

EMPLOYMENT LAW

OCTOBER 2022

IN THIS ISSUE

Following up on an earlier publication (IADC Newsletter December 2018 Edition) the author reports on a recent decision of the Belgian Supreme Court that quashed a ruling of the Ghent Labour Court of Appeals, which held that social security tax is due on equity compensation (in the form of restricted stock units) granted by the ultimate parent company to employees of a Belgian affiliate. The risk of a hefty social security price tag on such shares seems to be avoidable, provided specific conditions as outlined by the Court's landmark decision are met.

Social Security Contributions & Benefits Under Long-Term Incentive Plans - The Belgian Supreme Court Renders a Landmark Decision on a Long-Debated Matter

ABOUT THE AUTHOR



Cecilia Lahaye is an attorney at Bird & Bird LLP in Brussels, Belgium, specialized in employment law. She advises and litigates on a wide array of employment and social security law related matters, such as e.g. dismissals, compensation & benefits and workplace health & safety hazards. She can be reached at Cecilia.Lahaye@twobirds.com.

ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Thomas M. Buckley
Vice Chair of Newsletter
Goldberg Segalla LLP
tbuckley@goldbergsegalla.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

In the December 2018 Newsletter¹ I reported on the Belgian National Social Security Office (NSSO) taking a too broad view on what is remuneration – and therefore subject to a Belgian Social Security levy – with regards to stock-based benefits awarded by a foreign mother company to eligible employees of its Belgian affiliated companies worldwide. According to the NSSO social security is due on such shares or so-called Restricted Stock Units, as soon as the Belgian employer acts as a “*point of contact*” for the employee who receives these awards, even if the decision to grant these awards is not taken by a Belgian employer but solely by a foreign (mother) company, under the terms and conditions of its Stock Incentive Plan.

The aim of my contribution was to challenge this interpretation in so far as it violated the very concept of one of the legal criteria for benefits to be subject to Belgian social security, i.e., the condition that these benefits must be “*borne by the employer*” or “*be at the employer’s charge*”². If benefits awarded under Long-Term Incentive plans (Restricted Stock Units or Shares) are not at the Belgian employer’s charge, there would be no legal basis for the Belgian employer to pay social security contributions levied on these benefits.

Since December 2018, the Supreme Court has rendered three decisions on this matter

that is of self-evident interest to all multinational companies who award stock-based benefits under Long Term Incentive Plans to employees of its Belgian based subsidiaries or affiliated companies. The most recent decision ultimately leads to the conclusion that the NSSO’s interpretation was wrong and that these awards do not necessarily carry a hefty social security price tag.

Belgian Supreme Court 20 May 2019 (S.18.0063.F – *Sisley & Planet Parfum v ONSS*)

The Supreme Court upheld the decision of the Labour Court of Appeal of Brussels that considered that social security contributions were due on percentages paid directly by a French Cosmetics company (Sisley) to employees of Belgian perfume and cosmetics shops, based on sales made in Belgium. The Labour Court of Appeal had considered that these percentages or bonuses were in fact paid solely as a counterpart for work performed under the employment contract and were therefore to be considered as remuneration, even though there was no obligation on behalf of the Belgian employer to grant these bonuses.

This decision led some commentators to announce the demise of the legal condition of “*borne by the employer*”³. Under the

¹ [The Risk of a Hefty Social Security Price Tag on Shares Awarded to Employees of EU \(Belgium\) Based Affiliated Companies | IADC \(iadclaw.org\)](#)

² Article 2, par. 1, 3° Act of 12 April 1965 on the Protection of Remuneration; Article 14, §§ 1 and 2 of

the Act of 27 June 1969 revising the Act of 28 December 1944 on the social security of workers.

³ [Deloitte Individual Tax, Social Security and Immigration Alerts](#)

(ultimately proven false) assumption that benefits awarded under LTI-plans are automatically to be considered as a “counterpart” for work, all such awards – so it was announced - would henceforth attract social security contributions.

In a legal article of 2019 Pieter De Koster criticized this approach, setting out based on a close reading of the exact wording of the ruling and the specific facts of the matter why the conclusion some commentators were apparently eager to draw from this decision was wrong, or, at the very least, lacked nuance⁴. He argued that the crux of the matter is whether a specific “*causa*” can be proven – distinguishable from the mere performance of the contract – underlying the commitment of a third party to award, pay and bear the cost of the benefit. If so, these benefits cannot be subject to social security contributions, as they are not “borne by the employer” or “chargeable to the employer” in the sense of the law.

