

## Labour law and new forms of corporate organization

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In today's global economy, the drive for corporate competitiveness and flexibility has led to sweeping changes in the ways enterprises are organized, economically, financially and in terms of their workforce (Boyer and Durand, 1998; Castels, 1998). Developments such as the emergence of global financial networks, outsourcing, relocation and the establishment of networks of enterprises have had far-reaching consequences for labour relations and labour law enforcement. This article examines a few of the issues raised by these transformations together with the ways in which they could be managed – tentatively at this stage – in law, particularly with reference to the experience of France and Europe.<sup>1</sup>

Born of the second industrial revolution, contemporary labour law is, historically, the outcome of a gradual process of construction, concomitant with that of productive organization itself, within national boundaries. Such law, be it statutory or contractual, was strongly influenced by the integrated large-scale enterprise model. It conceptualizes wage employment relationships in terms of binary relations between employers and workers. It is therefore hardly surprising that the reorganization of firms, under the combined effects of financial concentration and productive decentralization, should give rise to a new set of needs for protection.

The necessary evolution of labour law has already been the subject of important contributions (Supiot, 1999; Simitis, 1997; Verge and Vallée, 1997). Since the early 1980s, a process of important legal reform has

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<sup>1</sup> This article is based on a presentation given at a round-table discussion during the seventeenth Congress of the International Association for Labour Law, held at Montevideo on 25 September 2003. It draws on the findings of empirical research conducted in France and Europe-wide by the Interdisciplinary Laboratory for Research on Human Resources and Employment (LIRHE), CNRS Social Sciences University of Toulouse, and on ILO (2003).

been under way at the national level. At the international level too, the adjustment process is beginning to bear fruit. Examples include the European Commission's Green Paper on corporate social responsibility (European Commission, 2001), the Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference in 1998 (ILO, 1998; Duplessis, 2004), and the work of the World Commission on the Social Dimension of Globalization (ILO, 2004).

As a contribution to this ongoing process, this article begins by analysing the ways in which enterprises have effectively changed in order to bring the real issues into sharper focus. Then, by reference to a few of the central concerns of labour law, it attempts to identify the legal techniques or concepts which are already being used, or which could be used, to further the construction of that body of law in such a way as to take account of those changes in productive organizations.<sup>2</sup>

### New forms of corporate organization: The search for an analytical framework

In the absence of a legal definition, the notion of "an enterprise" has provoked much debate among labour law specialists, as it has in other branches of law for that matter (Despax, 1957; Lyon-Caen and Lyon-Caen, 1978; Farjat et al., 1987). There have also been a great many economic and sociological studies of the enterprise and the changes it has been through (Storper and Salais, 1993). These will not be rehearsed here. Rather, this study proposes to take a multidisciplinary approach based on an analysis of labour relations and of how they relate to productive organization. From the economic and legal perspectives alike, when a person supplies labour to another the resulting relationship can be considered from either of two angles. The first is that of the productive organization within which the employment relationship occurs and of the determination of the organization's centre of power. The second is that of the sharing of the economic and social risks relating to production and to the work of the people involved (Morin, Dupuy and Larré, 1999). The first angle calls for a descriptive approach to the organization of firms. It also offers an opportunity to comprehend those issues that labour law is concerned with in relation to the enterprise, i.e. the objectives it pursues. The second angle involves a more theoretical analysis: how to interpret

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<sup>2</sup> The following discussion owes much to earlier seminar work on this topic, particularly in France: "The Boundaries of the Enterprise and Labour Law", a seminar organized by the French Association for Labour Law (AFDT), Paris, December 2000 (see *Droit Social*, No. 5, May 2001), and the contributions of G. Vallée on codes of conduct; and the international symposium of May 2003 on "Equity, Efficiency and Ethics: The Social Regulation of Global Business", organized by the Inter-University Centre for Research on Globalization and Work (University of Montreal, Laval University, HEC Montreal), Montreal, 2003 (see Murray and Trudeau, 2004).

the changes under way? What is the nature of the legal issues that they raise in labour law?

### *Levels of corporate organization*

Taking the descriptive approach, one can indeed identify different levels of organization of “the firm” in which employment relationships occur. The term “firm” is used deliberately here in preference to “enterprise” because it is broader and, legally speaking, neutral.<sup>3</sup> These levels of organization are structured hierarchically, though the whereabouts of the dominant level – the main focus of labour law – has shifted over time.

In today’s labour law, it is common practice to distinguish the establishment, the undertaking and the group of undertakings (Gaudu, 1999; A. Lyon-Caen, 2003). In actual fact, these distinctions refer to the different levels of corporate organization with which labour law has, historically, been successively concerned in order to focus on the centre of effective power and thus ensure the protection of employees. Yet, while seeking to ensure workers’ protection, labour law also contributes to organizing the production of goods or services. While spelling out the rules that govern the individual contract of employment – i.e. the master–servant relationship – between a legally identified employer, be it a legal or natural person, and the employee, labour law is also concerned with the organization – endowed with a centre of power and governed by labour relations – of which the employee is a part by virtue of the contract of employment (Jeammaud, 1989). Employment relationships are thus legally structured around two essential focal points to which particular attention will be devoted below (Jeammaud, Lyon-Caen and Le Friant, 1998).<sup>4</sup>

#### The firm as “producer”

Historically, labour law began by conceptualizing “the firm” as “a producer”, i.e. the meeting place of capital and tangible labour where goods are manufactured for the market. Hence its focus on the factory, the establishment, the place where tangible labour was performed and where it was necessary to protect wage-earners or, rather, bodies at work. Early industrial legislation, particularly in the field of occupational health and safety, was establishment-level legislation, targeting the locus of tangible labour – the subject matter of the contract of employment. It was also from these tangible workplaces that collective solidarity networks first emerged, leading to the first collective actions.

<sup>3</sup> This reasoning draws on multidisciplinary research on the concept of “the enterprise” conducted by economists and legal experts (see, in particular, Jeammaud, Kirat and Villeval, 1996; Morin and Morin, 2002).

