

Reconsidering the Notion of ‘Employer’ in the Era of the Fissured Workplace: Responses to Fissuring in French Labour Law

Sylvaine Laulom
University Lumière Lyon 2

1. Introduction

For a long time in France, as in many other countries, the question of “who is an employer?” has not been considered a very important issue, the main question continuing to be “who is an employee?”

Traditionally, the concept of the ‘employer’ is defined in relation to the concept of the ‘employee’, the employer and the employee being the two parties to the employment contract. The main test used to identify the employer is ownership of the company, together with exercising the managerial powers of control, direction and coordination over the working activity (the “subordination test”). Most case law dealing with the issue of employer has traditionally been about identifying the “real” employer, hiding behind the apparent, contractual one.¹ Therefore, and beyond the scope of the supply of workers, if the legal entity which exercises the managerial power of control and direction over the working activity is different from the legal entity which is formally part of the employment contract, the latter will not be regarded as the employer insofar as employment protection is concerned. According to Corazza and Razzolini, this principle is rooted in the rules governing the interpretation of contracts based on the idea that content prevails over form. They also consider that “*in Continental European legal systems, the prohibition of separation between the formal employer, who bears the employment risk and liabilities, and the employer who effectively owns the firm and exercises control and direction over the working activities, derives from the traditional hostility toward any form of labour intermediation.*”²

However, in France as in other countries, the transformation of economic organisations has led lawyers, scholars and, sometimes, legislators to discuss and redefine the concept of employer. As early as 1981, a conference on ‘the fragmented company’ (*L’entreprise éclatée*) was organised in Paris.³ Here, the starting point of the analysis is the company (the employer) and not the workforce. In this conference, perhaps for the first time in France, the reality of this fragmentation of the company and its consequences was discussed and the fragmentation of workers’ collectivity was analysed. Articles published at that time described how this fragmentation can occur and how civil and commercial law

¹ See for example, a case dated 1978, Soc. 9 Nov. 1978, n°77-13723.

² L. Corazza, O. Razzolini, “Who is an Employer?”, *WP CDSLE Massimo d’Antona*, 110/2014.

³ *L’entreprise éclatée*, SAF conference of 24 January 1981, report published in *Droit Ouvrier*, March-April 1981.

could be used to organise firms in such a way to disempower the formal employer.⁴ According to these articles, what was at stake was temporary agency work, the freedom to organise corporate groups and recognising separate subsidiaries, sub-contracting and franchising. 30 years later, a new conference on the same issue was organised, this time with a subtitle: ‘The fragmented company, identifying the employer and assigning liability’⁵. At this event, the processes described were more numerous and more complex and discussions took place on the legal solutions to this fragmentation, specifically on how to identify decision-makers in order to make them liable. In an article published in 2000, Supiot also described the ‘new faces of subordination’⁶ whereby the single employer model is fragmented because of new forms of decentralisation of power within companies. The network enterprise model is also described as the disbanding of large companies which, by ‘focusing on their core trade’, further reduce the boundaries of their ‘hard core’ and the resources associated with it. Within the network enterprise, the organisation of power is no longer hierarchical. Non-hierarchical coordination is established among the entities, which affects the distribution of employer liabilities and obligations.⁷ The single employer model does not seem to be adapted to this decentralisation and redistribution of powers. More recently, the digitalisation of the economy and the ‘Uberization’ of the employment relationship has also become a concern.

Therefore, there is some evidence that fissured work arrangements have become an issue for labour lawyers, particularly when dealing with groups of companies, outsourcing, externalisation of the employment relationship and supply-chains.

This paper initially presents the current situation of fissurisation in France. It then presents some of the French legal responses to this fissurisation as regards individual labour relations and collective relations. These legal responses are themselves fragmented, partly because fissurisation itself is not a unique phenomenon and partly because the traditional conception of the employer makes it difficult to define a ‘plural-employer’ model, where two or more firms can share employers’ responsibilities.

2. Current situation of fissurisation in France

Weil’s description of a fissured workplace may be applied to the French labour market, although it is difficult to really ascertain the extent of fragmented work forms. There has been a movement from centralised decision-making toward decentralised structures and production networks. In both the manufacturing and service sectors, vertical

⁴ M. Jeantin, ‘L’entreprise éclatée: intérêts d’une approche commercialiste du problème’, *Droit Ouvrier*, March-April 1981, p. 118; M. Henry, ‘Les conséquences de l’entériorisation pour les salariés et leurs institutions représentatives’, *Droit Ouvrier*, March-April 1981, p. 122; A. Lyon-Caen, ‘A propos de l’entreprise éclatée’, *Droit Ouvrier*, March-April 1981, p. 127.

⁵ *L’entreprise éclatée, Identifier l’employeur, attribuer les responsabilités*, SAF conference of 8 December 2012, report published in *Droit Ouvrier*, mars 2013. B. Dondero, ‘Entreprise et personnalité morale: l’approche du droit des sociétés’, E. Peskine, ‘La responsabilisation des sociétés mères’, N. Micault, ‘Construction des groupes: à la recherche du responsable’, D. Métin, ‘Mise à disposition et prêt de main d’oeuvre: la main d’oeuvre extérieure importée dans l’entreprise’; M. Kocher, ‘A la recherche de la responsabilité du donneur d’ordre dans les relations de travail de sous-traitance: une quête impossible?’, S. Ducrocq, ‘Externalisation de l’activité ou sous-traitance des licenciements?’, A. Lyon-Caen, ‘Retrouver l’entreprise’.

