

Measures concerning dismissals on economic grounds included in the so-called El-Khomri Bill: Much ado about nothing?

The objective of the so-called “El-Khomri Bill” - as was the objective of the so-called “Macron Law”, clearly not fully achieved - was to make French labor and employment law more flexible, in particular to increase the attractiveness of the French marketplace in the eyes of foreign investors. Despite the significant changes that have been made to the initial version of the Bill, strong objections continued to be raised against the text and the government had no other choice but to use Article 49-3 of the French Constitution^[1] and to commit its responsibility on the Bill to force the Bill through on May 12, 2016.

A courageous action by the government? Not really if we take a closer look at the provisions set forth in the last version of the Bill, in particular with respect to dismissals on economic grounds.

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Current Minister of Labor, Mrs. Myriam El-Khomri, with the support of the government, is presenting to the French Parliament a Bill “aimed at introducing new liberties and new protections for businesses and people in work”, commonly referred to as the “Labor Bill” or “El-Khomri Bill”.

The objective of the Labor Bill - as was the objective of the so-called “Macron Law”, clearly not fully achieved - was to make French labor and employment law more flexible, in particular to increase the attractiveness of the French marketplace in the eyes of foreign investors. The initial version of the Bill heralded a reform of entire sections of the French Labor Code and stirred a huge outcry from a large part of the French population - if not

a small French revolution - thereby forcing the government to review and reconsider the text. Despite the significant changes that have been made to the initial version of the Bill, strong objections continued to be raised against the text and the government had no other choice but to use Article 49-3 of the French Constitution and to commit its responsibility on the Bill to force the Bill through on May 12, 2016. A courageous action by the government? Not really if we take a closer look at the provisions set forth in the last version of the Bill...

In its current version that will be presented to the French Senate at the beginning of June, the El-Khomri Bill addresses primarily the following issues: (i) reform of the French Labor Code: the legislator will ask a committee of experts to rewrite the Code over a two-year period; (ii) working time: the El-Khomri Bill enshrines the principle that, with respect to working time organization, company-level agreements will prevail over industry-wide agreements (which is in fact not really new) while introducing a right of supervision at the industry level; (iii) social dialogue: said company-level agreements must be majority agreements, i.e. approved by trade unions representing at least 50% of the votes cast and, in case of a minority agreement, the trade unions representing at least 30% of the votes cast may ask that the agreement be put to a referendum; and (iv) health at work.

The Labor Bill also provides for the implementation, by way of ministerial decree, of the indicative baseline of compensation that should be awarded by French labor courts to employees dismissed without cause, as contemplated by the Macron Law. It also foresees the creation of the Personal Activity Account (Compte Personnel d'Activité or "CPA") that should bring together the Personal Training Account (Compte Personnel de Formation or "CPF"), the Account for the Prevention of Hazardous and Arduous Working Conditions (Compte de prévention de la pénibilité) and a new "citizen commitment account" (Compte engagement Citoyen).

The Labor Bill slightly amends the terms and conditions governing dismissals on economic grounds.

1. CRITERIA CURRENTLY APPLICABLE TO DISMISSALS ON ECONOMIC GROUNDS

In France, a dismissal on economic grounds means *"a dismissal decided by the employer for one or more reasons that are not related to the employee, resulting from the elimination or transformation of an employment position, or a modification, refused by the employee, of an essential component of the employment contract, **due, in particular, to economic difficulties or technological changes**"* (Article L 1233-3 of the French Labor Code).

The *Cour de Cassation* (French Supreme Court) has also laid down two other grounds that can be relied upon to justify a dismissal on economic grounds: **the discontinuation of the company's operations**^[2] and **the reorganization of the company in order to safeguard its competitiveness**^[3].

In addition, if the company is part of a corporate group, the economic ground is assessed on a larger scale, i.e. at the level of the business sector common to the companies of the group, **everywhere in the world**.

In this respect, a recent court decision indicated that the **dismissal letter does not need to expressly include a motive on the economic situation of the group**. It is only if there is a dispute that the employer will be requested to establish, within the relevant scope of assessment (i.e. the group or the business sector), the reality and seriousness of the motive set forth in the dismissal letter^[4].

Current criteria are **too vague and their application varies from one court to another**. As such, they cannot be properly used. Companies are subject to a great legal uncertainty and groups are clearly exposed to more severe penalties and sanctions than “independent” companies. This is the reason why they often prefer to negotiate termination rather than getting lost in the meanderings of the criteria governing dismissal on economic grounds.

