EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/13 New French works council legislation (Article)

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Introduction

On 15 June 2013, legislation took effect that I anticipate will have a deep impact on labour relations in France. The legislation is one of the fruits of the *Accord National*[1] of 11 January 2013. That agreement paved the way for reforms in a number of fields. One of those reforms resulted in new rules on collective redundancies, on which I wrote in EELC 2013/33. This article deals with another set of new rules, in the field of consultation between the management and the works council (*comité d'entreprise*).

France has had works council legislation ever since 1945, long before the adoption of Directive 2012/14 on informing and consulting employees. That legislation was amended several times with a view to increasing the level of consultation between management and staff representatives. In 1982, an obligation on employers was created to consult with their works council prior to implementing a decision that leads to substantial changes in the workforce, the organisation of the company or the content of the work. In 2005, an obligation was introduced for large companies (300+ employees) to consult with their works council with respect to staff planning and training. Moreover, in the course of time, a second employee representative body, the health & safety council (*comité d'hygiène, de sécurité et des conditions de travail*), has been created.

Despite all these legislative changes, works councils have widely considered the law insufficient to enable them to perform their tasks adequately. Although works councils had to be informed and consulted on a wide range of topics, and the law provided for an annual meeting on matters such as the company's economic and financial situation (basically, its profit and loss account), R&D, health and safety and training, for example, this merely allowed the works council to be informed of and consulted about decisions that were already made. Except in the event of major reorganisations, works councils were not involved in the decision-making process. In other words, until now, works councils were consulted in a piecemeal way. They had difficulty 'joining the dots' between the information they heard and the things they didn't hear - and they often could not see changes coming that they might have seen had they been informed and consulted more fully, particularly as regards future strategy.

Following his election, President Hollande launched negotiations between the social partners that eventually led to the *Accord National*, which in turn led to the adoption, on 14 June 2013, of the *Loi relative à la sécurisation de l'emploi* and an implementing Decree of 27 December 2013. This legislation brings two significant changes:

1° an obligation for management to consult with the works council at least once a year regarding the company's strategy;

2° a restriction on works councils' ability to delay the consultation process.

Annual consultation

As of 2014, the employer must consult with the works council at least once a year regarding the company's strategy - that is to say, its strategy for the coming years - and its anticipated impact on the business, headcount, job content and skills, the way the work is organised and

the use of contractors, temporary agency workers and short-term employment contracts. The purpose of the consultation is to explain to the works council, and to listen to its views on, how the company's added-value is created and shared between shareholders, management, staff and creditors. For international companies with a French subsidiary this will entail discussing such matters as the French entity's contribution to the group results and the group strategy inasmuch as it is relevant to the French subsidiary (e.g. its business development, hiring and firing, management compensation and real estate). This is likely to form a real challenge for many companies. Works councils will demand detailed information in writing.

Databases

Under the new rules, information provided to the works council must be entered into a computerised database that is accessible on a confidential basis to both the works council and the health & safety council and relevant unions. The database must be kept regularly updated. Information may not be removed from the database for two years and it must cover the company's strategy for the coming three years. The database must include information on at least the following subjects:

equity capital, bank loans, other debts;
mergers, acquisitions, divestments;
shareholder remuneration;
outsourcing;
government subsidies and tax breaks;
significant transfers of capital between group entities;
(planned) investments in material and immaterial assets;
fluctuations in headcount;
fluctuations in percentages of staff on short-term contracts, traineeships, part-time contracts and temporary agency assignments;
compensation, broken down by qualifications and gender and specifying the total earnings of the five highest paid individuals in the company (or ten in companies with 200+ employees);
the works council's "social and cultural activities";
working conditions;
professional training.

Most of this information is already required to be provided to the works council under existing law. What is new is that the works council will have continuously updated information available at all times, as it were, within a mouse click.

Companies employing 300+ employees in France must have their database in place by 15 June 2014. Smaller companies have one more year to comply.

Limitation on duration of consultations

Until the the *Loi relative à la sécurisation de l'emploi* and its implementing Decree of 27 December 2013, there was no firm time limit within which the works council had to complete the consultation process. By law, the consultation had to continue until the works council considered itself to be fully informed. Depending on the complexity of a topic, the works council could delay the consultation process for weeks or months, arguing that it had not yet been fully informed.

Under the new law, the works council's consultation is limited in time by two new mechanisms:

it is limited by agreement or, in the absence of an agreement, by the Decree of 27 December 2013;
at the end of the allotted time, the consultation stops, whether or not the works council has given its opinion.

No later than the beginning of the consultation, management and the works council must agree upon the maximum duration of the consultation process. This may not be less than 15 days. It should be long enough to allow for a meaningful exchange of information and views, depending on the complexity of the subject. If no agreement is reached, the Decree of 27 December 2013 provides for a cut-off date that is (i) one month after the start of the process; (ii) two months, if the works council appoints an expert; or (iii) three months if the health & safety council is also involved.

In the event that the works council considers that management has failed to provide sufficient information, it can apply to the court for an injunctive order requiring the management to submit the missing information. The new law provides that the court must issue such an order within eight days. Whether the courts will be able to meet this ambitious deadline has yet to be seen.

