Read this post online

Focus on the so-called florange bill: will it help keep industrial sites in france or, on the contrary, foster the flight of investment?

Adopted on October 1, 2013 by the National Assembly under the fast-track legislative procedure, the Bill aimed at "*restoring prospects for the real economy and industrial employment*", known as the *Florange* Bill (the "Bill"), imposes on companies intending to close down a site the obligation to search for a buyer and provides for financial penalties if companies do not comply with this obligation.

The Bill should enter into force in early 2014[1].

In our May 2013 e-newsletter, we had indicated that the Bill was supposed to complement the provisions already introduced by the Law on securing employment dated June 14, 2013 with respect to companies' obligation to find a buyer.

Given the differences between the two legislative instruments, and in order to clarify the obligation to search for a buyer, the legislator has decided to consolidate these two pieces of legislation. As such, the provisions of the Bill should be incorporated into New Articles L. 1233-57-9 to L. 1233-57-22 of the French Labor Code (the "FLC"), and its implementing terms should be set forth in a Decree of the *Conseil d'Etat* (Council of State). In parallel, Article L. 1233-90-1of the FLC – that is derived from the Law on securing employment – should be repealed.

In terms of content, the Bill is quite different from the pledge made by François Hollande as candidate before his election as President in May 2012. Indeed, under the Bill as it stands at present, only companies and groups with more than 1,000 employees should be impacted. Small- and medium-sized businesses (SMBs) should theoretically be excluded from the scope of the new set of rules.

This drew protests from trade-unions that argue that 85% of the *plans de sauvegarde de l'emploi* (collective lay-off plans, or hereinafter "PSE") implemented in France in the past few years impacted precisely companies

with less than 1,000 employees.

In addition, the Bill no longer imposes on the head of a company the obligation to sell the site he intends to shut down. More precisely, the legislator imposes on companies an ***obligation de moyens***, as opposed to an ***obligation de résultat***[2]: while companies should be required to "*search for a buyer if they intend to close down an establishment*", they could refuse to move further in this direction if this jeopardizes "*the continuation of the business activity as a whole*".

Pierre Moscovici, Minister of Economy and Finance, spoke of a "responsible compromise" between protection and attractiveness. Right-wing parties, on the other hand, claim that this set of rules would infringe property rights and companies' rights and evoke the risk that investors will expeditiously flee the country.

After a brief presentation of the set of rules currently being examined by the French Parliament and associated penalties, we will discuss the biggest issue, i.e. the usefulness of the Bill: as commendable as its objective – to protect industrial employment in France – may be, can we be sure that the contemplated measures and constraints will actually help save industrial sites in France?

1. Presentation of the Bill

The procedure set forth in the Bill will apply to any and all companies that have the obligation to offer **redeployment leaves**, i.e. companies or establishments with at least 1,000 employees, as well as companies or groups of companies[3] with a total workforce of at least 1,000 employees. On the other hand, this procedure will not apply to companies placed under judicial receivership or liquidation as they do not have the obligation to offer redeployment leaves. Conversely, companies subject to safeguard proceedings will be impacted by the new set of rules.

In addition, the Bill targets only companies that contemplate shutting down a site **in the framework of a collective lay off plan**.

Under the Bill – that may be amended by the French Senate – the procedure includes three stages:

- First stage: The legislator imposes on companies the obligation to provide prior information to the Works Council (the "WC") and to the Administrative authorities (probably the DIRECCTE) "*on or before the start of the information and consultation procedure provided for under Article L. 1233-20 of the French Labor Code*" in the framework of the collective lay-off procedure.

  The company must send to the staff representatives, together with the notice to attend the WC meeting, **any and all useful information on the contemplated closure, in particular the reasons for the closure, the measures envisaged to find a buyer, the possibilities for the employees to make a purchase offer, the various types of purchase arrangements available – in particular in the form of a *société cooperative et participative* (cooperative and participative company, usually referred to under the acronym "SCOP") – as well as the WC's right to seek the assistance of an**

expert.

In order to ensure a rapid mobilization of all parties involved in the survival of the site, the legislator has stated that the company must notify the Administrative authorities of the contemplated site closure "without delay". In addition, as soon as it has been informed of the contemplated closure, the Administrative authorities must notify the relevant elected officials, while the company must inform the city mayor of the contemplated site closure.

- Second stage: The company head must actively search for a buyer.

First, the company head must (i) inform all potential buyers of his intention to sell the establishment/site, (ii) edit a **presentation** of the relevant establishment/site for the purpose of delivering it to potential buyers, and, as the case may be, (iii) initiate the conduct of an environmental assessment.

He must provide companies that are candidates for buying the establishment/site with any and all necessary information, except, however, information that is likely **to prejudice the company's interests or to jeopardize the continuation of its activity**. Lastly, the company has the obligation to examine all purchase offers received and to make a reasoned reply to each such offer.