⁶ A. Supiot, ‘Groupe de sociétés et paradigme de l’entreprise’, *RTDC*, 1985, p. 5. ‘Les nouveaux visages de la subordination’, *Droit Social*, 2000, p. 131.

⁷ E. Peskine, *Réseaux d’entreprises et droit du travail*, LGDJ, 2008.

disintegration and outsourcing have enabled firms to make their operations leaner and more flexible. Outsourcing and subcontracting activities as market forms of governance which replace hierarchy have definitely increased.

Two recent reports published by the National Institute of Statistics provide some information on two forms of this fissurisation: subcontracting and groups of companies. The use of temporary agency workers also takes place.

According to the first report, published in 2014 by the French National Institute of Statistics (INSEE)⁸, 18% of companies employing at least 50 employees sub-contract some of their activities outside France, particularly to other countries in the European Union and 38% rely to subsidiaries located outside France in their production process. Subcontracting in France is widespread and 57% of companies employing at least 50 employees subcontract some of their activities, which is particularly significant for groups of companies (60%).

A second Insee report provides an indication of the importance of groups of companies in the French economy.⁹ This report uses an economic concept of firms to give an overview of the way groups are organised in France. According to this report, the main innovation illustrates the clearer picture obtained when groups are considered in economic analysis: *'In France, enterprises have long been defined in purely legal terms. In statistics and in terms of the law, an enterprise was defined according to its legal status, the 'legal unit', i.e. a sole proprietor or company carrying out a production function. In December 2008, for the first time, the Economic Modernisation Act (LME – 'Loi de modernisation économique') provided enterprises with an economic definition. This new definition gives a better understanding of the way a group was organised. Indeed, when an enterprise was assimilated with a legal unit, this did not describe the true situation of companies that were owned by other companies within a group organisation, as they were likely to have little, if any, decision-making autonomy. With the aim of implementing this new definition, profiling consists in identifying among groups the relevant enterprise(s) as defined by the decree of 2008, and reconstructing their consolidated accounts'. 'Now that an economic definition has been established, it provides a better overview of the country's economic fabric. Using this definition, the economic fabric can be seen to be more concentrated than it had seemed'.*

'Industrial enterprises have often created separate subsidiaries to perform a commercial role. In addition, a large proportion of their shares are in holding companies or real estate companies, classed as being in the tertiary sector. When the switch was made from a legal unit approach to an enterprise approach in industry, the total balance sheet more than doubled. This gave a more realistic view of company performance, as all resources contributing to the company results were now taken into account. Using this approach, the exportation rate of the manufacturing industry increased by 4 points, labour productivity was revised upwards, and the margin rate increased slightly. The perception of the weight of each sector has also changed'.

'In 2011, across all non-farm and non-financial market sectors, there were about three million enterprises. Of these, 95% were micro-enterprises. They employed 2.5

⁸ Insee Premières, n°1518, October 2014, 'La sous-traitance internationale, une pratique fréquente', <http://www.insee.fr/fr/ffc/ipweb/ip1518/ip1518.pdf>, accessed 22 February 2016.

⁹ Insee References Collections, 'Enterprises in France', 2015, Press kit, http://www.insee.fr/fr/ppp/comm_presse/comm/Dossier%20de%20presse%20Les%20entreprises%20en%20France_EN.pdf, accessed 22 February 2016.

million payroll workers, i.e. only 20% of the total, and produced 16% of turnover and 21% of value added. At the other end of the scale, 222 large enterprises employed 3.1 million payroll workers, or 25% of the total, achieving 31% of turnover and 30% of value added. In addition to this duality, there was another fairly well-balanced division: 136,000 non-microenterprise SMEs and 4,900 intermediate sized enterprises (ISE) employed 29% and 26% of all payroll workers respectively. They produced 22% and 31% of turnover respectively, and 26% and 23% of value added’.

‘Legal units were always considered by workforce size when measuring economic concentration and especially the proportion of SMEs. In 2011, out of more than 3 million legal units in market activities in the non-farm and non-financial sectors, only a hundred or so exceeded the threshold of 5,000 employees that defines large enterprises: they employed 13% of all payroll workers. If the economic approach to enterprises is used, this concentration is far higher. Since they employ 25% of payroll workers in the scope of the coverage, the economic weight of the 222 large enterprises is now more than twice that of legal units of comparable workforce size. They produce 30% of value added of enterprises (or 15% of GDP), which is more than double that generated by legal units of similar workforce size’.

‘The change in the definition of the unit of analysis also changes the breakdown across sectors. Manufacturing or construction enterprises that form a group contain many companies within their core business. However, they have often also set up separate affiliates whose main role is to perform commercial functions in France or for export, and to carry out support functions (holding companies, head office activities, transport, real estate, research, etc.). Thus for the manufacturing sector, the switch from using legal units to an enterprise approach increases the sector’s share in the economy in terms of workforce. This refocusing on manufacturing is even more visible for some aggregates that were particularly affected by spin-offs to affiliates within groups, such as net assets’.

