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El Khomri Bill – Impact on redundancies and dismissals

The "*El Khomri Bill*", officially called "*Bill aiming at introducing new liberties and new protections for companies and employees*" would significantly amend several provisions currently applying to redundancies and dismissals. This bill, which has been transmitted to the French Council of State ("*Conseil d'Etat*"), will be presented during the Council of Ministers on 9 March and will probably be examined by the assemblies in April and May 2016.

Definition of the economic grounds which can justify redundancies

The bill proposes to amend the definition of the economic grounds currently set by the French Labor Code.

In particular, when the company belongs to an international group, it suggests to assess the economic difficulties or the necessity to safeguard the competitiveness at the **national** level, and not at the **worldwide** level anymore.

It also proposes a more precise definition of economic difficulties which can be considered as justifying redundancies.

The definition of the economic grounds which can justify redundancies is currently the following (Article L. 1233-3 of the French Labor Code – paragraph one):

"*A redundancy based on economic grounds is a redundancy decided by an employer for one or several reasons which do not result from the employee but from the deletion or transformation of employment or a modification of an essential element of the employment contract which has been refused by the employee and notably due to economic difficulties or technological changes*".

It must be noted that French case law considers that redundancies can also be justified by the necessity to safeguard the company's competitiveness or by the company's cessation of activity.

According to the French Supreme Court, economic difficulties or the necessity to safeguard the competitiveness must be assessed **at the level of the business sector to which the company belongs, within the entire group at the worldwide level.**

The new definition proposed by the bill is the following:

"*A redundancy based on economic grounds is a redundancy decided by an employer for one or several reasons which do not result from the employee but from the deletion or transformation of employment or a modification of an essential element of the employment contract which has been refused by the employee and due to:*

- *economic difficulties characterized by a decline in orders or in turnover during several consecutive quarters in comparison with the same period of precedent year, or by operating losses during several months, or by an important deterioration of cash flow, or by any element which can justify these difficulties,*
- *technological changes,*
- *reorganization of the company necessary in order to safeguard its competitiveness,*
- *the company's cessation of activity.*

The materiality of the deletion or transformation of employment or modification of an essential element of the employment contract is appreciated at the company's level.

The appreciation of economic difficulties, technological changes or the necessity to safeguard the company's competitiveness is made at the level of the company if the latter does not belong to a group and, otherwise, ***at the level of the business sector common to the companies of the group which are established in France***".

The duration of the decline in orders or in turnover required to characterize economic difficulties is provided by a branch collective bargaining agreement (with a minimum of two consecutive quarters) or, failing that, by the Labor code (four consecutive quarters).

The duration of operational losses is also provided by a branch collective bargaining agreement (with a minimum of one quarter) or, failing that, by the Labor code (one semester).

Cap for the damages granted to the employees in case of dismissals or redundancies considered as deprived of any cause

The bill proposes a scale of damages which would bind the judges in case of litigation, should the dismissal / redundancy be considered as deprived of any cause (Article L. 1235-3 of the Labor Code). This scale is based on the employee's seniority within the company:

- If the employee has less than 2 years of seniority: maximum 3 months of salary,
- If the employee has at least 2 years but less than 5 years of seniority: maximum 6 months of salary,
- If the employee has at least 5 years but less than 10 years of seniority: maximum 9 months of salary,
- If the employee has at least 10 years but less than 20 years of seniority: maximum 12 months of salary,
- If the employee has more than 20 years of seniority: maximum 15 months of salary.

This scale only concerns damages granted to the employee due to the absence of any cause for the dismissal / redundancy.

These maximum amounts do not include the dismissal or redundancy indemnity due by application of the Law or the applicable collective agreement, do not apply to cases where the nullity of the dismissal / redundancy is incurred and do not prevent employees from obtaining additional damages based on distinct claims, if any.

It must also be noted that if the redundancy is considered as being null because of the insufficiency or inexistence of the employment safeguard plan, the minimum indemnity would be six months of salary (instead of 12 months previously).

Company-level agreements aiming at preserving or developing employment

The bill introduces the possibility to enter into company-level agreements aiming at preserving or developing employment.

Said agreements will be strictly binding for the employees, even if they contradict the employment contracts (even on remuneration and working duration). They can however not amend the employees' monthly remuneration downwards.

Should an employee refuse the amendment to his employment contract induced by the company-level agreement, the employer would be free to dismiss him for personal reasons, and not economic reasons.

It should be noted that according to the bill, in order to be valid, all collective agreements should be signed by one or several representative unions having obtained at least **50%** of the votes during the last professional elections (and not 30% as previously).

If this threshold is not met and if one or several representative unions having obtained at least 30% of the votes during the last professional elections ask so, it would be possible to validate the agreement by **referendum** (in such case, the majority of the employees must approve the agreement).

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