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Adoption of the so-called florange law: should the new obligation to search for a buyer imposed on companies intending to shut down a site be a cause for concern?

In our December 2013 e-newsletter, we announced the forthcoming publication of the so-called "Florange" Law that notably imposes on companies and groups with at least 1,000 employees that intend to close down a site the obligation to search for a buyer.

This has now been done… after three months of parliamentary vicissitudes! Even though the French Constitutional Council had found that some sections that could be considered as the "heart" of the Law, were unconstitutional, the legislator has stayed the course: Law n°2014-384 of March 29, 2014 aimed at recapturing the real economy was published in the Official Journal on April 1, 2014… and this is not an April Fools hoax!

Because of its underlying political implications, the *Florange* Law (the "Law") clearly went through a tumultuous parliamentary process. On February 4, 2014, the Bill was rejected by the Senate because a number of Senators from the Majority abstained from voting. The Bill then returned to the National Assembly that incorporated a few changes through legislative amendments and finally passed the Bill on February 24…. But the story does not end there!

Considering that the Law violated property rights and entrepreneurial freedom, the opposition parties referred it to the Constitutional Council that, in a decision dated March 27, 2014, invalidated large sections of the Law. It notably held that the obligation to accept a reasonable purchase offer imposed on employers and the jurisdiction conferred upon the Commercial Court to assess the performance of this obligation and, as the case may be, impose sanctions constituted indeed an infringement of property rights and entrepreneurial freedom.

In this context, it could be expected that the legislator would have abandoned the idea of promulgating the Law given the decision of the Constitutional Council that, by refusing the enforcement of sanctions in case of non-compliance, frustrated the very purpose of the Law.

It could be expected… but the Majority stood its ground. The Law was finally published on April 1, and the obligation to search for a buyer imposed on employers who intend to shut down a site was maintained. Even though the Law is now deprived of its key element (i.e. financial sanctions), it does entail, from a procedural perspective, increasingly complex and burdensome procedures for the implementation of collective lay-off procedures.

As such, after many vicissitudes, the main provisions of the Law can be summarized as follows: companies and groups with at least 1,000 employees that intend to close down a site with the consequence that a collective lay-off plan would be implemented, now have the obligation to "search"[1] for a buyer and to provide a reasoned response to any purchaser offer they receive.

The relevant employer must first and foremost convene and inform the Works Council ("WC") of the contemplated closure no later than on the day on which the collective lay-off procedure is initiated, i.e. at the first WC consultation meeting.

Once the WC is informed of the contemplated closure, the employer must "search" for a buyer and complete a number of formalities, including, but not limited to, the preparation of a presentation document of the relevant site intended to potential buyers. For its part, the WC, that must be informed of the purchase offers within a maximum of eight days as from their receipt by the employer, can issue opinions, elaborate proposals or even take part in the search for a buyer.

Lastly, if the employer wishes to move forward with a purchase offer, it must consult the WC that will be required to issue an opinion. The issuance of this opinion marks the end of the search process. If no purchase offer has been received or accepted, the employer must convene the WC and present a "report on the search process" detailing the actions undertaken, the reasons for which offers were refused, etc.

If the employer fails to comply with its obligation to search for a buyer or refuses a purchase offer deemed serious by the WC, the latter may apply to the Commercial Court within seven days as from the WC meeting in which the employer presented the report on the search process.

The Commercial Court must assess whether the employer has conducted the search in compliance with the obligations imposed by law: However, as a result of the partial invalidation of the Law by the Constitutional Council, the Commercial Court is not supposed to assess – contrary to what had been initially contemplated – (i) the "*seriousness of the purchase offers with regard to the offerors' ability to guarantee the continuity of the business activities and the preservation of employment*", nor (ii) whether there exists a "*legitimate reason to refuse the purchase offer, i.e. whether the continuation of the business activity as a whole is jeopardized".* In other words, the Law, in its current form, deprives the Commercial Court of its ability to make an assessment – which is necessarily subjective – of the reasons that led the employer to refuse a purchase offer. The Commercial Court must merely check whether the employer has complied with its obligation, from a "*formal point of view*". This is exactly the objective pursued by the Constitutional Council that specified in its decision that "*the judge is not supposed to substitute his/her own assessment to that of the head of a company, that is not in difficulty, with respect to economic choices related to the conduct and development of that company*".

So, things are clear: the current obligation to search for a buyer is purely a formal obligation!

On the other hand, we believe that one of the provisions of the Law that has not been held unconstitutional is a major point of concern. This provision imposes on the employer the obligation to give to all potential buyers access to **all necessary information, except information, the disclosure of which would be likely to prejudice the company's interests or jeopardize the continuation of its business activities**. While it is true that the Law expressly stipulates that companies are bound by a confidentiality obligation, the fact remains that competitors would, in the meantime, have had access to a number of information. And this raises a critical issue: who will decide whether a piece of information is to be considered as confidential or not? In this respect, we can only deplore the fact that French law does not provide any legal definition of trade secrets.

As evoked in our December 2013 e-newsletter, it is obvious that companies will unreservedly use the above-mentioned legally-authorized restriction on disclosure of information as a pretext to disclose as little information as possible to competitors, especially insofar as they do not face any sanction (or sanctions that are insufficiently deterrent) if they breach their obligations in this respect…

Finally, the main effect of the partial invalidation of the Law by the Constitutional Council is indeed that there is no longer any sanction for employers that do not comply with their obligations. As such, the financial penalty equal to 20 times the value of the French minimum wage per employment position axed, up to a maximum of 2% of the company's yearly turnover, no longer applies.

If the employer is condemned for breach of its obligations, it will "merely" be ordered to refund all or part of the financial set-up, economic development and employment aids granted to the company in relation to the to-be-closed site for the two years prior to the condemnation.

It should be noted that this obligation to search for a buyer applies since April 1, 2014 to collective lay-off procedures. The Council of State should shortly issue a Decree setting forth the conditions in which the new obligations set out by the Law must be implemented.

While the new version of the Law seems to have lost its substance, the Majority does not intend to leave matters there: socialist MPs have redrafted some of the provisions held unconstitutional by the Constitutional Council and submitted them to the Parliament on April 16, 2014.

The "Florange" saga is not over yet: investors in France unfortunately still have good reasons to worry about…

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[1] It should be noted that the legislator has imposed on companies an ***obligation de moyens***, as opposed to an ***obligation de résultat***, which means that companies have the obligation to search for a buyer, not to find one.

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