Finally, regarding temporary work, between 1988 and 2015, the percentage of agency workers within the workforce increased from 0.7% to 3%, representing 586,200 temporary agency workers. These workers are predominantly employed in building and industry and this may be one of the reasons why most the temporary agency workers are men.¹⁰

3. Current legislative and interpretative responses: individual labour relations

The process of fissurisation of workplace can take various forms. Some are not so new, nor are the responses of the legislator. For example, temporary agency work relationships have been regulated in France since 1972. Corporate groups have also existed for a long time and have challenged some of traditional representations of labour law.

Measures to protect workers by going beyond the boundaries of the legal entity do exist. In order to present them, it is necessary to distinguish the type of fissurisation at stake, as the solutions are not uniform. Labour intermediation has justified the most complete organisation of shared responsibilities between the user company and the

¹⁰ See ‘Temporary work at the end of 2015’, Insee, <http://dares.travail-emploi.gouv.fr/dares-etudes-et-statistiques/statistiques-de-a-a-z/article/l-emploi-interimair-e-les-series-mensuelles-trimestrielles-et-annuelles>, accessed 30 March 2016.

employer, the temporary agency. In groups of companies, it is initially the definition of the unit of representation which has led the boundaries of the legal concept of the 'employer' to be redrawn, by focusing on economic activity. Going beyond the legal concept of the 'employer' in groups of companies has had knock-on effects in employment legislation. In subcontracting, the share of responsibilities mainly concerns in relation to health and safety legislation. Finally, in franchising, an old article of the French labour code allows labour legislation, under certain conditions, to be applied to the franchisee.

3.1. Temporary employment agencies and other forms of supplying workers

Traditionally in France, any profit-making operations, the sole purpose of which is the supply of employees, is forbidden (see Article L. 8241-1 of the French Labour Code). This provision does not apply to temporary employment agencies and other marginal forms of intermediation such as job-sharing employment agencies, model agencies and sports' associations. In a mirror provision, Article L. 8241-2 of the Labour Code authorises loans of employees for non-profit purposes.

Although hiring workers through temporary work agencies is not the only authorised form for supplying workers, the regulation of temporary work, and the distribution of responsibilities among the employers which it implies, is the most complete. In 2011 a law was adopted to define the notion of 'non-profit-making purposes' which essentially draws the boundaries between the legal and illegal supply of workers. At the same time, the law defines the legal framework governing of the temporary hiring of employees.

3.1.1. Temporary employment agencies: a complete regulation of a triangular relationship with shared responsibilities

Hiring workers through temporary employment agencies has been extensively regulated in France since their recognition in 1972. The lucrative hiring-out of labour and labour-only subcontracting is forbidden unless conducted through temporary employment agencies. The French regulation is based on three aspects: the regulation of temporary employment agencies, a limited used of agency work and a definition of rights for agency workers. In this paper, we will only present the distribution of rights and duties between the user firm and the temporary employment agency as organised by the French Labour Code.

To summarise, the French Labour Code splits the rights and duties of employers between the employment agency and the user firm, thus creating a hypothetical duality of employers. *'The characteristic of temporary agency work is to create for the worker a dualistic relationship, with the temporary work firm on the one side, with the user company on the other. The first company takes on the legal status of employer while the second constitutes only the user of the worker's labour force. Therefore, agency work develops a new kind of legal position, the user of the worker. Distinct from the familiar status of employer, the status of user appears more singular to labour law structures. Nevertheless, the distinction between the one who employs and the one who uses the worker is fundamental to the legal mechanism of temporary agency work. To the employer the worker is subordinated, to the user the worker is at the disposal. While in the past the*

*criterion of subordination assimilated the employer to the user, it is not necessarily the case nowadays*¹¹.

Labour law defines the rights relating to the presence of the agency worker within the user company. Firstly, agency workers must enjoy similar treatment to that given to employees of the user firm. Permanent workers within the user company serve as comparators for determining most employment rights of agency workers. Equality also extends to pay and all working conditions. Secondly, the user may be found liable for any damages suffered by the agency worker during the assignment. Despite the lack of any contractual link between the temporary agency worker and the user company, some rights and obligations exist between the two. The very fact that the agency worker performs his or her duties within the user company creates some legal obligations for this company. The French Labour code states that for the duration of the assignment, the user company is responsible for all working conditions. Thus, a general obligation to protect the agency worker is binding upon the user company. Any damages caused to the agency worker during the assignment may trigger the user company's criminal or civil liability. The user company is also liable for all damages caused by the temporary agency worker to third parties. In particular, the user company has a duty to ensure the safety of temporary agency workers. Finally, if the user company decides to hire the temporary worker at the end of his or her contract, the continuity of the relationship is recognised and his or her length of service will be calculated taking into account the temporary employment contract. Any violation of the rules regarding the duration, renewal and successive number of assignments exposes the user company to specific sanctions. In this case, French law establishes an open-ended contract between the user company and the agency worker.

In terms of the collective rights of agency workers, the French legislator has attempted to adjust employment legislation to the peculiar situation of agency workers. Their collective rights are organised within the agency firm, with some adjustments. The law includes agency workers within the calculation of the workforce in order to decide whether the number of employees of the temporary employment agencies goes beyond the threshold established for trade union representatives or elected working committees. Agency workers may vote in elections within the temporary employment agency when they can justify three months' service during the last twelve months preceding the drafting of the lists. In order to stand in the elections, they must have been employed by the temporary agency firm for at least six months out of the last eighteen months prior to the election. Moreover, the worker must have been an employee of the temporary employment agency when the lists were drawn up.