<sup>4</sup> These authors consider additional focal points to be procedures for defending interests, collective bargaining and the role of the State.

As the first level of corporate organization, the establishment remains a major framework for the application of labour law. For example, this is reflected in the concept of the establishment used in German law, which forms the basis of the establishment's "social constitution" (Rémy, 2001). Another example is the notion of a "transferred economic entity" which carries on its activity while retaining its identity, as provided for in the European Directive on transfers of undertakings.<sup>5</sup> Such an entity is indeed characterized by a set of organized interactions between capital and labour, aimed at the pursuit of some form of activity.<sup>6</sup> The producer is above all the owner, the manager of the asset who is, at the same time, the employer, being a party to the contract of employment. This conceptualization of the productive firm remains very close to the concepts of farm assets and stock-in-trade which were hallmarks of the as yet very rural societies of the first industrial revolution (Gaudu, 2001).

#### The firm as an economic and social organization

Labour law subsequently went on to concern itself with the second level of organization of "the firm" which governs the latter's economic activity in relation to the market. In other words, the firm's economic organization was for a long time left to the complete discretion of the employer, without any interference from labour law beyond its focus on the performance of the contract of employment itself. From a consideration of the firm's economic organization – as opposed to a narrow focus on the labour-related aspects of the organization of production – it turns out that the firm can carry on multiple economic activities; it can comprise several branches of activity and have any number of establishments (Desbarats, 1996). Yet it is characterized by a single economic management which also governs the organization of its workforce. The firm's organizing principle is thus no longer production but economic decision-making power in relation to the market. The enterprise can then be conceptualized as an organization, both economic and social, under a single management. This classic notion of the firm, typified by the large Fordian enterprise, still lies at the heart of the conceptualization of the enterprise in labour law. In Germany and, later, in France, it gave rise to institutional theories of the enterprise as the locus of the exercise of private power, which the law has endeavoured to frame as such, although persistent debate has

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<sup>5</sup> Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (*Official Journal of the European Communities*, No. L201, 17 July 1998, pp. 88-92).

<sup>6</sup> See Case 24/85, *Jozeph Maria Antonius Spijkers vs. Gebroeders Benedick Abattoir CV and Alfred Benedik en Zonen BV*, ECJ 1986, p. 1119, on the maintenance of workers' rights in the event of enterprise transfers, as subsequently confirmed by case C-13/95, *Ayşe Sützen vs. Zehnacker Gebäudereinigung GmbH Krankenhausservice*, ECJ 1997, p. I-1259.

carried on in the realm of theory, both legal and economic, between the proponents of the contract and those of the organization.

Consideration of the enterprise as an economic and social organization was labour law's starting point for developing the modern concept of employment, both in the passive sense – i.e. to be employed – and, more importantly, in the active sense, i.e. to have a job and thus to play a part in an organization (Gaudu, 1996). This, in turn, laid the foundations for the legal construction of protection of the long-term employment relationship based on attachment to the enterprise, as reflected in the law of dismissal and more particularly in that of redundancy, an institution particular to the contract of employment. Social protection mechanisms based on the holding of a job were developed accordingly (Supiot, 1997). In the field of collective labour law, the reconceptualization of the firm around this level of organization led to the development of enterprise-level worker representation in continental Europe and, gradually in the post-war period, to the development of workers' rights to information and consultation on management's economic decision-making, particularly when such decisions were likely to affect employment. Hence the emergence of a body of law governing the exercise of executive power within the enterprise. Enterprise law and employment law are thus the corollaries of an understanding of the enterprise as an organization with both social and economic dimensions under a single economic management. From the standpoint of industrial relations, and again in the context of Europe, the development of industry-level bargaining paved the way for the organization of the social and labour aspects of competition between enterprises on the national markets for goods (affiliation to a particular industry being determined by the enterprise's main line of business).

#### The firm as a financial group

The third, financial level of organization of the firm is that concerned with resource allocation. It is also at this level that shareholder value is monitored and distributed. When a single company or person exercises majority control over the entire range of companies – whether through direct or indirect ownership of majority shares in the companies of the group or through the power to appoint company executives – there is “unity of governance” at the group level, which then becomes the locus of real decision-making power. This unity can then serve as a basis for tracing the boundaries of the firm.

European labour law and the law of some countries take account of this level of decision-making and recognize groups of companies as entities. The classic paradigm of the enterprise is indeed still effective when unity of governance can be identified as such (Supiot, 1985; Teysse, 1999), though innovative approaches are needed to accommodate the separation between the legal employer, be it a corporation or a natural

person, and the actual locus of decision-making power, as well as such discretionary scope as may be enjoyed by the individual enterprises within the group. Indeed, a group can encompass a variety of economic activities such that the locus of economic decision-making and that of financial decision-making may not always coincide. In practice, a supervisory relationship takes over – one of “controlled autonomy”, to use a concept more sociological than legal (Appay, 1993) – which may give some scope for economic decision-making to individual enterprises within the group. The group and the enterprise may happen to coincide when, say, “economic and social unity” can be readily identified in terms of the concept developed under French law on this point (Boubli, 2004). But this is not always the case since a group can comprise several enterprises in the economic sense. Under French law, the institution of the group-wide works council and its recognized terms of reference represent an attempt to provide for such relationships; they also serve as the legal basis for the obligation to re-employ workers within the group in the event of redundancies and, more recently, recognition of group-wide collective bargaining.<sup>7</sup> Under European law, the directives on group-wide works councils and the status of workers in European companies also extend the scope of labour law to this level of decision-making.<sup>8</sup>

At present, this level of organization of the firm is the one that determines the hierarchy among the other levels in the sense that economic decision-making is dominated not so much by the market for goods as by the necessity of increasing value for shareholders. Indeed, with the development of the financial market economy, the 1990s witnessed a crucial turning point. The need to create value for shareholders,<sup>9</sup> together with the notion of shareholder value, led to an evaluation of the financial performance of an enterprise which was no longer based on its fundamental value but on the typical remuneration that its shareholders had come to expect. Applying this concept to the strategic management of the enterprise produces “a radical change of perspective that subordinates the firm’s economic performance to an ex ante requirement for financial reward” (Baudru and Morin, 1999).<sup>10</sup> This radical shift obviously had far-reaching consequences for employment relationships since workers had no power whatsoever to influence shareholders’ decisions on the financial market. The financial level of decision-making can indeed be very far removed from the establishments that have to face the consequences

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<sup>7</sup> Act No. 2004-391 of 4 May 2004 concerning lifelong vocational training and social dialogue, in *Journal Officiel* (Paris), 5 May 2004; new article L.132-19-1 of the French Labour Code.