Further support for his view that the Court had not overruled the specific and distinct legal requirement of “*borne by the employer*” could also be found in the opinion of Procureur-général Genicot to the Supreme Court who had expressly referred to this condition and insisted on its importance in assessing whether a benefit can be regarded as remuneration subject to social security levy. As the Procureur-général

stated: “*There must nonetheless be a payment, if only in part, of remuneration, that is to say, in the sense of [the Act of 12 April 1965], of a benefit that can be laid at the employer’s charge*”⁵ affirming also that “*the requirement of the condition with regards to the existence of a benefit at the employer’s charge appears to still be a legal condition of the concept of ‘remuneration’*”⁶.

Belgian Supreme Court 14 March 2022 (S.21.0006.F - PSA Finance v ONSS)

As far as the facts were concerned, this case was quite similar to the Sisley case: salespersons in a car dealership received a bonus from a third party (a financing company) upon sales of such car financing. Reiterating its reasoning as developed in the Sisley case the Supreme court upheld the Labour Court of Appeals ruling that such a bonus, although granted and paid for by a third party, was paid in clear consideration for the labour performed at the car dealer’s.

Again, it would be wrong to draw from this decision the conclusion that all benefits awarded under LTI-plans *per se* form the counterpart of the performance of the employment contract and are therefore subject to social security contributions. What is the case for the sales bonus, awarded on the basis of the mere performance of the contract (i.e. selling car financing solutions), is not necessarily so

⁴ DE KOSTER, P., Mijlpaalarrest inzake loonbegrip voor heffing van socialezekerheidsbijdragen?”, *JTT* 2019, p. 342-344.

⁵ « *Il faut cependant qu’il s’agisse d’un paiement fût-il partiel, c’est-à-dire, en vertu de la disposition précitée [art 2 Act 12 April 1965], d’un avantage pouvant être mis à charge de l’employeur* », concl.

Proc.gen. Genicot prior to Cass. 10 May 2019, S.1800063.F.

⁶ «... *l’exigence d’une condition liée à l’existence d’un avantage mis à charge de l’employeur apparaît certes demeurer une condition de la rémunération* » (ibid. note 4).

when a benefit is awarded by a third party on the basis of a separate *causa*.

**Belgian Supreme Court 5 September 2022
(S.21.0007.N – ESKO Software & ESKO Graphics v RSZ)**

In this landmark ruling the Supreme Court quashed a decision rendered by the Labour Court of Appeal of Ghent of 20 April 2020 which held that social security contributions are due under Belgian law on equity compensation (in this case, Restricted Stock Units) granted by the ultimate (US based) parent company to employees of a Belgian based affiliated company.

The Labour Courts – both in first instance, as well as on appeal – had followed the NSSO's interpretation of the law and considered, although on somewhat different grounds, that social security contributions were due on these awards.

In its landmark decision the Supreme Court, seemingly validating P. De Koster's analysis, explicitly stated that the concept of "*benefits with a value that can be pecuniary assessed*" are remuneration in the sense that they are subject to social security contributions only if the right/entitlement to such benefits are "*at the employer's charge*". Such is the case, according to the Court, if the employer "*has undertaken the commitment to award such benefits and the benefit is thus awarded by the employer to the employee*".

The Court then outlined the facts of the matter as set out by the Labour Court of appeal, i.e.:

- The plaintiffs (two Belgian based companies) are part of a conglomerate of companies, specialized in industrial technology.
- Danaher Corporation, an American conglomerate established in Washington DC took over the shares of the plaintiffs in 2011.
- The inspection services of the Federal Authority on Social security discovered the plaintiffs had listed exceptional benefits paid to employees in 2013 and 2014 without withholding social security contributions on these benefits.
- The plaintiffs had explained these benefits were RSU's, paid by the mother company Danaher.
- The NSSO considered these benefits as remuneration and levied social security contributions to be paid by the plaintiffs.
- The Danaher Stock Incentive Plan considered as "employee" every employee in the service of the Company or one of its affiliates.

The Court observed that the Labour Court of Appeal had considered that since the Danaher Stock Incentive Plan had equated employees of Danaher Corporations to employees of its affiliates, the legal requirement of "*by the employer to the employee*" was met and, in deciding on this ground that these RSU's were remuneration subject to social contributions, had violated the legal provisions defining the legal concept of remuneration for this purpose.

The Court furthermore examined another ground for quashing the decision, i.e., where the Labour Court of Appeal had considered that the employees could only turn to their Belgian employer if they believed themselves to be entitled to these benefits. In this particular ground for quashing the decision the plaintiffs had criticised the Labour Court of Appeal's decision in that it violated the concept of remuneration by considering the employees had a claim against their Belgian employer, whereas there was no specific *causa* or commitment on behalf of their Belgian employer.

By explicitly validating the plaintiffs' point on this matter, the Supreme Court seems to uphold the plaintiffs' analysis that for benefits not to be subject to social security contributions, they must be borne by the employer, i.e., there must be a legal ground to pay such benefits. If the legal ground is to be found in the mere performance of the contract, then the benefit is subject to social security contributions, regardless of who actually pays the benefit (see *Sisley* and *PSA Finance*). If the employer has undertaken the commitment to grant the benefit, it is also subject to social security contributions, even if the benefit is paid by a third party⁷.

However, if a third party (not the employer) has taken up a specific commitment to grant, pay and bear the cost of a benefit, and this ground can be distinguished from the mere performance of the contract, the benefit is

not borne by the employer and therefore not subject to social security levy.

Relevance of this Decision

The importance of this decision can hardly be underestimated. With a hoodwink to Mark Twain, it is fair to state that earlier reports of the demise of the legal condition of "*borne by the employer*" were greatly exaggerated. For USA or other foreign based multinational companies and their Belgian based affiliates the financial impact of having to pay Belgian social security contributions⁸ on stock-based awards granted based on LTI-plans could well have been considered prohibitively high and ultimately lead these companies to exclude Belgian employees from the benefit of these plans. As a result, the Belgian tax authorities would also have been deprived from the possibility of levying taxes on these benefits.

By clarifying the legal concept of remuneration for the levy of social security contributions the Belgian Supreme Court has now set the record straight in a manner that is most likely to be welcomed by the business community in Belgium and throughout the world.

⁷ Supreme Court 10 October 2016 (Roularta): employees of a printing business received free subscriptions to newspapers published by their company as a benefit, awarded by their employer under the terms of their employment contract. In this case the employer had therefore clearly

undertaken the legal obligation to grant these benefits, even if the cost thereof was borne by a third party.

⁸ In the order of approx. 25 %. Moreover, remuneration is also subject to holiday pay in the order of 15,67 %.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MARCH 2020

[Practical Tips to Minimize Labor and Employment Risks Arising from the Coronavirus in the Workplace and Workforce](#)

Bonnie Mayfield

JANUARY 2020

[NLRB Reverses Course on Lawfulness of Policies Requiring Confidentiality of Open Workplace Investigations](#)

Tara Martens Miller

DECEMBER 2019

[Spoliation and Sanctions in Employment Litigation: An Update](#)

Peter J. Pizzi and Eric Padilla

AUGUST 2019

[Do Applicants Have a Disparate Impact Claim Under the ADEA?](#)

Larry D. Smith

MAY 2019

[Employing Foreigners in Turkey](#)

Dr. Döne Yalçın and Sinan Abra

MARCH 2019

[Gratuities in the Restaurant Industry- What's Going On?](#)

Glenn Duhl

JANUARY 2019

[Inadvertently Perpetuating Wage Discrimination: The Ninth Circuit finds Employers' Reliance on Salary History Violates the Equal Pay Act](#)

Tara Martens Miller and Christina Fout

DECEMBER 2018

[The Risk of a Hefty Social Security Price Tag on Shares Awarded to Employees of EU \(Belgium\) Based Affiliated Companies](#)

Cecilia Lahaye

NOVEMBER 2018

[The Rising Number of Platform Workers as a Problem for Employment Law](#)

Dr. Gerlind Wisskirchen and Jan Schwindling

OCTOBER 2018

[Enhanced Workhour Flexibility Under Taiwan's LSA](#)

Christine Chen

[2018 Immigration Roundup For Employers](#)

Michael H. Gladstone