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# So-called Florange: From a pipe dream to reality: Large companies and groups now do have the actual obligation to search for a buyer wherever they intend to close down a site in France

**In our April 2014 e-newsletter, we reported the enactment of Law n°2014-384 of March 29, 2014 aimed at recapturing the real economy, commonly referred to as the "Florange" Law, that notably imposed on companies or groups with at last 1,000 employees the obligation to search for a buyer wherever they intend to close down a site, which results in large-scale dismissal on economic grounds.**

**At that time, we stressed the stubbornness of the legislator who decided – despite all opposition – to push for the enactment of the text whereas the Constitutional Council had invalidated large sections thereof and rejected the enforcement of sanctions in case of non-compliance, which, in practice, made the Law ineffective. We also announced the forthcoming publication of a decree setting forth the conditions in which the Law would be implemented.**

## In April 2014, we had an unworkable text with an unclear scope of application.

## The announced decree has been finally published and it thus is time to make a new status report on the contemplated scheme that turns out to be particularly burdensome for companies and groups that intend to close down a site in France.

1. In order to make the obligation to search for a buyer effective again, Articles 21 and 22 of the Law dated July 31, 2014 reintroduced a **supervision and penalty system** managed by the administrative authorities, taking into account the findings of the decision issued by the French Constitutional Council.

Two sanctions are provided for by law:

- **If the employer fails to comply with the applicable procedure, the "Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi" (Regional Directorate for Companies, Competition, Consumption, Labor and Employment, known under the acronym "DIRECCTE") may henceforth refuse to validate the collective agreement or to approve the employer's unilateral document on the contemplated collective lay-off plan and the consultation procedure.**

In other words, the employer's compliance with the obligation to search for a buyer becomes a condition for the collective agreement to be validated or the unilateral document to be approved.

More specifically, the DIRECCTE will ensure that the company has complied with all the steps of the process to find a buyer, i.e. it will make sure that the employer:

– has convened and informed the Works Council (or the Central Works Council) of the contemplated closure on or before the start of the consultation procedure on the contemplated dismissals and provided any and all useful information in this respect;

– has notified the administrative authorities of the contemplated closure, provided the required information and informed the city mayor thereof;

– has duly informed the potential buyers;

– has informed the Works Council of the submitted purchase offers within 8 days as from receipt thereof, and has provided it with an access to the information transmitted to the buyers to the extent the Works Council has decided to participate in the search for a buyer;

– has consulted the Works Council on any purchase offer it wishes to explore or, if the company has not received any purchase offer or decided not to explore any received offer, submitted a report to the Works Council and forwarded such report to the administrative authorities.

**It should be underlined that the refusal to validate the collective agreement or to approve the employer's unilateral document may only sanction the employer's non-compliance with its formal obligations, not the fact that it has not selected/found a buyer. However, the employer is bound to provide reasons for refusing offers.**

**(ii) The DIRECCTE may also claim the reimbursement of certain types of state and public aids granted to the employer.**

The aids, the reimbursement of which can be claimed, are the financial aids granted by a state or public body in connection with the setting up of a business, economic development, research or employment (reimbursement of exempted social-related contributions may not be claimed). These financial aids must have been granted to the to-be-closed entity within the two years that precede the first Works Council meeting on the contemplated dismissals following the entry into force of the Law.

Pursuant to the French Labor Code, the administrative authorities may request the reimbursement of the financial aids "*taking into account the employer's capacity to avoid dismissals or to limit the number thereof through the sale of the to-be closed site, as attested to by the reports referred to in Articles L 1233-57-17* (report of the expert commissioned by the Works Council) *and L 1233-57-20* (report of the employer if it has not received any purchase offer or decided not to explore any received offer*)*".

Although this is not explicitly stated, this penalty – taking the form of a claim for reimbursement – is *a priori* an alternative to the refusal to validate the collective agreement or to approve the employer's unilateral document.

2. Secondly, in our April 2014 e-newsletter, we announced the forthcoming publication by the Council of State of a decree.

As a matter of fact, numerous questions remained open, in particular with respect to the scope of application of this new obligation: What companies, what sites and what procedure to be followed?

**It took more than 18 months to have Decree n°2015-1378 of October 30, 2015 (the "Decree") finally published on November 1, 2015. The Decree sets forth the scope of application of this new obligation and the conditions in which companies must search for a buyer.**

The Decree, that entered into force on November 1, 2015, introduces Articles R 1233-15 to R 1233-15-2 into the French labor Code and clarifies:

– the concept of closure of an establishment that entails the obligation to search for a buyer;

– the information that the employer subject to the obligation to search for a buyer must provide to the administrative authorities;

– the time period within which the administrative authorities may request from an employer that has not complied with its obligation the repayment of the state aids it has received.

The Decree defines two key concepts:

– **the concept of "establishment"**: Is considered as an "establishment" any economic entity required to set up a works committee at the entity level.

**This definition seems to significantly reduce the scope of the obligation since – if we apply the text in the strictest sense – it would only target "establishments" – not companies – that a group contemplates to close down.**

As such, only the sites that meet the definition of "establishments", i.e. production or service entity with at least 50 employees and that are not subsidiaries of another company, would be subject to this obligation.

We can, however, wonder about the objective of the legislator who would have voluntarily excluded from the scope of this new scheme "firms", i.e. commercial companies with a legal personality that are subsidiaries of a group. What is the legislator's actual intention? Is this merely an unfortunate and clumsy wording? To find out about it, we will have to wait for courts to render decisions in this respect…

– **the concept of "closure of an establishment"**: Are considered as a closure (i) the complete cessation of activity of the establishment, (ii) the merger of several establishments outside the employment area where they were located, (iii) the transfer of an establishment outside the employment area where it is located, **wherever they result in the implementation of collective lay-off plan in connection with contemplated dismissals on economic grounds, at the level of the establishment or the company.**

The second point calls for two comments. The first is that the reference to the implementation of a collective lay-off plan is now clearer.

The obligation to search for a buyer is imposed only if the implementation of a collective lay-off plan is seriously envisaged.

The second comment is related to the last paragraph of Article R. 1233-15 of the French Labor Code.

Indeed, following the enactment of the Florange Law, one could legitimately wonder about the concept of "closure". Was this concept designed to mean a "physical" closure or an "economic" closure? The question is not without significance as the geographical transfer of an establishment constitutes a "physical" closure but not an "economic" one.

On this last point, the Decree confirms our concerns; it the “geographical” approach that prevails since the merger of several establishments or the transfer of an establishment outside their/its initial employment area are to be considered as closure with the meaning of the Decree.

As such, preference is given to a territorial vision of the obligation, which is regrettable and rather unrealistic because what can a company offer to a potential buyer when the business is merely transferred from one area to another? Premises that it most usually leases from a landlord…

At the end of the day, despite the long-standing efforts made by the legislator to make this text operational, we can only but see the demagogic aspect of the scheme.

By keeping implementing dispersed measures that must satisfy some (trade-unions) without too much frustrating others (companies and employers’ organizations), we end up with shaky schemes that do not fully satisfy anyone.

Whereas series of measures are announced to simplify French labor law and make it more flexible, this obligation paradoxically makes procedures governing collective dismissals on economic grounds more complex and more burdensome.

Well… for the few companies and groups concerned… because if, in the end, only establishments with 50 employees that do not have a legal personality – as opposed to group companies – are targeted, the scope of application of the text if considerably reduced!

Finally, once again, the Florange Law looks like a smokescreen for French unions, but an increasingly anxiety-provoking smokescreen for foreign investors…