Although works council members enjoy strong statutory protection against dismissal and other forms of retaliation, in practice, most works councils will be reluctant to start proceedings against their management, certainly in small companies, where union influence tends to be small and works council members are often inexperienced in legal matters. There is a total of 34,800 companies in France with 50 or more employees, but no more than 2,600

could be considered large (500+ employees) and so I do not anticipate much litigation in this area.

In theory, failure by management to comply with the law is a criminal offence. However, unless it has blatantly provided insufficient information, managers are unlikely to be prosecuted for failure to provide a works council with sufficient information.

Flaws in the new legislation

I see three major shortcomings in the new legislation (i.e. the law and decree). First, it does not put a cap on the duration of consultations involving the health & safety council. This means that this council still has the ability to delay consultations. As most large reorganisations require both the works council and the health & safety council to be consulted, this omission in the rules could defeat the purpose of the new law.

Another shortcoming is that the new law is unclear on when the time limits on consultation start to run. Do they start to run when the works council has received all the information it reasonably needs to render its opinion, as some works councils will be bound to argue? If so, that could also frustrate the purpose of the new law.

Thirdly, the time limits themselves are not logical. The basic period of one month is too long for simple matters. This period jumps to two months as soon as the works council decides to engage an outside expert. This will surely tempt many a works council to appoint an expert, if only to unilaterally extend its time for rendering an opinion. In cases where the health & safety council also needs to be consulted, which is the case whenever a major reorganisation is planned, the time limit goes up to three months, which in many cases, in my opinion, is excessively long.

Conclusion

The new rules will not change much for the largest French companies, which already have a well-defined written policy about consultations and are used to consulting with a professional works council. For the vast majority of French companies with 50 or more employees, however, the new rules bring significant change, both legal and in terms of management culture. For the first time, works councils must be consulted prior to the implementation of strategy. Instead of informing the works council after strategic decisions - in some cases, mistakes - have been made, the works council will have a say before the decisions are made. In my opinion, this represents a major shift, as this new type of communication will become the starting point for all subsequent consultations. It should put those subsequent consultations into perspective and, hopefully, make them more meaningful.

In companies with a tradition of good social relations, the new legislation has been well received. It is certainly an improvement for works councils. But many French companies will find the new law an additional burden. They will need to get used to spelling out a clear strategy in writing for the benefit, not just of management and shareholders, but of others too. This will also apply to many subsidiaries of international companies.

A trend seems to be emerging as a result of the new legislation, where management negotiate a framework agreement with the works council and the health & safety council specifying the duration of consultations based on subject matter and type of project. Framework agreements of this kind should bring more predictability for all parties.

Comments from other jurisdictions

Hungary(Gabriella Ormai*): In Hungary there is a recent trend towards limiting works councils' rights. On 1 July 2012 a new Labour Code (Act I of 2012) came into force. We would like to focus on the most significant changes the new Act introduced in relation to works councils by way of comparison to the situation in France.

The new Act has retained the three main competences of the works councils, namely: (i) the right to co-determination; (ii) the right to prior consultation; and (iii) the right to information. While matters about which the works council has the right to a consultation before a decision is made by the employer were widened (and now cover, e.g., the technical means to monitor employees, health and safety measures, the principles determining salary structure and measures to protect the environment), the right to co-determination was narrowed in terms of decisions relating to the use of welfare funds, (however, it is not uncommon for such funds to exist). In case of the right to consultation, the employer is still not bound to follow the views of the works council.

An important change is that whilst before the new Act if the employer breached the works council's right to co-determination prior consultation, the relevant measure was invalid, the new Act does not provide such a legal consequence any more, with the result that even if the works council takes a breach to the employment tribunal, the tribunal cannot invalidate the relevant measure.

Hungarian labour law is also not particularly generous to works councils when it comes to the duration of consultations. Generally, if the law or parties do not specify otherwise, the employer may not implement a planned measure that is subject to consultation until seven days from the date the consultation began. If there is no agreement, the employer may close the consultation after the deadline has passed.

Finally, the new Act significantly limits the dismissal protection that works council members used to enjoy. While the previous law provided dismissal protection to every member of the works council (e.g. a requirement to obtain the consent of the works council to the termination of the member's employment with notice), in the new Act, such protection is only granted to the chair of the works council. In extreme cases, this can be used to force new elections, since if more than one-third of the council members lose their membership (which is automatic upon termination of employment), the works council would cease to exist.

Finally, the new Act significantly limits the dismissal protection works council members enjoyed. While the previous law provided such dismissal protection (e.g. the requirement to obtain the consent of the works council to the termination of the member's employment with regular notice) to every member of the works council, based on the new Act such protection is only granted to the chairman of the works council. In extreme cases, this can be used to force new elections since if more than one-third of the council members lost membership (which is automatic upon the termination of employment), the works council ceases to exist.

Footnote

[1] Accord National Interprofessionnel pour un nouveau modèle économique et social au service de la competitivité des entreprises et de la sécurisation de l'emploi, agreed on 11 January 2013 between the principal associations of employers and employees, with the exception of the Confédération Générale du Travail.

Creator:
Verdict at:
Case number: