SQUAIR

NEWSLETTER

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Corporate

CJEU invalidates public access to beneficial owner information.

CJEU gde ch. 22-11-2022 aff 601/20

In its decision of November 22, 2022, the CJEU invalidates the provision of the "anti-money laundering" directive, imposing public access to information on beneficial owners, on the basis of the right to respect for private and family life and the protection of personal data. The CJEU considers that giving access to public with information on beneficial owners seriously and unjustifiably interferes with these two rights, as the data fed into the register contains information on identified natural persons and constitutes processing of personal data, regardless of the subsequent use of the information provided. Similarly, the Court noted that insofar as the information relates to the identity of the beneficial owner and the nature and extent of his or her interests in the companies, it is likely to enable a profile to be drawn up concerning certain personal identification data. Moreover, a potentially unlimited number of persons may have access to it and this may lead to a possible misuse of this information.

The eviction warrantee in the context of a transfer of company shares. *Cass.com.16-11-2022 n°21-13.561*

The eviction warrantee, in French law, ensures the purchaser the peaceful possession of the property purchased after its delivery.

Recently, the French Court of Cassation had to assess the scope of the activities protected by the warranty of eviction and its proportionality (*Cass. Com. 16-11-2022 n°21-13.561 and Cass.com.10-11-2021 n°21-11.975*).

In this decision, the French high court states that the eviction warrantee only relates to the activity concerned by the transferred shares and not to the activity of the purchaser. Moreover, the warranty of eviction must be proportionate to the legitimate interest to be protected and starts as of the conclusion of the transfer, it cannot therefore be postponed in time in case of earn out clause or when an employment contract is signed between the seller and the company.

Confidentiality of annual accounts in groups of companies

Under French law, commercial companies are, in principle, obliged to make their annual accounts public.

However, the legislator has provided for three exceptions to confidentiality when filing annual accounts:

- micro-enterprises: can benefit from total confidentiality by declaring that their accounts will not be made public (L. 232-25 al. 1 C.com.). This applies to companies that do not exceed two of the following three thresholds: total balance sheet of €350,000, net sales of €700,000, 10 employees.
- small companies: can benefit from partial confidentiality by requesting that their profit and loss account not be made public. These are companies that do not exceed two of the following three thresholds: total balance sheet of €6 million, net sales of €12 million, 50 employees.
- medium-sized companies: can limit the disclosure to a simplified presentation of their balance sheet and notes. This applies to companies that do not exceed two of the following three thresholds: total balance sheet of €20 million, net sales of €40 million, 250 employees.

In addition, the law denies the benefit of confidentiality to micro-companies whose financial shares are admitted to trading on a regulated market, or which carry out their activity in certain financial fields, and those whose activity consists of managing equity and securities. This last exception concerns parent companies. Nevertheless, the law is unclear on this last category. Awaiting an official position, the doctrine considers that only parent companies whose sole activity is to hold equity securities are excluded from confidentiality.

The same applies to listed small and medium-sized enterprises ("PME") and those belonging to a group within the meaning of Article L. 233-16 of the French Commercial Code. Due to the ambiguity of the law on the notion of group of companies, the doctrine considers that only parent companies preparing consolidated accounts are concerned. Consequently, these companies are required to publish their annual accounts and not its subsidiaries under the above mentioned thresholds.

Co-employment of an employee in a group of employees

The parent company can be qualified as co-employer of the employees of its subsidiary if the following conditions are met (*Cass.soc. 25-11-2020 n°18-13.769*):

- Coordination of economic actions between companies of the same group
- State of economic domination
- Permanent interference of the parent company in the economic and social management of the employer company
- Total loss of autonomy of action of the employer company

In a more recent decision (*Cass.soc 23-11-2022 n°20-23.207*) it is the complete loss of the employer's capacity to act due to the permanent interference of another company in the economic and social management of the company that allows to characterize a situation of co-employment. Thus, a parent company was ordered to pay compensation to an employee of its subsidiary for unjustified dismissal.

B to B relationship: Validity of the jurisdiction clause in documents accessible online. *CJUE 24-11-2022 aff 358/21, Tilman SA c/ Unilever Supply Chain Company AG*

The CJEU validated, based on the Brussels I bis Regulation, the jurisdiction clause inserted in the general terms and conditions to which the contract signed between two professionals refers by a hypertext link. Indeed, the court stated that the parties were able to take cognizance of the general terms and conditions before signing the contract and were therefore aware of the jurisdiction clause. It is therefore not necessary that the party to whom this clause is opposed was formally invited to accept these general conditions by checking a box on the site. However, it is necessary that the contract expressly refers to the general terms and conditions, that these have been communicated and that this reference can be checked by a person applying normal diligence.

Shareholder's Exclusion clause providing by SAS by-laws *Cons, const, 9-12-2022 n°2022-1029 QPC*

In its decision of December 9, 2022, the French Constitutional Council ("*Conseil Constitutionnel*") stated that the French simplified joint stock company ("SAS") law governing exclusion clauses was consistent with the right of ownership. As a result, the articles of association of a SAS may provide, under the conditions they determine (including voting majority threshold), that a shareholder may be required to transfer his shares without affecting the shareholder's right of ownership over his own shares. The grounds retained were the following:

- the exclusion is not an expropriation
- the exclusion is the result of a statutory procedure
- the exclusion is subject to compensation
- the judge is the guarantor of the reality and the seriousness of the reason retained, and
- the partner can contest the price of the transfer of his shares.

The procedures for using the new electronic one-stop shop are specified

Three texts relating to the terms and conditions for using the one-stop shop ("*guichet unique électronique*") have just been published: they specify the technical characteristics of the filing of files, the recipient organizations and the formalities concerned.

Since January 1, 2023, the electronic one-stop shop replaces the various networks of business formalities centers for the completion of all formalities for the creation, modification, or cessation of business activities (L. 123-33 and R. 123-2 C. com.). Thus, for example, any registration in the RNE ("*registre national des entreprises*"), any main and/or secondary registration in the Company and Trade Registry ("*registre du commerce et des sociétés*"), the indication of the beneficial owners will have to be filed online with the electronic one-stop shop.