<sup>8</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, in *Official Journal of the European Communities* (Luxembourg), No. L294, 10 November 2001, pp. 22-32.

<sup>9</sup> A concept proposed by Stewart III (1991), cited by Gendron, Lapointe and Turcotte (2004).

<sup>10</sup> Cited by Gendron, Lapointe and Turcotte (2004).



of decisions taken in response to financial logic. In such cases, the legal means of getting the decision-making centre involved are not always straightforward, especially in regard to international groups. This can be illustrated by the European Union's painful soul-searching over corporate restructuring projects.<sup>11</sup>

To sum up, labour law began by focusing on employment relationships at the establishment level in order to regulate the conditions of tangible labour and extend protection to workers' physical bodies. It then sought to protect employment and to organize collective relations within the economic boundaries of the enterprise – the economic entity then being the main locus of decision-making. Nowadays, it is painstakingly endeavouring to extend its reach to the group, as the embodiment of the dominant level, so as to ensure that workers' interests can be taken into account at that level too.

#### Questioning the unity of the firm

In its quest for the unifying feature of the firm, or at least for the level at which decisions are taken, labour law has come up against new obstacles. Aside from globalization which is weakening the overall effectiveness of national-level regulation, this unity-seeking approach to the firm is being challenged both downstream and upstream. This process is leading to a form of partitioning that labour law – initially constructed within the binary framework derived from the contract of employment – is ill-equipped to cope with.

Upstream, investors – many of them pension funds – are not interested in taking control of firms or in exercising economic decision-making power and taking responsibility accordingly. By acquiring shares, often on a relatively small scale, their objective is typically to reap financial rewards by wielding such influence as will sway the financial markets. Moreover, alongside groups characterized by unity of governance, which can thus be influenced by the decisions of minority shareholders, there are also various forms of inter-firm alliances without majority shareholdings (e.g. equity swaps, bank-industry alliances) which also have implications for firms' strategic decision-making. Within such networks (or financial arrangements), labour law has become something of an irrelevance, particularly when the underlying relationships are tenuous. In this model of financial market capitalism (Aglietta, 1998; Aglietta and Rebérioux, 2004), whose workings are increasingly disconnected from the real economy, capital mobility is generally accelerating. Faced with the influential power of minority shareholders within these financial networks, the means of action open to workers necessarily differ from those available within groups of companies whose unity of governance can be

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<sup>11</sup> See *Liaisons Sociales Europe* of 6 February and 17 April 2003.

identified as such. Employee shareholding or the development of employee savings funds could be used to add another dimension to shareholders' decision-making which otherwise remains purely financial. But the quest for appropriate responses is clearly still on – and it is not confined to labour law alone.

Also on the upstream side, commercial alliances are being developed by networking enterprises on the basis of varying degrees of economic interdependence.<sup>12</sup> Such networks also pose new challenges to labour law. Examples include teamwork by the employees of several enterprises working on a common project, common systems of labour relations based on new information and communication technology between enterprises within a given network, the nature of employment within distribution networks (i.e. wage employment versus self-employment), etc. Such configurations also give rise to relations of “controlled autonomy” between enterprises, based not only on institutional financial interdependency but also on contractual economic interdependency. In all such cases, new forms of “allegiance” are emerging (Del Cont, 1998; Virassamy, 1986; Supiot, 2001).

Downstream, at the producer level of the firm, i.e. the establishment level, the sweeping drive towards “productive decentralization” – outsourcing of service functions, subcontracting arrangements – is also undermining the traditional unity of the enterprise as a social and economic organization (Morin, 1994 and 1996). At the production level itself and at the workplace, workforces are fragmented, working under different sets of collective rules, and parts of the production process may be relocated elsewhere. Internationally, these practices have revived the issue of competition, not only among enterprises but also, and perhaps more importantly, in the labour market. This, in turn, has undermined the regulatory function of industry-level collective agreements as envisaged within the framework of the dominant national markets of the twentieth century, which were consistent with the enterprise being organized as an economic and social entity. Arguably of even greater concern is the difficulty of identifying the employer responsible for working conditions and conditions of employment. In this respect too, inter-enterprise relationships tend to be relations of “controlled autonomy” in which hierarchy is determined less by the exclusive economic dependence of a subcontractor on a prime contractor than by specific requirements pertaining to quality, delivery deadlines, training, etc., which can directly impact on working conditions without entailing any responsibility whatsoever on the part of the prime contractor.

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<sup>12</sup> For example, the Sky alliance between eight airline companies from different continents operates common services to the various companies with the result that the employees of different enterprises occasionally work together or in shared premises. Another example is given by distribution networks based on agreements between retailers and suppliers.



As Supiot (2002) points out, such networked enterprises combine autonomy in the subordination of employees (who are evaluated on performance) with allegiance in the independence of the enterprises within the network which can thus sidestep the constructs of labour law based on master-servant relationships and hierarchic organization.

From the legal perspective, these sweeping changes raise two major issues. The first is the identification of the employer, since it has typically become impossible to piece together an enterprise with a single management. And the second, just as crucial, concerns the ways and means of providing for these forms of productive organization not only for the purposes of employment security, but also in terms of workers' ability to influence the decisions taken in particular workplaces, and the protection of working conditions.

### *The sharing of risks and responsibility*

#### New organizational configurations and the transfer of risks

The developments outlined above and the underlying rationale have been the subject of many different interpretations. The one considered here, hypothetically, is that these changes may be driven by a shift in the terms on which responsibility is taken for the risk inherent in any economic enterprise.