Agency workers do not participate in the election of workers' representatives in the user company. However, staff delegates in the user company also represent agency workers.

Sectoral collective agreements play an important role in the regulation of temporary agency work. Employers are represented by PRISME, which claims to cover 600 temporary work agencies representing 90% of the sector. For example, specific provisions adapted to the precarious situation of workers can be found regarding vocational training, access to loans, social protection, etc. A new agreement, signed in July 2013,¹² introduced a new, open-ended contract for temporary agency workers in order to fight the

¹¹ See C. Vigneau, 'Temporary Agency Work in France', *Comparative Labor Law and Policy Journal*, Vol. 23, No 1, pp. 45-66, Fall 2001.

¹² Agreement of 10 July 2013 on securing the career paths of temporary workers.

precariousness of their employment. However, it has not been hailed as a success, as agencies only propose this type of contract to workers who do not have any difficulties finding jobs and, for these workers, an open-ended contract could be less advantageous than a fixed term contract. If this is the case, they receive a bonus (known as the '*prime de précarité*'), which they lose if they have an open-ended contract.

3.1.2. The loan of employees for a non-profit purpose

Although the exclusive loan of employees for the purposes of profit is prohibited, it is possible to loan employees for non-profit-making purposes. To avoid being considered as illegally supplying employees or subcontracting labour, which would expose the companies to criminal sanctions, loaning employees must, necessarily, be for non-profit-making reasons. This technique has been increasingly used among groups of companies, particularly as a human resources management tool. Outside groups of companies, it has been presented as a way for companies to adapt to difficult economic contexts. Under this scheme, a company agrees to lend an employee for a fixed-term period to a so-called 'user' company that has a temporary need for labour.

Until 2011, defining the concept of 'non-profit-making purposes' fell within the confines of case law. In an important decision, the John Deere decision of 18 May 2011,¹³ the *Cour de Cassation*, the French Supreme Court, redefined the concept of non-profit-making purposes, taking into account the user's perspective in the context of an intra-group loan of employees.

In this decision, the *Cour de Cassation* clarified and extended the concept of the illegal supply of employees as part of a loan of employees from a parent company to one of its subsidiaries. In this case, employees had been hired by the parent company in order to subsequently be loaned to a subsidiary. Salaries were paid by the parent company which re-invoiced the salary costs and related social security contributions to its subsidiary. The *Cour de Cassation* recalled that the prohibition on lending employees for profit-making purposes set out in Article L. 8241-1 of the French Labour Code applies both to the lending company and the user company. Neither of them may derive a financial gain or advantage from the loan of employees.

The *Cour de Cassation* specified that the profit-making nature of the loan may result from increased flexibility in staff management and administration and savings in social security charges enjoyed by the user company. Having recalled this principle, the *Cour de Cassation* noted that the subsidiary had not incurred any staff management expenses, with the exception of the reimbursement of salaries and social security charges on a euro for euro basis. The situation therefore, constituted an illegal loan of employees.

Shortly after this decision, which was criticised by employers' organisations, the Law Cherpion was adopted on 28 July 2011¹⁴ in order to redefine the concept of

¹³ Cass. Soc. 18 May 2011, n°09-69175.

¹⁴ Law N°2011-893 of 28 July 2011 '*pour le développement de l'alternance et la sécurisation des parcours professionnels*'. Indeed, an amendment has been added to the bill following discussion with Parliament on the development of work/study programmes and securing career paths. F. Favennec-Héry, 'Prêt de main-d'oeuvre à but non lucratif: un texte décevant', *Dr. soc.* 2011, p. 1200; F. Pelletier, 'Le prêt de main-d'oeuvre exclusive', *JCP S* 2011, 1397; A. Teissier, 'Prêt de main-d'oeuvre: un nouveau régime juridique', *Sem. soc. Lamy* 2011, n° 1503, p. 4; S. Tournaux, 'Libéralisation des groupements d'employeurs et statut embryonnaire de la mise à disposition', *RDT* 2011, p. 572. D. Métin, 'Mise à disposition et prêt de main d'oeuvre: la main d'oeuvre extérieure importée dans l'entreprise', *Droit Ouvrier*, March 2013, p. 173.

non-profit-making and, at the same time, regulate the loan of employees for non-profit-making purposes. A new paragraph was added to Article L. 8241-1 of the French Labour Code, stating that the loan of employees does not have a profit-making purpose when the lending company only bills the user company during the loan period for the wages paid to the employee, the associated social-security charges and contributions, and the professional expenses repaid to the employee in connection with the loan.

With this new definition, which aims at putting an end to court decisions around the concept of ‘non-profit-making purposes’, the bill also introduces new provisions in order to regulate the loan of employees. The employee’s express consent is now required and the conclusion of an amendment signed by the employee is mandatory, even if there are no substantial modifications to the employee’s working conditions. Article L. 8241-2 of the French Labour Code specifies that the employee may not be sanctioned, dismissed or subject to discriminatory measures if he or she refuses to be loaned. The amendment to the contract must specify the duration of the loan, the work to be performed within the user company, the place where such work is performed as well as the specific features of the job and the working hours of the employees. The amendment may also include a probationary period if the loan entails a change in one of the main elements of the employee’s employment agreement. The employee also continues to benefit from all provisions set out in the collective agreements which would have been applicable if the employee had performed his or her work in the lending company. This new provision generates some uncertainties, as it is not clear whether the employee should be entitled, as previously, to claim for the application of the provisions set forth in the industry-wide collective agreement or company-level bargaining agreements applicable within the user company, even when such provisions are more beneficial to him or her. The law also recalls that the loaned employee may access the services (for example the company restaurant) and collective transportation means established by the user company.

