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Towards a new procedural framework for large-scale collective dismissals

Stormy times – or forthcoming fireworks – for French labor law governing dismissals on economic grounds: Article 13 of the Bill on securing employment (the "Bill"), that transposes Article 20 of the Inter-professional National Agreement ("INA") of January 11, 2013[2], was presented to the Council of Ministers on March 6, 2013.[1]

It sets out in details what should be a major recast of French rules governing large-scale collective dismissals. Unfortunately, it is doubtful whether the spirit of "flexicurity" that guided the drafters of the INA will be faithfully transposed by the legislator…

Specifically, effective as from July 1, 2013 (contemplated date of entry into force of the new legislation), companies with at least 50 employees that contemplate dismissing at least 10 people within a period of 30 days (and that are, therefore, legally required to implement a so-called *Plan de Sauvegarde de l'emploi* (collective layoff plan or "PSE") will have the obligation to (1):

- negotiate a so-called majority collective agreement with trade unions, or
- prepare a so-called unilateral document to be approved by the French Labor Authorities.

The underlying idea is that the employer should no longer be alone in the establishment of the procedure for collective dismissals: trade unions and the French Labor Authorities will now become its key partners.

The works council consultation process will be subject to stricter timeframes and the scope of the consultation will be restricted in certain circumstances, even though its core elements should be maintained (2).

Under this recast procedure, the French Labor Authorities would play a significant role (3).

Lastly, the Bill includes specific provisions applicable in case of insolvency/bankruptcy proceedings (4).

An ambitious reform that, while seeking to respond to employers' expectations in terms of security and shorter procedures, may generate burdensome constraints in the implementation of the new contemplated procedure.

1. The obligation to negotiate a majority collective agreement or to prepare a unilateral document

- *Negotiating a majority collective agreement*

Under the Bill, this majority collective agreement would have to be signed by one or several representative trade unions having obtained at least 50% of employees' vote cast in favor of trade unions recognized as representative in the first round of the most recent elections of the members of the Works Council ("WC") or of the so-called Unique Staff Representation ("USR") or, if there is no WC or USR, of staff representatives, irrespective of the number of voters.

The Bill expressly provides that the majority collective agreement must address the content of the PSE and may also cover the following issues:

– the conditions governing the WC information and consultation process;

– the weighting and scope of application of the selection criteria applied to determine the order of the contemplated dismissals;

– the dismissal timetable;

– the number of dismissals and the concerned professional categories;

– the conditions in which the adaptation or redeployment measures will be implemented.

On the other hand, the Bill stipulates that the majority collective agreement may not depart from:

– the employer's obligation to make training, adaptation and redeployment efforts;

– the employer's obligation to propose employees to enter into a *contrat de sécurisation professionnelle* (professional security scheme);

– the employer's obligation to communicate to the staff representatives useful information concerning the contemplated dismissals;

– the rules applicable to companies subject to insolvency/bankruptcy proceedings.

- *Or preparing a unilateral document*

If a majority collective agreement is not concluded, the content of the PSE and the above elements would be

set out in a unilateral document prepared by the employer after the last meeting of the WC[3], as per applicable legal provisions and provisions of the collective bargaining agreement.

2. The WC consultation process

Under the Bill, the employer would not escape its obligation to consult the WC on the contemplated staff-reduction measures and their implementing conditions, as provided for in Article L. 2323-15 of the French Labor Code. This obligation would apply, irrespective of whether a majority collective agreement has been signed or a unilateral document prepared.

Yet, if a majority collective agreement has been negotiated, there would be no need to consult the WC on the contemplated collective dismissal project, i.e. the number of dismissals, the concerned professional categories, the selection criteria applied to determine the order of the dismissal, the forecast dismissal timetable and the accompanying measures included in the PSE. The WC would have to be consulted on these issues only in case of a unilateral document prepared by the employer. The difference between these rules could be explained by the fact that all the aforementioned issues should be addressed in the majority collective agreement. Yet, an ambiguity remains: the Bill stipulates that these issues can – but do not have to – be included in the priority collective agreement. So, what will happen in practice if they are not addressed therein?

The WC would meet at least twice, with an interval of at least 15 days between the two meetings. It would be required to issue two opinions within the following timeline:

- two months for dismissals of less than 100 employees;
- three months for dismissals of 100 to 249 employees;
- four months for dismissals of 250 employees or more.

An interesting change brought forth by the Bill is that if the WC fails to issue its opinion within these timelines, it would be nonetheless deemed to have been duly consulted. This should help put an end to certain observed excesses whereby WCs refuse to issue their opinion in order to gain time.