The sharing of economic risk in a market economy, together with the corollary issue of responsibility for social risks in a wage-employment society like western Europe's, have indeed been at the very heart of the construction of labour law and, more generally, social law (Deakin, 2002; Ewald, 1986; Morin, 2000). A worker who makes her labour available to an employer takes no responsibility for entrepreneurial risk. She accepts a position of subordination in return for a measure of security based on the operation of collective solidarity, be it in the form of social insurance or regulations protecting labour and employment. The recent developments at issue here are contributing to the disruption of the terms of the trade-off between security and subordination, as already discussed by Supiot (1999 and 2002, *inter alia*).

The way firms are structured financially most certainly follows a financial rationale as to the sharing of financial risk. The networking of firms – into groups or contractual networks of enterprises – allows for the sharing of economic risk (and of the burden of investment). But the resulting distribution of economic and financial risks also entails a sharing of the employment risk, which is both a component of the risk of entrepreneurship borne by the employer and a social risk borne by the employee in the event of job loss and, consequently, loss of livelihood. The incorporation of subsidiaries and outsourcing are assuredly means of transferring to other enterprises – if not to the employee or state

authorities – the risks attaching to employment and work. The employment risk is not confined to labour costs: it also includes the risk of having to adjust the labour force to changes in employment, which may mean dismissals. As for the work-related risk, it comprises the risks that arise from the work itself,<sup>13</sup> from the very conditions in which it is performed collectively, taking account of the ever-present possibility of conflict, and from the safety of workers.

In today's financial market economy, such a transfer of risks poses a daunting question about responsibility, not so much in the legal sense of the term – responsibility being borne by whoever causes damage – as in an etymological sense: who is to be held accountable for events that are likely to affect working and employment relationships? And who is to contribute not only to compensation but also to preventing them? From this perspective, the emergence and significance of debates over corporate social responsibility are – however this concept is understood – probably indicative of the new light in which the question is being posed as to the work and employment responsibilities of enterprises and, more generally, of each of their stakeholders (Igalens, 2004).

#### Labour law options for accommodating the changes under way

The conventional responses that labour law has come up with fall into two categories. On the one hand, it spells out the responsibilities of the entrepreneur or, rather, of the legal employer, which derive from her/his entrepreneurial capacity, both within the collective framework of the enterprise and within the individual framework of the contract of employment, while endeavouring to strike a balance between the right to employment and freedom of enterprise. On the other hand, it organizes collective protection for jobless workers in the labour market.

In a situation where the reorganization of firms is accompanied by the development of various “controlled autonomy” relations and transfer of risks as described above, the problem is not only a matter of how the enterprise can be reconceptualized so as to come up with binary relationships again, with a responsible employer or entrepreneur. From the legal standpoint, it is indeed just as much a question of how to accommodate trilateral relationships, be they contractual or institutional, in order to establish the respective responsibilities of the parties and organize collective guarantees more appropriately.

In a landmark article written over a decade ago, Teubner (1993) explored the relationships between new forms of corporate organization and the law, proposing three types of approach that may achieve such accommodation. All three of them are indeed helpful in this respect.

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<sup>13</sup> Which also tends to be increasingly transferred to the employee, particularly through today's new forms of remuneration (A. Lyon-Caen, 1996).

The first approach, being the most conventional, consists in seeking out fraud. In the case of subcontracting operations, for example, the aim is to distinguish between those that are bona fide and those that are not, in order to identify who the real employer is. In particular, it is always essential to establish whether labour has been leased unlawfully. However, subcontracting or the incorporation of subsidiaries to carry out some of a firm's work may be entirely legitimate even when it involves a change of employer.

The second approach consists in piecing together the constituent parts of the enterprise in order to get a picture of the firm's economic and social unity in practice, following the classic paradigm of the enterprise.<sup>14</sup> This is the approach underlying France's legal doctrine and case law on economic and social unity (Boubli, 2004).

The third approach, on which Teubner lays particular emphasis, consists in examining the contractual or financial relationships between firms in order to retrace the chain of responsibility. Under French law, the obligation to re-employ redundant workers within a group of companies reflects an attempt at this approach. The same goes for other recent developments in Europe's positive law. European regulations on occupational safety and health in the event of joint work, for example, actually organize the sharing of responsibility for occupational safety between the prime enterprise and the other enterprises involved. Here, the aim is neither to crack down on fraud in order to identify the real employer nor to piece together a full picture of the enterprise, but to take account of inter-firm relationships so as to determine each firm's respective share of responsibility for such events as may occur over the course of the employment relationship.

This last approach will now be examined in the light of three classic concerns of labour law which corporate reorganization is once again bringing to the fore, namely, the powers of the enterprise's chief executive, the identification of the employer for the purposes of contractual relationships, and accountability for the conditions in which the work itself is performed.

## New forms of corporate organization and responsibility

The various approaches outlined above are already being used in positive law to establish the responsibilities of various parties, say, in identifying the locus of power for the purposes of collective labour relations, or in identifying the employer for the purposes of the individual contract of employment, or yet in seeking to establish responsibility for

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<sup>14</sup> This paradigm actually characterizes this approach, which may also be combined with the fraud-seeking approach (Urban, 2000).

working conditions. A more detailed overview of the means used to these ends may help to give some idea of what the future holds.

### *The exercise of power and industrial relations*

On this point, trends in the development of industrial relations law suggest, albeit tenuously, a few leads.

#### The broadening of workers' rights to information and consultation

Under European law, the right to information and consultation of workers' representatives now seems to be established as a matter of general principle, though not yet as a general right (Rodière, 2002). At any rate, this principle is reflected in a fair number of European directives – including those on European works councils,<sup>15</sup> on information and consultation of employees,<sup>16</sup> and on the European company statute<sup>17</sup> – and in the provisions on mandatory information to be provided to workers' representatives in the event of a transfer of enterprise ownership or redundancy.