While the initial version of the El-Khomri Bill, backed by the government, included interesting developments that aimed at making the grounds for dismissal more objective and reducing the geographical scope of assessment of such grounds, the version adopted by the National Assembly has **whittled away what could have been a good reform** for businesses, in particular for international groups that wish to expand their operations in France.

2. CRITERIA APPLICABLE TO DISMISSALS ON ECONOMIC GROUNDS MADE SLIGHTLY MORE OBJECTIVE

The El-Khomri Bill contemplates codifying the economic grounds that justify dismissals, as laid down by case-law, i.e. the discontinuation of the company’s operations and the reorganization of the company in order to safeguard its competitiveness.

It also proposes a more precise definition of economic difficulties that can be put forth to justify dismissal on economic grounds. Such difficulties would be characterized either by “*significant alteration of at least one economic indicator such as a decline in orders or in turnover, operating losses, a deterioration of cash flow or EBITDA*” or by “*any other element which can justify these difficulties*” (as such, it seems that the list is not exhaustive).

The duration of the decline in orders or in turnover that characterizes the economic difficulties should reportedly be set by way of comparison with the same period of the preceding year, and such duration should be at least equal to:

- a quarter for a company with less than eleven employees;
- two consecutive quarters for a company with at least eleven but less than fifty employees;
- three consecutive quarters for a company with at least fifty but less than three hundred employees;
- four consecutive quarters for a company with three hundred employees or more.

Even though it seems to us that this measure is fair as it is likely to take into account the greater constraints

faced by very small businesses and SMBs, it is feared that the Constitutional Council will invalidate it, just like it invalidated the sliding scale initially provided for under the Macron Law and capping the damages that French Labor Courts may award in case of dismissal without cause, holding that such scale breached the principle of equality of employees before the law as it applied the criterion of the company size to fix the minimum and maximum amounts of damages that could be awarded.

The initial version of the Labor Bill also laid down minimum duration for operating losses. This is no longer the case and this criterion will be left at the judges' discretion and their subjective judgment.

It also suggested that the difficulties specific to each industry sector be better taken into account by allowing **industry-wide agreements** to fix the duration of the declines in orders or in turnover that characterize economic difficulties. Unfortunately, this provision has not been maintained.

3. THE CONTEMPLATED CHANGE TO THE SCOPE OF ASSESSMENT OF THE ECONOMIC GROUND FINALLY ABANDONED

Contrary to what was foreseen in the initial version, the water-down version of the El-Khomri Bill adopted by the National Assembly **does not re-consider the scope of assessment of the economic grounds**.

It was initially planned to significantly reduce the scope of assessment of economic grounds for corporate groups. Specifically, the initial version of the El-Khomri Bill stipulated that *"if the company belongs to a group, the economic ground will be assessed at the level of the business sector common to the companies of the group which are established **on the national territory**"*, not everywhere in the world.

Such a drastic change would have contributed to approximating the French legislation with the laws of its European neighbors and would necessarily have made France more attractive to large groups, as advocated by the government itself on its information web portal. Indeed, the subsidiary of a group which is economically distressed may not proceed with dismissals in France if the economic situation of the group at the global level is satisfactory.

This reduction of the scope of assessment of the economic grounds for corporate groups was eventually withdrawn from the El-Khomri Bill, which is highly regrettable.

As such, while the first version of the Labor Bill combined brave and effective measures to make France more attractive to large international groups and promote employment, the version adopted by the National Assembly in first reading turns out to be quite disappointing. Pale shadow of the original text, this Bill – just like the Macron Law – is simply a catalogue of "dispersed" measures that are unlikely to translate into a reform that will bring about more flexibility on the French labor market, help France be more competitive and catch up with its European neighbors.

However, the game is not over yet. The current version is not the final one! The Senate will discuss the Labor

Bill, starting on June 1. Some Senators have already made it clear that they would push for returning to the original text.

To be followed...

[1] Article 49§3 of the French Constitution: *“The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered passed unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in the foregoing paragraph. In addition, the Prime Minister may use the said procedure for one other Government or Private Members’ Bill per session”*.

[2] Labor Chamber of the *Cour de Cassation*, January 16, 2001, n° 98-44.647; Labor Chamber of the *Cour de Cassation*, November 16, 2011, n°11-40.071.

[3] Labor Chamber of the *Cour de Cassation*, April 5, 1995, n° 93-42.690

[4] Labor Chamber of the *Cour de Cassation*, May 3, 2016, n°15-22.046

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