At the end of the loan period, the employee is reinstated to his or her position in the lending company, with no impact upon his or her career evolution or remuneration as the result of the loan period (L. 8241-2 of the Labour Code). In a decision dated 7 December 2011¹⁵ the *Cour de Cassation* ruled that in the event of termination of the employment contract by the subsidiary, the employee must be reinstated in the parent company, even if he or she had never effectively worked there before.

The lending company must consult the works council prior to implementation of the loan of an employee and inform the works council of the signed loan agreement. Furthermore, when the position in the user company appears on the list of jobs that pose particular risks to the health or safety of employees, the Health and Safety Committee of the lending company must be informed. Within the user company, the works council and the health and safety committee must be informed and consulted prior to integrating a loaned employee.

3.2. Groups of companies: some incomplete and fragmented solutions

Groups of companies are not a new phenomenon in France but their numbers have increased and they are becoming increasingly complex. In groups of companies, several companies, although formally separated, are managed under the unified management and coordination of the holding as a single economic entity. A multiplicity of companies thus

¹⁵ Cass. Soc. 7 December 2011, n°09-67367.

coexists within the unity of the group.¹⁶ The issue here is to go beyond the limits of the legal entity and rebuild a unity that matches the economic organisation of the group. In France, this was first implemented for workers' representation rights and, more recently, in the context of dismissal for economic reasons.

3.2.1. Groups of companies and workers' representation

The definition of the unit of representation is an important point in the French system of workers' representation and the law attempts to adapt the structure of works' councils to that of the company. Where possible, the structure of the works council follows the structure of the company and the corporate group. Thus, each decision-making level corresponds to a specific structure of representation: the company works' council, the central works' council, the group council and, now, the European works' council.

The representation unit was initially structured around the concept of the company as a legal autonomous entity. Case law has gradually adjusted this approach by recognising the notion of the '*Economic and Social Unit*' (*Unité économique et sociale* or *UES*). This notion emerged in the 1970s¹⁷ against a backdrop of fraud in response to the issue of employers with separate legal entities each with fewer than 50 workers, but which together exceed this threshold. The *Cour de Cassation* thus decided that, in terms of workers' representation, each company could not be considered as a separate entity. Soon after, the recognition of the economic and social unit became independent from the existence of a fraud. When the conditions of the economic and social unit are met, the judges recognise that a group of companies represents a single unit. In 1982, the concept was recognised by the law and introduced into the Labour code¹⁸. However, the Labour Code does not provide any definition of the concept and it has fallen to case law to provide a definition. An economic and social unit is recognised through collective agreement or, failing such agreement, through court order.

The Courts use several indicators in order to recognise an economic and social unit¹⁹. The idea is that, when several companies which are technically separate legal entities, have strong operational, human resources, economic and financial ties, they can be stated to be an Economic and Social unit. In this case, works' council elections occur within this broader framework and only one works' council will operate within the entity.

The unit should be Economic and Social in nature. Economically, a managerial unity should be identified (the managers or the board members are the same), companies have common goals and strategies, there is a joint-exercise of a unified economic activity. Judges also verify whether the assets are similar and if the activities of the companies are similar or complementary. In social terms, some other criteria are relevant: the same collective agreement, similar working conditions, etc. apply. An economic and social unit does not need to encompass account all the companies within a group and a group can integrate more than one economic and social unit. A holding company without any employees can also be integrated in an economic and social unit²⁰.

The Economic and Social Unit is mainly used to define a workers' unit of representation and the social partners may also negotiate at that level. However, the Labour

¹⁶ See. L. Corazza and O. Razzolini, *op.cit.*

¹⁷ Cass. Crim. 23 April 1970, Ets Herriau, D. 1970. 444.

¹⁸ See Article L. 2322-4.

¹⁹ See for example, Cass. Soc. 18 July 2000, n° 99-60353.

²⁰ Cass. Soc. 21 January 1997, n° 95-60833, 95-60838, 95-60839, 95-60840.

Code refers to this notion in two others areas: for defining the employer's obligation to establish a profit sharing plan²¹ and for defining the level at which health services should be established (group, company or Economic and Social Unit).²² However, the consequences of the recognition of an economic and social unit in the context of dismissal for economic reasons are far more important.

3.2.2. Groups of companies and employment responsibilities

When an employer is contemplating a collective dismissal (affecting at least 10 employees) in companies with more than 50 employees, he or she must establish a social plan ('an employment preservation plan' or *plan de sauvegarde de l'emploi*, PSE), which includes a number of measures aimed at limiting the number of redundancies and encouraging the reassignment of workers who are laid off. The content of the social plan depends on the company's resources and the measures should be proportional to these resources. Since 2002, the content of the social plan is evaluated not at the level of the company but at the level of the Economic and Social Unit if such a Unit has been recognised. Otherwise, judges may sometimes appear to be reluctant to extent the scope of application of this concept. For example, judges refuse to recognise the Economic and Social Unit as being the employer responsible for the dismissals on economic grounds.²³ The legal entity, the formal employer, remains responsible for such dismissals and for establishing the social plan and it does not share these responsibilities with other companies within the group or the Economic and Social Unit.²⁴ However, the *Cour de Cassation* decided that if the decision to dismiss is taken at the level of the Economic and Social Unit, the collective nature of the dismissal should be recognised at that level.²⁵

Without using the notion of Economic and Social Unit, corporate groups are also taken into account by judges to check the employer's economic reasons and to define the scope of the obligation to redeploy employees prior to any dismissal on economic grounds.