This broadening of rights to information brings to mind a parallel that other authors have drawn already (Supiot, 2001). In the same way as corporate governance in the context of financial market capitalism rests on the principle of information transparency vis-à-vis shareholders, should such transparency not be provided on the same terms to the workers of the enterprises within the group? New information and communications technologies can play a crucial part in this respect. At present, European law lays down a principle of useful information, i.e. the provision of such data as will furnish a basis for adequate consideration (which is in fact the precondition for useful consultation – a substantively meaningful exchange of views aimed at eliciting a considered response and, if possible, reaching agreement). The relevant directives also establish the principle of equal access to information concerning the undertakings within a group. The principle of information transparency could, however, be extended a little further: as stakeholders in the firm, should employees not have access to the same information as shareholders, as opposed to information that is merely “appropriate”?

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<sup>15</sup> Council Directive 94/45/CE of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees, in *Official Journal of the European Communities* (Luxembourg), No. L254, 30 September 1994, pp. 64-72.

<sup>16</sup> European Parliament and Council Directive 2002/14/CE of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, in *Official Journal of the European Communities* (Luxembourg), No. L080, 23 March 2002, pp. 29-34.

<sup>17</sup> See note 8 above.

The European Court of Justice, for its part, considers that the right to information presupposes worker representation.<sup>18</sup> In other words, the representation of workers' interests must be organized at an appropriate level. Although the directives on European works councils and the European company statute do organize representation at the level of the centre of power, the fact remains that in less structured enterprise networks and in contractual networks the representation of workers' interests has yet to be organized at the level where problems actually arise (Gaudu, 2001). Affirmation of the principle of information transparency could thus serve as a catalyst for improving the structure of representation itself.

#### Appropriate levels of collective bargaining

Over the past 20 years there has been much talk about the decentralization of enterprise bargaining. Elaborating on this idea, France's legislation of 4 May 2004 enshrines the principle of subsidiarity in industry-level bargaining.<sup>19</sup> The effectiveness of this principle is questionable, however, at a time when the boundaries of the firm are becoming blurred both upstream and downstream.

Upstream, some legal systems like France's now recognize group-level bargaining.<sup>20</sup> Under European law, the establishment of a group-wide works council must proceed from bargaining at that level. In actual fact, group-level collective agreements had been concluded even before these legislative initiatives (Vachet, 1999). These were mostly framework agreements or procedural agreements designed to lay down principles whose practical application was then left to each individual enterprise within the group. This was indeed one way of accommodating the "controlled autonomy" that governs relations within the firm. From a legal perspective, the key issue concerns the extent to which a group-level agreement may or may not limit the scope of enterprise-level bargaining in areas where enterprise bargaining is recognized as a right in itself. France's recent legislation, for example, does not settle this issue.<sup>21</sup>

Downstream, in response to the decentralization of production, another avenue being explored ever so tentatively is that of location-based

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<sup>18</sup> See case C382/92, *Commission of the European Communities vs. United Kingdom of Great Britain and Northern Ireland*, ECJ 1994, p. I-2435, on the maintenance of workers' rights in the event of enterprise transfers.

<sup>19</sup> In relation to individual enterprises, though not in relation to the group (new article L.132-19-1 of the Labour Code).

<sup>20</sup> In a new article of the Labour Code introduced by the legislation of 4 May 2004.

<sup>21</sup> The issue was raised by the so-called AXA judgement that preceded statutory recognition of group-level bargaining in France. See Court of Cassation, Social Chamber, 30 April 2003, Case No. 1283, in *Revue de jurisprudence sociale* (Levallois-Perret), No. 916, July.

inter-enterprise bargaining or territorial bargaining covering enterprise networks. In the United States, for example, a notable decision of the National Labor Relations Board has established that the employees of the prime enterprise together with the agency employees working for it make up a multi-employer bargaining unit.<sup>22</sup> This approach has been taken in a number of countries (though not in France), and many authors have stressed the need for this bargaining format (Texier, 2003; Supiot, 1999; Trentin, 2002; Morin, 1999).<sup>23</sup>

The main issue raised by this form of bargaining is its purpose. Indeed, it may be tempting to think of this in terms of securing equal pay for the workers of separate enterprises participating in the same production venture at the same location, particularly in scenarios involving subcontracting. In positive law, the European directive on services lays down the principle of equal treatment – to some minimum standard at least – when the workers of an enterprise based in the European Union are sent to perform services in an enterprise located in another country of the Union. However, the application of this principle presupposes that the employees of the first enterprise hold jobs similar to those of the employees of the host enterprise. Yet, except in the event of subcontracting to make up for under-capacity, the outsourcing of certain tasks such as security surveillance or highly specialized subcontracting tends by definition to be concerned precisely with those jobs that have no equivalent in the host enterprise or which are outside its line of business. Indeed, such jobs would most probably not even be covered by the same collective agreement.

For these reasons, production-site bargaining would seem to be better suited to issues such as the standardization of fringe benefits (e.g. catering, transport, etc.), provisions for training or labour mobility within the network or across a given location, or the establishment of production-site commissions. Such bargaining could also focus on some sort of social clause that would spell out required minimum standards applicable to the employees of subcontractors wishing to prequalify for work with a prime contractor. This idea has already been taken up in the codes of conduct adopted by several major multinationals, sometimes at the outcome of collective bargaining. Such codes or agreements, however, are now more typically concerned with respect for

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<sup>22</sup> M. B. Sturgis, Inc. and Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union local 108, 331 NLRB, No. 173, 25 August 2000 (cited by Gaudu, 2001).

<sup>23</sup> A somewhat dated example is the Agreement on the Ariane Espace Base at Kourou between Ariane Espace and the subcontractors working on the base. For a more recent example of location-wide social dialogue (though not actual bargaining) at the CGE Alsthom site at Nantes, see Texier (2003).



certain fundamental rights than with the specification of minimum standards, as are collective agreements.<sup>24</sup>

The obstacles to the wider development of this form of bargaining are in effect more sociological than legal. They stem primarily from the composition of workers' collective representation and their willingness to accommodate enterprises' new organizational configurations. But they also stem from employers' reluctance to enter into legally binding commitments.