Concerning the duration of the search period: The legislator has aligned the duration of the search period to that of the WC information-consultation process provided for in case of collective lay-offs, i.e.: two months if the number of lay-offs is below 100, three months if the number of lay-offs is at least equal to 100 but below 250 and four months if the number of lay-offs is at least equal to 250.

The WC can become involved in the search process. The company must keep the WC informed of the submitted purchase offers within 8 days as from receipt thereof. This information must be considered as confidential.

The WC may issue an opinion, make proposals and participate in the search for a buyer.

In doing so, the WC may seek the assistance of an **expert**. This expert will be remunerated by the company and his assignment would be to analyze the buyer search process, assess the information made available to potential buyers, study the purchase offers, and even assist the WC in its search for a buyer and participate in the preparation of purchase projects. **If an expert is appointed, the company will thus have no other choice but to take a very active part in the search for a buyer.**

- Third stage: At the end of the search period, the company shall consult the WC on any purchase offer it wishes to explore and shall specify the reasons therefore, in particular with respect to the **buyer's capacity to guarantee sustainable business and employment**. The WC must issue an opinion on any such offer within a time period that may not be inferior to 15 days.

If the company does not receive any purchase offer or decides not to explore any received offer, it must submit to the WC a **report**, within the time-line granted to the staff representatives to issue their two

opinions on the contemplated collective layoffs. This comprehensive report, that is also forwarded to the Administrative authorities, must detail the actions taken to search for a buyer, the offers received and their main terms and conditions, and, as the case may be, the reason(s) why such offers were rejected.

2. Applicable penalties

Under the Bill as it stands at present, the WC – or, in the absence of a WC, the staff representatives – may apply to the territorially competent **Commercial Court** within 7 days as from the date of the meeting during which the company submits the aforementioned report, if it/they consider that the company has failed to comply with its obligation to search for a buyer or has refused to explore an offer that it/they deem to be serious.

The Commercial Court has 14 days to issue a decision, it being specified that the ratification of the PSE may not take place before the Court issues its decision.

Companies that do not play by the rules should watch out! Under the Bill, companies that do not meet their obligations could notably be ordered to pay a financial penalty that would amount to as much as **20 times the value of the French minimum wage (i.e. almost 30,000 Euros) per employment position axed in the framework of the collective layoffs implemented as a result of the establishment/site closure, up to a maximum of 2% of the company's yearly turnover**.

3. Our opinion

While constraints faced by companies in the context of collective layoffs on economic grounds are already quite burdensome, the legislator now adds up new formal requirements to be met, new reports to be submitted to the WC as well as a new financial constraint related to the appointment of an expert; and if these new obligations are not complied with, companies may face a particularly severe financial penalty.

It should also be underlined that the Bill includes another provision whereby the WC's role and prerogatives would be enhanced in case of a take-over bid. Indeed, the WC of the target company would be mandatorily consulted on the draft bid, even before the board of directors or supervisory board issues its own opinion. On top of this, the WC would even be entitled to refer the matter to an "ombudsman" appointed by the Government if it has objections concerning the bidder's plans with respect to the target company!

It is to be feared that these new measures and costly constraints – that burden the purchase process – will scare off potential buyers and, more generally, discourage investment in France.

This is all the more true as the Bill authorizes the company not to disclose to potential buyers information, "*the communication of which is likely to prejudice the company's interests*".

While this restriction is aimed at protecting the selling company vis-à-vis its competitors, it remains a substantial impediment for potential buyers in the preparation of their offer and may, therefore, act as a disincentive.

In any event, a company that does not want to sell its site to avoid strengthening the position of its competitors and, as such, to preserve its own interests, will undoubtedly use the above legally-authorized restriction on disclosure of information as a pretext, even with the risk of having to pay a financial sanction, rather than strengthening a competitor's position by selling it its site.

In the end, one could wonder whether the Bill, based on so many compromises, has not become meaningless as it makes business reorganizations even more complex to implement without, however, preventing the closure of plants.

Does the legislator really try to recapture the "real economy"? Isn't it rather unrealistic… if not sheer utopia?

---

[1] The Bill, as it currently stands, provides that the new provisions should apply to collective layoff procedures implemented as from January 1, 2014. However, it is doubtful that these provisions will become effective as of January 1 as the French Senate has not yet scheduled a date for the review of the Bill! Amazed by this situation and wondering – legitimately – if this delay was not a sign that the Government would backtrack, we have contacted Mrs. Anne Emery-Dumas, Senator and Rapporteur of the Bill, who explained that the date on which the Bill was supposed to be discussed had been postponed simply because of a "legislative bottleneck" but confirmed that the Bill would be debated. As such, even if it is highly probable that the obligation imposed by the Bill will not apply as of January 1, 2014, we still wanted to promptly draw readers' attention to the imminent adoption of the Bill because of the important issues at stake.

[2] With an *obligation de résultat*, a party must fulfill a specific obligation or arrive at a specific result. With an *obligation de moyens* the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result.

[3] Within the meaning retained for the Group Works Council or the European Works Council.