According to Article L.1233-3 of the Labour code, as interpreted by the Supreme Court, dismissal on economic grounds can be justified by economic difficulties, technological changes or a reorganisation of the company which is necessary to safeguard its competitiveness. Where a company is part of a corporate group and proceeds with a redundancy, the economic grounds are, in principle, assessed at the group level and, more precisely, at the level of the group's business line to which the company proceeding with the redundancies belongs. There must be valid economic grounds either at group level (if the group only operates in only one line of business), or at the level of the business line in which the company operates (if the group operates several business lines of business). Therefore, it is not sufficient to have a valid economic grounds on the company level, it is the situation of the group which matters and the situation of the group in its transnational organisation²⁶. Thus, the economic situation of companies located outside France and belonging to the same group shall be taken into consideration.

²¹ According to Article L3322-2 of the Labour Code, the establishment of a profit sharing plan is mandatory in the companies or Economic and Social Unit employing at least 50 employees.

²² Article D. 4622-1.

²³ Cass. Soc. 16 December 2008, n°070-43875.

²⁴ Cass. Soc. 13 January 2010, n° 08-15776, Flodor.

²⁵ Cass. Soc. 16 November 2010, n°09-69485, note E. Peskine, RDT 2011, p. 112.

²⁶ A highly debated Bill is currently being discussed in Parliament. Among its numerous provisions, it proposes redefining 'economic grounds' in such a way that economic difficulties will only be assessed at the

Prior to any economic dismissal, the employer also has an obligation of redeployment. Under this obligation, before dismissing an employee on economic grounds, the employer is bound to verify whether it is possible to redeploy the worker within the economic organisation. The employer is obliged to seek any alternative job opportunities for the employees concerned and to offer them, if necessary, professional training. In the event of an employee working in a company belonging to a group, the redeployment obligation is extended to the group as a whole (included companies outside France, although the redeployment obligation differs when the job proposal is located outside France). Economic dismissal is considered as unfair if possibilities of redeployment in the holding or in the other subsidiaries have not been taken into account.

Finally, it is in the context of dismissal on economic grounds that judges have recognised the concept of the 'co-employer' (or 'joint-employers'). This concept is not new and was traditionally used to seek the liability of parent companies.²⁷ In 2011, the Supreme Court issued decisions²⁸ which appeared to extend the scope of this concept. The 2011 case brought before the French Supreme Court related to the following situation. In 2004, the French company MIC, which was indirectly controlled by the German company Jungheinrich AG (the 'grand-parent' company), closed down its activities in France and made all its employees redundant. The employees challenged the redundancies and claimed for damages against not only MIC but also Jungheinrich AG. The Court of Appeal in Caen ruled that the German company Jungheinrich AG was also an employer of the employees working for its subsidiary MIC. Jungheinrich AG challenged this decision before the *Cour de Cassation*, claiming that even though a holding company has a control on its subsidiary and takes decisions which may have an impact on the employees of the subsidiary, this is not sufficient to prove that the holding company is a co-employer of these employees. The French Supreme Court did not accept the arguments of the grand-parent company and instead ruled that there was a 'confusion of interests, activities and management' between both companies, because there was a common management between both companies, under the supervision of Jungheinrich AG. The decisions taken by Jungheinrich AG had deprived MIC of any industrial, commercial and administrative autonomy; Jungheinrich AG was the owner of all trademarks and patents of MIC; the strategic decisions were taken by Jungheinrich AG, which also dealt with human resources management and had decided upon closing down the activities of MIC; the managing director of MIC had no real power and was entirely subject to the instructions of Jungheinrich AG. Consequently, Jungheinrich AG was deemed to be a co-employer of the employees of its subsidiary and could be held directly responsible for the damages claimed by these employees for unfair dismissal because of a lack of economic grounds.

With this decision, the *Cour de Cassation* appears to want to extend the scope of the concept of 'co-employer'. Taken in its widest sense, this concept could be used to redefine the boundaries of employment protection and admit a multiple-employer model where the responsibilities of employer could be shared by a number of companies belonging to the

national level, and the transnational nature of the group of companies will no longer be taken into account (Article 30). However, it remains to be seen whether the text will be amended in Parliament and whether the Bill will be adopted.

²⁷ Cass. Soc. 24 March 1969, Bull. civ. V, n° 209.

²⁸ Cass. Soc. 18 Jan. 2011, n° 09-69199, 1 Feb. 2011, 10-30045, Cass. Soc. 22 June, n° 09-69021, 28 September 2011, n°10-12278, notes G. Couturier, *Droit Social*, 2011, p. 379; F. Géa, *Revue de Droit du travail*, 2011, p. 168; P.-A. Antonmattéi, 'Groupe de sociétés: la menace du co-employeur se confirme', *Semaine Sociale Lamy*, 2011, n° 1484.

same group. However, in 2014,²⁹ the Supreme Court fell short of these expectations and confirmed that the concept of co-employer should be understood in its narrow sense. It is only when an 'abnormal' relationship between a parent company and a subsidiary is identified that a judge would be willing to infringe the formal separation between the corporations.

Judges will consider that a company is a co-employer (very often between a subsidiary and its parent company) only if there is a confusion of activity, interests and management at such a point and a level as to determine a contractual confusion and a mixed and indistinct use of the workforce within the group. Judges will assess, on a case-by-case basis, whether the subsidiary is autonomous or not. They will examine a series of elements in order to appraise the level of dependency of the subsidiary. These elements are, for example, the identity of the managers, the determination of the subsidiary's strategy, pricing policy, economic and labour related choices made unilaterally by the parent company, the existence of a centralised human resource and employment-related management system, full or quasi-full ownership of the capital, financial control, lack of autonomy in terms of operational and administrative management, and complete dependency of the subsidiary's economic activity upon the group to which it belongs. When an autonomous economic entity is, in practice, a mere establishment deprived of any decision-making authority and management powers and where it does not have any autonomy, a co-employer will be recognised. However, mere economic dominance over another company is not sufficient for the status as co-employer to be established.

The consequence is that a co-employer is subject to the same obligations and exposed to the same liabilities as an employer.

The concepts of the Economic and Social Unit and of co-employer could limit the fissurisation of employment created by corporate groups. However, the solutions which have largely been defined by case law are not general in scope and a general application of these concepts in order to establish shared responsibility among the various entity of a corporate group is lacking.

3.3. Contracting-out and subcontracting processes

There are two sets of rules to protect workers in subcontracting processes. The first relates to the fight against undeclared and illegal work and the second relates to health and safety regulations.

3.3.1. The responsibility of the client or the principal contractor

The aim of the legislation, first adopted in 1975, is to prevent the use of illegal work in subcontracting processes. The contractor's responsibility reflects his or her 'dominant position' in the subcontracting process and is mainly a tool to combat illegal employment.

According to Article L. 8222-1 of the Labour Code, any recipient of services which amounts to more than €3,000 must require from its co-contractor documents to ensure that its co-contractor does not employ undeclared or illegal workers. The list of documents that the client must request was extended by Decree n°2011-672. The client shall ask and the provider of service must provide, upon the execution and every six months thereafter, proof of its registration (if any) and a certificate issued by the French body responsible for

²⁹ Cass. Soc. 8 July 2014, n°13-15573.

collecting social security contributions, proving that social security declarations have been made and social security contributions have been paid by the co-contracting party, dated within the past six months. The certificate must state the company's identification number, number of employees and total wages paid. The client is obliged to check with the relevant body that the certificate is genuine. In the event of failure to comply with these provisions, the recipient of the services may be sentenced to paying the social security charges which the service provider had failed to pay by not declaring its employees to the French government. A new law, No. 2014790 of 10 July 2014, was also adopted in order to counter unfair social competition or social dumping in relation to the posting of workers. The law institutes a system of joint financial liability designed to encourage contractors to make sure that posted workers are treated in line with the law. Here again, we can find a limited recognition of a form of dual employer.

3.3.2. Health and safety at work in subcontracting

The 1989 European Framework Directive (89/391), implemented in France, lays down certain obligations when several undertakings share a workplace. This is an interesting example, where a real share of responsibilities is organised among various employers even though each of them remains responsible for their own employees. An original cooperation agreement is established between the companies participating in the same production process. The Labour Code lays down the obligation of the various employers to cooperate in implementing safety and health provisions and coordinating their actions in relation to the protection of workers and the prevention of occupational risks, where several undertakings share a workplace.³⁰ The client must carry out a risk assessment and contractors must assess the risks to their own workers. Both parties must cooperate and exchange information on the effects of interaction between the workers and the tasks of both parties and to assess the possible risks arising from such interaction. The client or host company is responsible for this coordination. A specific inter-enterprise health and safety committee is also recognised in 'Seveso' facilities and in the building sector (see Articles L. 4523-11 and L. 4532-10).

This sharing of responsibility is limited to health and safety issues, although it would be possible to share other areas of responsibilities of the client company regarding employment, for example.³¹

3.4. Franchising systems

French legislation contains a specific regime dedicated to branch managers ('*gérant de succursale*', Article L. 7321-1 of the Labour Code). This article of the Labour Code was introduced just after the Second World War and is regularly applied in franchising situation.³² It appears that this Article began being discussed just after the *Cour de Cassation* refused to use the criteria of economic dependence to define the contract of employment.³³

³⁰ Articles R. 4511-4, R. 4512-2 and following of the Labour Code.

³¹ See article by M. Kocher, 'A la recherche de la responsabilité du donneur d'ordre dans les relations de travail de sous-traitance : une quête impossible?', *Droit Ouvrier*, March 2013, p. 180.

³² R. Pihery, 'L'appréhension des accords de réseau par le droit social: pour une reconnaissance des spécificités de la franchise', *AJ Contrats d'affaires*, 2016, p. 11.

³³ Cass. 6 July 1931, Bardou.