### Upholding corporate social responsibility

The third lead is given by the concept of corporate social responsibility as defined in the Green Paper of the European Union, "whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis" (European Commission, 2001, para. 20; Desbarrats, 2003; Sobczak, 2002 and 2004). It follows directly from the developments in collective bargaining outlined above, albeit with greater openness to the entire range of concerns surrounding corporate activity.

The actual scope of this concept remains the subject of intense debate (Sobczak, 2004; Gendron, Lapointe and Turcotte, 2004). Some see it as a means of promoting corporate self-regulation independently from government regulation, while others take the view that the practices deriving from corporate social responsibility foreshadow the way government standards and market standards will eventually come to interact on the basis of new standard-setting instruments.

Initially, the concept of corporate social responsibility was indeed used in reference to the codes of conduct that multinationals required their subcontractors to abide by. Typically, this meant that subcontractors (or enterprises within a given group) had to respect workers' fundamental rights or applicable collective agreements, sometimes subject to supervisory mechanisms. The literature on the subject highlights the significance of this growing practice, initiated by the multinationals themselves, but also the difficulty of securing compliance with these arrangements at the most basic level in spite of the emergence of supervisory mechanisms and social labelling schemes that function with the support of consumer groups.

In legal terms, the underlying trend raises two issues. The first is the scope of the very notion of fundamental rights. How does it differ from recognition of a wage employment status enshrined in a collective agreement? A tentative answer may be that it aims primarily to secure the rights of the wage-earner as an individual, rather than as a worker

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<sup>24</sup> See, for example, the agreement on social responsibility concluded between General Motors and its European works council, in *Liaisons Sociales Europe* (Paris), No. 67, 27 November 2002; or the agreement of 11 May 2001 between the IUF, the Coordinating Committee of Banana Workers' Unions (COLSIBA) and Chiquita Brands International (cited in ILO, 2003).

(Waquet, 2003; Valdés Dal Ré, 2003; Lyon-Caen and Vacaric, 2001). The rights in question appear to be characterized by their source (constitutional or international conventions) – such that their international application can indeed be envisaged – and by their objective, i.e. protecting the life or dignity of human beings. This last proposition obviously includes collective freedoms, but it also extends to commitments to occupational safety, protection of privacy and decent remuneration.

The second issue relates to the nature of penalties for non-compliance with codes of conduct. More specifically, what would be the liability of an enterprise that has adopted such a code if its sub-contractors failed to abide by its provisions? On this particular point, Sobczak (2004) cites a ruling of the Supreme Court of California, in *Kasky vs. Nike Inc.* to the effect that non-compliance with a commitment made in a code of conduct, together with false information given in a social audit report, entail liability to prosecution for misrepresentation through advertising.<sup>25</sup>

Within the conceptual framework of a corporate social responsibility extending to inter-firm relations, the practice of adopting codes of conduct is thus underpinned by three important ideas. First, the aim is to secure the fundamental rights of workers as individuals. Second, the legal actionability of such codes is grounded in a mix of company law, consumer law and labour law. And third, the effectiveness of the codes is conditional upon a certain amount of publicity and, therefore, on a degree of transparency in their application. In other words, the system does not directly promote corporate responsibility in the sphere of labour relations; rather, it does so through the economic power that firms wield.

### Social responsibility and restructuring

The issue of social responsibility obviously comes up in the context of corporate restructuring as well (redundancies, plant closures, etc.). In this context, however, the point is not to understand relations between firms per se, but to make a direct determination of the share of responsibility falling to an enterprise that closes down a given plant in relation to that plant's environment. In European law, efforts to give effect to the notion of corporate social responsibility in respect of restructuring have run into serious difficulty.<sup>26</sup> However, within the domestic systems of member States, including French law in particular, the framing of legal rules on this subject features a number of interesting developments. One of these, in France, is the obligation to re-employ redundant workers within the group. This obligation is particularly significant: although it

<sup>25</sup> *Kasky vs. Nike Inc.*, Supreme Court of California, 27 CAL 4th 939, No. SO87859, 2 May 2002.

<sup>26</sup> Following initial consultations, work on restructuring is now at a standstill. For empirical work taking a comparative European perspective, see Segal, Sobczak and Triomphe (2002).

places a burden on companies implementing redundancy plans, the very fact that the obligation is provided for shows that corporate responsibility can go beyond the strict confines of the contract of employment. Such reasoning could be extended to contractual networks of enterprises so that such networks also might be recognized as “spheres of mobility”. French case law offers a few examples of contractual networks being considered in this way.<sup>27</sup> But it may be necessary to go further still and recognize a prime contractor’s specific responsibility for employment relationships among subcontractors. The practices of certain large enterprises actually point in that direction (Raveyre, 2001). The extension of corporate responsibility beyond corporate boundaries and the need for joint action with other parties (local authorities, for example) are also reflected in the obligations recently prescribed in section 118 of France’s Social Modernization Act of 17 January 2002. This requires very large enterprises to contribute to the development of alternative employment opportunities in areas affected by the complete or partial closure of one of their establishments. In such circumstances, the underlying idea is that whoever is responsible for economic decision-making has to take account of its consequences for third parties in accordance with new rules that apply regardless whether a fault was committed or an accident has occurred.

Another set of emerging issues centres on transfers of enterprise or establishment ownership, typically a key instrument of corporate restructuring. In actual fact, the law has long embodied solutions for maintaining production units in operation in such cases. This is especially true of European law and those domestic systems that provide for continuity of the contract of employment and, to some extent, the maintenance of collective regulatory frameworks. However, the reconfiguration of firms is now raising two kinds of issues. The first relates to the transferred entity being defined in such a way as to allow the contract of employment to be maintained, particularly in the service industry. The question here is whether the maintenance of economic activity is sufficient to identify the economic entity – and the outsourcing of business services makes this question ever more pressing. In other words: what is it that makes the firm a firm? Is it a set of contracts covering particular aspects of economic activity or is it a particular form of organization? Debates on enterprise ownership transfers thus raise a question about the very concept of the firm, calling for fresh thinking about its most basic level of organization. The “haziness” (Bailly, 2004) of the concept of a transferred economic entity may well be a reflection of the ease with which today’s work organizations can be reconfigured. Another question that also relates to this first level of organization is

