Collective redundancies in groups of companies (the Coca-Cola Iberian Partners case, SAN 12-6-14, Proc. 79/2014)

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Approximately one third of collective redundancies that end up in court take place within groups of companies. In these cases, doubts arise with respect to the proper makeup of the *ad hoc* joint consultative committee and the information to be provided during the consultation period; doubts which the courts resolve as they are brought up.

The latest illustration of the above is the judgment handed down by the Employment Division of the *Audiencia Nacional* (National High Court) in the Coca-Cola Iberian Partners case, which contains a thorough analysis of the legal construct of a group of companies and takes a new stand that nuances the Court's heretofore position on this issue.

The relevant facts of the case are, in brief, that various independent bottling companies decided to join into a group as the only bottler in the peninsula, following which it began to carry out collective redundancies for organisational and productive reasons. A single consultation period was provided for the group as a whole insofar as admittedly such a group "for employment purposes" (also called a "single employer group"); i.e., it identified itself as a single employer in spite of taking the form of a group of independent companies. This would allow for an all-inclusive negotiation rather than multiple committees in each of the group companies, as well as entailing joint and several liability amongst the companies.

The *Audiencia Nacional* has held the redundancies to be unlawful on several grounds, one of which was a lack of good faith negotiation insofar as the new employer (the single employer group) unexpectedly presented itself as such to the employees in order to carry out the collective redundancies, failing to fulfil the obligation to provide prior information, as required by employment legislation for all transfers of undertakings.

Identification of the single employer group

A group of companies, as defined in art. 42(1) of the Spanish Code of Commerce, can be considered a single employer group for employment purposes when it conceals the existence of a single employer. In this regard, the Supreme Court states that not all groups of companies are single employer groups, as "*the mere fact that two or more companies belong to the same group of companies is not sufficient, on its own, to give rise to joint and several liability in respect of the obligations acquired by one of the companies with its own employees; rather, additional elements need to be present*"[1].

Current legal doctrine[2] identifies these additional elements, of which only one needs to be present:

a) Shared staff, where a significant number of employees simultaneously or successively perform work for different group companies.

[1] Judgment of the Supreme Court 30-1-90 (RJ 1990/233).

[2] Judgments of the Supreme Court 27-5-13 (RC 78/2012), 25-9-13 (RC 3/2013), 19-12-13 (RCUD 37/2013), 28-1-14 (RC 46/2013), 19-2-14 (RC 45/2013).

b) Shared assets, such that intra-group transactions are not recorded at fair value.

c) Cash pooling, i.e., shared funds with no separate accounting records.

d) Abuse of legal personality, creating a sham company[3].

e) Abusive use of single management, harming the rights of the workers[4].

Therefore, in the Coca-Cola Iberian Partners case, the *Audiencia Nacional* takes the view that almost all these elements are present, leading it to conclude that this is a single employer group of companies, jointly and severally liable in respect of the workers as a whole of said group and its subsidiary companies.

Collective redundancies in a single employer group

Both the Spanish Supreme Court and the *Audiencia Nacional* state that, under the Spanish and EU legal systems, collective redundancies must be negotiated by the company and not by the group of companies[5]. Therefore, only a single employer group can put collective redundancies into motion, as it is a true business unit for employment purposes.

This has been giving rise to a paradoxical situation that repeats itself in the case of Coca-Cola Iberian Partners: due to its interest in a joint negotiation, the group identifies itself as a single employer group, which in a certain sense implies recognising that it is illegally formed, as it conceals the existence of a single company that wishes to dilute its liability.

But on this occasion the *Audiencia Nacional* has introduced an important nuance that changes things. It clarifies that the institution of a single employer group, which rests on the idea of the abuse of the legal construct, cannot constitute an option available to non-compliant companies for their own benefit and lays down the following criterion based on such premise: in order for collective redundancies to be negotiated by a group, it is not sufficient that it be a single employer group – all parties to the negotiation must also recognise this status. This occurs, for instance, when the worker representatives accept the negotiation by the group or when there are final and conclusive judgments confirming the existence of a single employer group of companies.

In the case of Coca-Cola Iberian Partners, such group characterisation was unexpectedly revealed to the workers in order to put the collective redundancy procedure into motion and for its own benefit, as the reason given for the contract terminations was only legally effective if the group had a unitary structure.

Collective redundancies after the transfer of an undertaking

For employment purposes, the joining together of the bottlers into a single employer group is a change of employer, as regulated under art. 44 of the Workers' Statute on transfers of undertakings, which requires fulfilling certain information-related obligations in respect of affected employees and their representatives.

Therefore, the *Audiencia Nacional* holds that a negotiation of collective redundancies is vitiated when there has been a transfer of an undertaking and worker representatives have not been provided with adequate information. This is what happened in the case in point, as complete documentation on the formation of the group was not provided during the consultation period.

[3] In which case the piercing of the veil doctrine should apply (Judgment of the supreme Court 29-1-14, RC 121/2013).

[4] This is the case of a subsidiary lacking any management of its own (Judgment of the Audiencia Nacional 20-1-14, proc. 257/2013).

[5] Judgment of the Supreme Court 26-3-14 (RC 158/2013); Judgments of the Audiencia Nacional 28-9-12 (proc. 152/12), 18-12-12 (proc. 257/12), 25-2-13 (proc. 324/12), 20-1-14 (proc. 256/2013), 10-3-14 (proc. 285/13).

In short, there is nothing to prevent collective redundancies after a change of employer if there are objective reasons, but the negotiation may only begin once the transfer of the undertaking has been formally completed, including the provision of information to the workers and their representatives. If this is not done properly, it could affect the validity of the subsequent redundancies.