In the absence of a subordination relationship, the regime, defined by Articles L. 7321-1 of the Labour Code, extends application of parts of labour legislation to this category of managers (who can also themselves be the employer of other employees). According to Article L. 7321-2, this is possible under four cumulative conditions. This regime applies when (i) the franchisee sells goods (ii) exclusively or quasi-exclusively through a sole company (iii) in a locale attributed or agreed to by the company, (iv) under the conditions and prices imposed by the company. For example, the manager of an ‘Yves Rocher’ beauty centre used this legal technique. Her activity essentially consisted of selling ‘Yves Rocher’ branded products, but the brand imposed prices and conditions upon her exercising the activity. The *Cour de Cassation* decided that the manager should be considered as a branch manager and that French Labour law and all its benefits should apply to the former franchisee.³⁴ French Labour law applies as soon as the conditions provided by Article L. 7321-2 are met, regardless of the provisions in the contract, although no subordination relationship is identified. Cases in different sectors of activity such as gas stations, hotels, telephony, transport, clothing or food retailing regularly apply this article. However, this article does not have any effect on the employees of the franchisee and, for them, only one employer is recognised, although their employer can ask for the Labour Code to be applied.

4. Current legislative responses and interpretations: collective labour relations

Different mechanisms exist which provide some responses to the fissurisation of workplace. A first mechanism is old but remains important in France. Collective bargaining at sectoral level is a traditional level of collective bargaining and, although a decentralization of collective bargaining can be seen in France, as in many other countries, this level of bargaining plays an important role and small and medium enterprises are usually attached to this level. If companies belonging to a group or a chain of supply belong to the same sector, collective agreements at sectoral level can unify some of the working conditions of the workers.

As stated above, the French system of workers’ representation and the law attempts to adapt the structure of works’ councils to that of the company. Where possible, the structure of the works’ council follows the structure of the company and the corporate group. Thus, each level of decision-making corresponds to a specific structure of representation: the establishment works’ council, the central works council, when necessary, an Economic and Social Unit will be defined for the establishment of a works council. Collective agreements can be concluded at each level. Another level of representation exists. Established by the 1982 Auroux laws, group councils are set up within groups consisting of a controlling company and controlled companies. A group council must be created within each group composed of a parent company having its registered office in France, its subsidiaries, and all affiliated entities (Article L. 2331-1 of the Labour Code). However, this is subject to the condition that the parent company directly or indirectly controls the subsidiary and/or affiliates. The group council is not a substitute for the works council. Its purpose is to provide the representatives of each company with more comprehensive information concerning the activity of the group as a

³⁴ Cour de Cassation, 9 May 2011, n° 09-42901.

whole. The group council meets at least once a year and must be informed on matters such as the group's businesses, its financial situation, changes in employment issues, employment forecasts on an annual or multi-annual basis, possible preventative actions, and the group's economic prospects for the year to come. The group council does not have a consultative function. A group council consists, on one hand, of the controlling company manager and, on the other, representatives of staff within the group. Staff representatives are appointed by the representative trade unions from the members of the various works councils of all of the group companies and on the basis of the results of the latest elections. Finally, Directive 94/45 of 22 September 1994 was transposed into French law and European works' councils must be set up on the conditions defined by the Directive.

If we look at the competencies of works' councils, they have to be informed and consulted on the structure of the company to which they belong. There is also an obligation to inform and consult the works' councils at least one the year on the use of temporary work and subcontracting (Article L 2323-8 and L2323-10).

Finally, the collective rights of loaned employees are also organised. Employees loaned to a company are taken into account in the calculation of the workforce - in proportion to their presence within the company during the last 12 months - insofar as they are effectively present in the company's premises and have worked there for at least a year. Loaned employees, such as cleaning or security staff, are also entitled to vote in the elections of workers' representatives after 12 months of uninterrupted presence within the company. They are entitled to stand for election as a staff representative after 24 months of uninterrupted presence within the company, but are not entitled to stand for election to become members of the Works Councils.

Finally, it is possible for such employees to cast their vote and stand for election in their own company or in the company to which they have been loaned.

5. Conclusions

France's responses to workplace fissurisation are extremely fragmented. Certainly, what is missing is a general reflection on who the employer is and how responsibilities can be shared when the employer is dual or plural. Indeed, it is difficult to overcome the single employer model and some legal solutions, like the Economic and Social Unit, simply tend to bring together several companies in a single economic entity.

However, some solutions defined in one specific context could be extended: this is the case, for example, of the Economic and Social Unit whose scope is mainly limited to workers' representation. The sharing of responsibilities on health and safety issues in subcontracting could also be extended. It is possible to argue 'that the best protection for workers derives from splitting the employment risk and costs among different employing entities'.³⁵ However, organisation of the business remains that of the main managerial power. Until now, the law has respected this power and the recognition of a plurality of employers has been limited and fragmented. In France, the economic and political context does not seem to be favourable to extending and generalising some of the responses given to specific issues, on the contrary. A significant reform of French labour law is currently being discussed and its main aim seems to give more flexibility to companies. Not only does the Bill fail to address the problem of fissured workplaces, but some of the proposals

³⁵ L. Corazza, O. Razzolini.

could contribute further to this fissurisation. The bill aims at decentralising collective bargaining and if it is adopted could then contribute to weakening collective agreements at sectoral level. This level could contribute to the definition of a floor of rights for companies belonging to the same sector. Furthermore, in terms of collective dismissals, the transnational dimension of companies will no longer be taken into account in order to assess the economic difficulties allowing the company to proceed with redundancies.