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<sup>27</sup> Court of Cassation, Social Chamber, 9 June 2004, appeal No. 01-46584 (available at [www.legisfrance.gov.fr](http://www.legisfrance.gov.fr)).

about each worker's individual right to choose, which is recognized in some European legal systems and in the European directive on transfers. Specifically, the question here is whether a change of employer can be imposed on the worker; and, should the worker refuse to accept such a change, what are his/her rights (Ionescu, 2002)? There is no standard answer to these questions, though case law reflects some attempts to restrict outsourcing operations. In France, the so-called Perrier judgments follow a highly conventional approach to the enterprise, requiring verification that the transferred economic entity genuinely constitutes a unit with which the jobs of transferred workers are connected (Waquet, 2000).<sup>28</sup> Elsewhere, as in Australia for example, the approach taken is arguably more innovative: it is up to the court to verify that the transfer process is not a ploy designed to evade compliance with collective rights by challenging the applicable collective agreement.<sup>29</sup> But both approaches – i.e. maintaining the unity of the enterprise and preventing fraud – appear to be little more than partial responses to the development of outsourcing operations as an instrument of corporate strategy.

### *The contract of employment and determination of the employer*

Driven by new forms of corporate organization, the growing incidence of triangular relations between a worker and one or more enterprises highlights the need for new forms of protection precisely because the employer is now not necessarily the party with the real decision-making power (Morin, 2001). On this point, the ILO's (2003) report on the scope of the employment relationship makes an important contribution to the literature on account of the wealth of insights it provides.

From the standpoint of workers' employment, several configurations are indeed possible. For example, one might involve putting an employee at the disposal of several enterprises within a group or requiring the employee to work for each of them in succession. Another, more conventional, involves subcontracting or service provision whereby the employees of one enterprise engage in work on the premises of another or are placed at its disposal to perform a particular job (they could also be self-employed workers). Yet another, also common, involves contract work through an agency, whereby an enterprise uses labour hired by a third-party employer responsible for the employment relationship (Morin, Dupuy and Larré, 1999).

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<sup>28</sup> Court of Cassation, Social Chamber, 18 July 2000, Appeal No. 98-18037, in *Bulletin Civil de la Cour de Cassation* (Paris), part V, No. 285, July, p. 225.

<sup>29</sup> Australian Municipal, Administrative, Clerical Service Union vs. Greater Dandenong City Council (2000), 48 Australian Industrial Law Reports, 4-236.

In the face of such practices, the ILO report offers a comparative evaluation of at least two ways of taking account of inter-firm relations and, thereby, of establishing the responsibility of those firms that have taken decisions likely to affect the contract of employment.

### Joint employers

Two enterprises can be considered jointly as a worker's employer, with joint responsibility for the employment relationship. In French law, this device is used in dealing with the companies within a group. It has also been used in cases where the employee of one enterprise is seconded to another for a protracted period (e.g. brand-specific salespersons working in department stores) and where the host enterprise exercises a measure of management authority.<sup>30</sup> The general idea is that whenever the host enterprise exercises a degree of control over an employee placed at its disposal, it can be considered as that employee's joint employer. This offers a starting point from which to construct a legal framework for the practice of assigning employees to work for another enterprise – a framework which would also help to address other issues that arise (see below). But where the employees of several enterprises work together, it may not be feasible to ascertain whether the supervisory control requirement is fulfilled.

However, some countries have enacted provisions that allow for all of the enterprises participating in the arrangement to be held jointly responsible for the employment relationship.<sup>31</sup> Of course, effective supervision of work rests with the enterprise at whose disposal the employee has been placed (and he/she may be assigned to several enterprises either simultaneously or in succession), but responsibility for the employment relationship rests jointly with all the enterprises in the network. While this approach thus distinguishes the use of labour from the overall employment connection, it relies on the notion of “networked employers” to establish the joint responsibility of all of the participants in the arrangement for the continuation of the employment relationship (unlike what happens, say, in the case of temporary or agency work where the user of the labour bears no responsibility for employment).

### The joint liability of employers

The legal construct just described is indeed that of joint liability in respect of all or part of the employer's obligations to the worker. Finland, for example, has legislation that makes a prime contractor accountable

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<sup>30</sup> Court of Cassation, Social Chamber, 19 January 1999, in *Bulletin Civil de la Cour de Cassation* (Paris), Part V, No. 35, January. See also Lemière (1997).

<sup>31</sup> See, for example, article L.127-1 of the French Labour Code.

for respect for workers' fundamental rights by its subcontractors.<sup>32</sup> This is in fact a means of giving legal effect to codes of conduct through the controlling enterprise itself. In the same spirit, a New York district court annulled a contract for the supply of garments because its terms offered inadequate safeguards for the payment of applicable minimum wages. Here too, the court's decision is grounded in the idea that the principal cannot ignore the consequences of its operations in terms of respect for the fundamental rights of a subcontractor's workforce.

In the same spirit, the inclusion in sub-contracts of "social clauses" specifying the workers' rights that the subcontractor must respect would offer a means of establishing the prime contractor's liability. The latter would then be let off only if the terms of the sub-contract make adequate provision for respect for those rights. Here again, a focus on the need to uphold workers' fundamental rights is helpful in the search for innovative solutions.

Under the laws of some countries, the prime contractor may be held accountable for, say, the social security registration of subcontractors' workers. French legislation on undisclosed employment is based on this approach.<sup>33</sup> It is then up to the party entering into a contract with an enterprise to ensure that it complies with its social obligations.

The notion that the principal or prime contractor may be held jointly liable thus offers considerable potential. In fact, it comes up in a variety of provisions, sometimes in very old statutes, whereby the prime contractor is under an obligation to guarantee compliance by subcontractors, notably in respect of wages (as is the case with the provisions of the French Civil Code governing subcontracting in construction and public works). As regards temporary agency workers, joint obligations in regard to wages also extend to the enterprise using their labour.<sup>34</sup>

### *Liability and performance of work*

This question is another textbook classic. It takes us back to the issues that arise at the establishment level, involving tangible labour performed at a workplace. It is worth mentioning, however, that it has been at the heart of significant advances in the legal framing of new forms of corporate organization.

