances to "preserve" employment whereas the main purpose of a PSE is precisely to contain measures to limit job cuts;
- in practice, companies would increasingly use means to avoid the implementation of a PSE (e.g. by resorting to fixed-term employment contacts, temporary work or sub-contracting, by terminating employees individually as the occasions arise, etc.) whereas many international groups are already trying to avoid as much as possible implementing a PSE.

For all these reasons, systematically challenging PSEs would obviously be counter-productive.

Feverishly awaited, and now applauded by legal practitioners, the decision handed down by the *Cour de Cassation* on May 3, 2012 is "crystal clear". The *Cour de Cassation* indeed followed the letter of the Law and considered that "*the redundancy procedure may not be nullified in consideration of the grounds put forth to justify the redundancy, the validity of the PSE being independent from the grounds for the redundancy*".

In a communiqué, the Cour de Cassation explained its reasoning: "*This limitation on possible grounds of nullity takes into account the will of the legislator who, through the Law of January 27, 1993, viewed the PSE as a means to avoid redundancies, the absence of economic grounds merely entitling the redundant employee to claim damages".*

In fact, the *Cour de Cassation* simply applied its own case-law, leaving company heads some leeway to make economic and strategic choices:

- In a decision[5] dated December 8, 2000, the Plenary Assembly of the *Cour de Cassation* had denied trial judges the right to control the choices made by an employer between various options likely to safeguard the company's competitiveness.
- In a decision[6] dated October 3, 2001, the *Cour de Cassation* specified that, when checking a social plan (former expression used for PSE), the judge had no power to assess the employer's economic choices that led the implementation of such plan.
- Then, in a decision[7] dated March 20, 2007, the *Cour de Cassation* ruled that the relevance of a PSE is independent from the grounds put forth to justify the redundancies.

As such, the decision of May 3, 2012 is totally in line with the aforementioned case-law trend and, therefore, fully coherent.

The position adopted by the *Cour de Cassation* is also consistent with the stand of the *Constitutional Council* that, in a decision[8] issued on January 12, 2002 in relation to the Law for Labor Modernization, specified that "*by making redundancies conditional upon the existence of "serious economic difficulties that could not be overcome by any other means", the Law leads the judge not only to control, as is the case under applicable legislation, the economic grounds put forth by the company head to justify the redundancies under the procedures provided for by the French Labor Code, but also to substitute its own assessment of the choice between the various possible solutions to the assessment of the company head. **The combined constraints imposed by this definition on the management/administration of company has the effect of allowing companies to lay-off employees only if their survival is at stake ; by enacting such provisions, the legislator has infringed the free enterprise principle in a manner that is manifestly excessive with regard to the pursued objective of maintaining jobs***".

It seems that the *Cour de Cassation*, just like the Constitutional Council, does not view a PSE as the inevitable first stage of a process leading to mass redundancies but **rather as a positive alternative to such redundancies**.

The *Cour de Cassation* thus seems to promote the freedom of company heads in order to allow for recourses before the situation precisely becomes catastrophic. This reasoning has led it to limit the judge's interference at this stage of the procedure and, consequently, to quash the judgment rendered by the Paris Court of Appeals on May 12, 2011.

Following the judgment of the Paris Court of Appeals, the legal counsel of Vivéo France's works council had declared "*judges have imposed something that the legislator had never had the courage to vote*". Today, it announces that it will base its argumentation on the theory of non-existence of economic grounds, when pleading the case before the Versailles Court of Appeals, the remanding jurisdiction, and advocates the legislator to enact provisions that would recognize this ground of nullity. In fact, even if the Versailles Court of

Appeals granted the claim of the works council, the terms of the decision of May 3, 2012 are so clear that, if a second referral was made to the *Cour de Cassation*, the latter would probably quash the judgment without remanding again the case to a lower jurisdiction. Concerning the works council's call for the enactment of new legal provisions, it should be noted that the aforementioned case-law of the Constitutional council strictly regulates the intervention of the legislator with regard to the free enterprise principle.

On the other hand, while the decision of the *Cour de Cassation* comes as a great relief to labor law specialists, they still all agree to say that it time to reform French rules governing redundancies which are derived from 5 Laws meeting different objectives (1975, 1989, 1993, 2002 et 2005) and from an abundant case-law.

In fact, while the commented decision puts an end to the concerns about the new ground for nullification of a PSE that had been acknowledged by the Paris Court of Appeals, it also re-emphasizes numerous general issues in relation to redundancy rules applicable in France.

Regrettably, the issue of to **what level should be assessed the economic grounds** put forth to justify the redundancies is not widely debated.

Indeed, since the Videocolor decision[9], the economic grounds put forth to justify redundancies are assessed at the group level, not at the company level.

In the Vivéo case, the Paris Court of Appeals had, as part of its reasoning, effectively recalled that the assessment was to be conducted at the group level and then concluded, following that assessment, that there were no economic grounds justifying the redundancies. Yet, the *Cour de Cassation* did not address this point.

Since no other European country requires such assessment to be performed at the group level (except The Netherlands, but only to determine the amount of indemnification that should be paid the redundant employees), a legislative measure or a case-law development would be welcome to "*come back to a more concrete level of assessment, i.e. at the level of the relevant company*"[10].

Besides, procedures are too long, too burdensome and their effectiveness in terms of employability and redeployment is quite debatable.

It looks like time has come to rethink and completely overhaul French rules governing redundancies and dismissals on economic grounds.

A word to the wise is enough…

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[1] Labor Chamber of the *Cour de Cassation*, May 3, 2012 n° 11-20.741, Viveo France vs. works council of Viveo France)

[2] The obligation to implement an employment preservation plan applies to companies with at least 50 employees that contemplate laying-off at least 10 employees over a 30-day period

[3] Paris Court of Appeals, May 12, 2011, n° 11-1547: BS 11/11 inf. 947

[4]In this respect, the role played by AVOSIAL is worth noting. AVOSIAL is an association of French business lawyers specialized in labor and employment law that promotes recommendations in the field of labor and employment law and regulations to all concerned actors, including public authorities, legislators, the media, etc.

[5] Plenary Assembly of the *Cour de Cassation*, December 8, 2000, n° 97-44.219, SAT

[6] Labor Chamber of the *Cour de Cassation*, October 3, 2001, n° 00-15.267

[7] Labor Chamber of the Cour de Cassation, March 20, 2007 n°04-47.562, Delecroix vs. Sté 3M France

[8] Constitutional Council, 2001-455 DC, January 12, 2002: RJS 3/02 n°275)

[9] Labor Chamber of the cour de Cassation, April 5, 19955, Thomson Vidéocolor, RJS 5/95 n° 497)

[10] As claimed by AVOSIAL (see footnote 4)