3. The new procedure gives a major role to the French Labor Authorities

- *The French Labor Authorities ("FLA") would be involved at every stage of the negotiation of the majority collective agreement or preparation of the unilateral document*

The Bill stipulates that the FLA would have the possibility at any time to make observations or proposals in relation to the procedure or redeployment measures. The employer would be required to issue a reasoned response to any observations made by the FLA. The WC and representative trade union(s) (if any) would also receive a copy of these exchanges.

- *Obligation to obtain the validation of the majority collective agreement or the approval of the unilateral*

document

The FLA would be required to validate the majority collective agreement or to approve the unilateral document prepared by the employer, after having checked that such agreement/document is compliant, that the WC information and consultation process has been properly conducted and that the PSE does contain the measures supposed to be included therein.

Under the Bill, the FLA would have to validate/refuse to validate the majority collective agreement within 8 days as from its receipt and to approve/refuse to approve the unilateral document within 21 days as from its receipt.

If the FLA does not validate the majority collective agreement or does not approve the unilateral document, the Bill expressly stipulates that any employer that still wishes to implement the contemplated dismissals must file a new request for validation/approval after having adequately amended the majority collective agreement or the unilateral document and consulted the WC.

If the employer proceeds with the dismissals without having obtained the express or tacit validation/approval of the majority collective agreement/unilateral document (lack of response from FLA within the aforementioned timelines would be deemed a consent), the dismissals may be nullified.

It should be noted that, with a view to simplifying the procedure, the Bill provides for a single timeline of 30 days – that would start running as from (i) the notification of the FLA's validation of the majority collective agreement or approval of the unilateral document, or (ii) the expiry of the period within which the FLA must issue its opinion – to proceed with the dismissals. The currently applicable timeframes that vary depending on the number of contemplated dismissals and on whether the WC has required the assistance of a chartered accountant would thus be removed.

In addition, the Bill grants to administrative courts the jurisdiction to hear all claims/actions relating to a dismissal procedure concerning 10 employees or more in companies with at least 50 employees and to the PSE. A specific expedited procedure would be put in place.

As such, the majority collective agreements, the unilateral document prepared by the employer, the content of the PSE, the decisions made by the FLA in relation to the procedure and to the validity of the collective dismissal procedure would no longer be the subject of a dispute distinct from that related to the FLA's decision to validate/approve the majority collective agreement/unilateral document.

Judicial courts would no longer have jurisdiction in such matters. They would only retain jurisdiction to hear claims concerning the grounds put forth to justify the dismissals.

The objective of this new scheme is to limit the risks of an *a posteriori* nullification, primarily for formal reasons, and – at least apparently – to shorten the implementation timeframes.

4. Specific provisions applicable in case of insolvency / bankruptcy

The aforementioned rules would be adapted in case of judicial receivership or liquidation. Articles L. 1233-58, L. 3253-8 and L. 3253-13 of the French Labor Code as well as some provisions of the French Commercial Code would be amended.

Firstly, concerning the implementation of the dismissals, it would be up to the employer, to the receiver or, as the case may be, to the liquidator to negotiate a majority collective agreement with the trade union or, in the alternative, prepare a unilateral document in the conditions set forth above.

Secondly, the timeline within which the FLA must issue its opinion would be reduced to 8 days in case of receivership and 4 days in case of judicial liquidation.

It is true that this new procedural framework regulating large-scale collective dismissals supports the objective of securing the employers in their decision-making process since the available judicial remedies would be limited.

Yet, since the trade unions would be involved in the collective dismissal decision-making process (which in practice means that they will be asked to approve dismissals), there could be a risk of lengthier negotiation timeframes and, in the end, an increasingly cumbersome procedure.

Furthermore, one may ask if the FLA – that will be required to examine majority collective agreements and unilateral documents – will adopt a more pragmatic approach than judicial judges…

So, will this reform help achieve the government's objective of "flexicurity"? Security, probably[4] but flexibility… it is very doubtful!

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[1] In collaboration with Nisrin Kabssi, trainee-lawyer

[2] National inter-professional agreement of January 11, 2013 for a new social and economic model supporting companies' competitiveness and securing career paths of employees, aimed at creating a "flexicurity" *à la française*.

[3] It should be noted that currently the PSE must be submitted to the WC during the first meeting.

[4] And even so… provided that the legislator and the administrative authorities provide further details that are much needed for the practical implementation of the new rules.

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