The basic idea is that the user of the labour – i.e. the party to which the labour is supplied – is responsible for enforcing the rules applicable to the performance of work although that party's liability for employment may be limited. This notion is reflected in numerous provisions of

<sup>32</sup> Cited in ILO (2003, p. 69).

<sup>33</sup> Article L.324-13-1 of the Labour Code.

<sup>34</sup> See articles L.143-6 and L.143-8 of the Labour Code on construction workers and articles R.124-22 and L.125-2 on temporary employment and labour-supplying agencies.



French law, though it has not been systematically codified as yet. The rules in question will not be detailed here; suffice it to say that the notion is an important one.<sup>35</sup> Indeed, it could serve as a basis for developing a law of secondment/labour supply, if only to establish a clear legal framework for the many working arrangements that can occur in a host enterprise whose legal status remains largely unsettled, e.g. project-specific team work, secondment of an employee to another enterprise, joint provision of services, etc. (Morin, Dupuy and Larré, 1999).

Another idea, which follows from the first, is recognition of the concept of joint work or “co-working” in French law. This is more specifically concerned with occupational safety as provided for in the European Directive on workers’ safety and health. The term joint work should be understood to refer to situations where workers from several enterprises take part in a common undertaking.<sup>36</sup> The Directive is based on three principles, namely: responsibility rests with the employer who is a party to the contract of employment; preventive action must be taken in respect of risks arising from joint work; and enterprises sharing a workplace must cooperate, exchange information and coordinate protection. In French law, recognition of joint work has produced two sets of rules that are interesting in terms of provision for the respective responsibilities of each of the enterprises involved.<sup>37</sup> These rules were recently expanded in the legislation of 15 July 2003 on major technological hazards.

First, there are rules that effectively organize information-sharing on risks and preventive action between the host enterprise and the labour-supplying enterprise or, as the case may be, among the various enterprises sharing a given workplace. Such coordination of information and preventive action is linked to a sharing of responsibility between the prime contractor and the subcontractor(s) in respect of their workers. Responsibility for coordination, however, rests with the prime contractor. The extent of the latter’s responsibility is further increased under the recent legislation on major technological hazards: it is up to the prime contractor to ensure that the subcontractors comply

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<sup>35</sup> On temporary work and labour contracting agencies, see Articles L.124-4-6 and L.125-2 of the French Labour Code.

<sup>36</sup> This definition is taken from the circular issued in France in March 1993 pursuant to the Decree of 20 February 1992 to give effect to Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, in *Official Journal of the European Communities* (Luxembourg), No. L 183, 29 June 1989, pp. 1-8.

<sup>37</sup> For the purposes of occupational safety and health, French law considers joint work to be a particular form of work. See Articles R.237-1 et seq. of the Labour Code, on involvement of an enterprise in the workplace of another, and Articles L.235.1 et seq. on construction and civil engineering works.

with prevention requirements (an illustration of the second mechanism described above).<sup>38</sup>

Second, these statutory provisions (including the legislation on major technological hazards) prescribe a variety of rules that organize relations between the workers' representatives of the various enterprises sharing responsibility for occupational safety. Under the legislation on major technological hazards, provision is also made for joint, inter-enterprise representation on major worksites – through a “committee on occupational health and safety and working conditions” (CHSCT) – and for the workers' representatives of sub-contracting enterprises to attend the prime contractor's CHSCT.

In short, the coordination of enterprises' responsibilities needs to be matched by coordination of workers' representation. Although it is outlined here in very general terms, this idea is important because it highlights the need to ensure that representation genuinely takes account of the conditions experienced by workers. Unity of representation or bargaining must be organized or reorganized in the light of how tangible work is performed: it is not something that can be pre-determined. In France, this is the position taken in judicial decisions. Indeed, recent case law requires that all of the workers of independent enterprises contributing to the operations of a client enterprise must be counted as part of the latter's own workforce for the purposes of electing workers' representatives.<sup>39</sup> The establishment – now more broadly understood as a worksite – has thus regained its position as a major focus of the law.

## Concluding remarks

However patchy, the foregoing overview of incipient developments in the way positive law is coming to grips with new forms of corporate organization and the sharing of associated risks suggests three main themes. A focus on these themes could, in turn, help to chart the course of future developments in labour law, taking account of the various aims of workers' protection at different levels of corporate organization.

The first of these themes is in line with the general objective of respect for workers' fundamental rights. At the international level, this ties in with – not to say substitutes for – the objective of employment security that was central to the construction of national labour law systems in the second half of the twentieth century. The pursuit of this objective is evi-

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<sup>38</sup> A number of codes of social responsibility make provision for the safety of the workers of sub-contracting enterprises or for the establishment of worksite commissions. Examples include the above-mentioned General Motors agreement and the CGE Alstom experiment reported by Texier (2003).

<sup>39</sup> See *Syndicat CGT Renault v. Société Renault* (Court of Cassation, Social Chamber, 26 May 2004, Judgement No. 1073), in *Bulletin civil de la Cour de cassation* (Paris), Part V, No. 141, May.

denced both by the current debates over corporate social responsibility and by the adoption of the ILO's Declaration on Fundamental Rights and Principles at Work (ILO, 1998).

The other two themes are more specifically concerned with intra-firm or inter-firm relations. First, as regards industrial relations, the key issue seems to be transparency of information across enterprise networks. Such transparency opens up the possibility of establishing relations between workers' representatives and separate workforces either within a given firm or within a network of firms. It can help to set up new bargaining units or new units for collective action on the basis of the common interests of workers at different organizational levels. And second, as regards the responsibilities associated with the very exercise of freedom of enterprise in today's new corporate configurations, further consideration deserves to be given to recognition of the joint liability of distinct enterprises for all or part of the employer's obligations, according to the purpose of their collaboration and the nature of their relationships, so as to address the implications of new forms of corporate organization and the way work and employment risks are being shared as a result.

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