Mathilde Houet-Weil
Avocat (Paris)
Attorney at Law (NY)
Weil & Associés
26 avenue de la Grande Armée
75017 Paris, France
mhweil@weil-paris.fr

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FRENCH WORKS COUNCILS AND THE REORGANIZATION OF BUSINESSES

Hypothetical:

ABC Inc. manufactures components for the automotive industry. ABC Inc. is listed on the New York Stock Exchange.

ABC Inc. has manufacturing facilities in France, Germany, Austria, Spain, the Czech Republic and China.

ABC Inc. is profitable due to the fact that there is only one competitor manufacturing the same type of highly sophisticated widgets.

ABC Inc., whose customers are car manufacturers, faces a major drop in demand as the market enters into recession. The CEO has decided to cut 3.000 positions worldwide, mainly in France, Germany and Austria where profitability is low.

What is the process? What are the pitfalls? This paper focuses primarily on France.

One preliminary comment: ten years ago, the French term "*plan social*" was changed into "*plan de sauvegarde de l'emploi*" ("*PSE*"), which literally means "job preservation plan". This modification was meant to underline the fact that the primary goal of these plans is to create rather than destroy jobs.

The French term "*PSE*" is usually translated into "social plan" because this is how "*plan social*" used to translate, and this is how it is referred to in this paper – bearing in mind that such translation is not completely accurate.

The English terms of "reduction in force", "massive lay-offs" or "collective redundancy plan", who focus on the idea of dismissal, do not bear the same meaning as "*plan de sauvegarde de l'emploi*".

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Behind the semantic difference, the purpose of a French "*plan de sauvegarde de l'emploi*" is to have the company face its "social responsibility", a well-developed concept in France, and to do its very best and good faith efforts to help all concerned employees to remain employed, be it within or outside the company.

STEP	TIMING	ACTION
1	D – 60	**Confidential preparation before launching of the procedure**: ➢ WC's right to **prior** information ➢ definition of the economic cause ➢ the contents of the social plan ➢ risk of strike and bossnapping
2	D day	**Announcement of the reduction in force**: WC must be informed before anyone else rights of the WC v. disclosure obligations under SEC regulations
3	D + 38 / 52 days (legal minimum but can take much more time)	**Negotiation with the Works Council**, who often hires an expert at the cost of the company: ➢ no veto right but huge bargaining power ➢ WC's expert has unlimited access to information on the company **worldwide**
4	During negotiation of social plan	**Role of public authorities :** ➢ during negotiation of the social plan ➢ at every court hearing if deemed appropriate
5	After negotiation of social plan	**Remaining risk**: ➢ each employee can litigate his or her dismissal ➢ environmental risk if plant shut down

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1. Confidential preparation of the reduction in force

1.1. Absolute confidentiality: prior information right of the Works Council (WC)

One of the golden rules is that the WC must be informed of any project which impacts the workforce before anybody else.

Whenever an employer is considering taking actions bound to significantly affect the employment – that includes massive layoffs -, it must first obtain the opinion of the WC, which opinion it however does not have to comply with.

Failing to do so, that is, making a final decision on the contemplated measure before consulting the WC, is a criminal offence, that is "*délit d'entrave*" (literally "hindrance").

As a consequence, the team preparing the social plan must be composed of a few trust-worthy upper managers who fully understand their duty of confidentiality.

The timing of the consultation is extremely important because theoretically the WC must be informed and consulted before a final determination by the employer is made. The rationale is that the information-consultation procedure should enable the WC to discuss the considered measure and, when possible, to suggest alternative solutions enabling jobs to be saved, such as a salary freeze, reduction of working time, development of new activities, business turnaround etc.

If a final decision by the employer is made before the consultation, then the consultation is tantamount to a masquerade.

This is the black letter of the law. In practice, when an employer starts the information / negotiation process with the WC, the decision to reorganize has already been made and *is* final.

The whole process is therefore somehow hypocritical, all players having to pretend that the decision to proceed with the RIF has not been made, when it fact it has been.

It is however very important to play by this rule and not leave anything in writing that shows that the decision to implement a social plan has been taken before the WC is officially informed.

Although "*délit d'entrave*" can theoretically be punished by imprisonment, the criminal court will in the vast majority of cases limit the condemnation to a fine – however, this is quite an unpleasant experience for the corporate officer. Moreover, the fine may be substantial if charges are pressed against the legal entity itself.

It is therefore of the utmost importance that all managers involved in the project at the early stage fully understand that absolutely no information should leak before the WC is officially informed.

This being said, many critical questions remain open at this point and need to be discussed with the WC who, usually with the assistance of an expert, will provide an input on the reorganization and suggest alternative solutions in order to reduce the number of lay-offs and, when lay-offs could not be avoided, enhance redeployment.

1.2. The economic cause underlying the social plan

The economic rationale behind the decision to reduce workforce must be fully justified and explained by the employer.

The economic justification is assessed within the sector of activity within the corporate group to which the company belongs, including all national and foreign companies of said corporate group.

As a consequence, if the French subsidiary is loss-making but the business unit of the company worldwide is not, there is no cause justifying reorganization in France

In our hypothetical, if the French ABC company is facing profitability issues, but not the whole automotive business unit of ABC Inc., there is no cause under French law for a social plan.

The employer must anyhow prepare an informational report on the economic cause of the lay-offs, detailing the reasons which led to the situation at hand.

The economic difficulties can be either actual or anticipated and will be debated with the WC.

1.3. The measures contained in the social plan

The employer must also prepare a draft informational report detailing the measures taken to (i) reduce the number of dismissals and (ii) when dismissals cannot be avoided, cushion the social impact of such dismissals.

In short, a social plan in France will typically contain the following measures:

(i) to reduce the number of terminations :

a. calling for voluntary leaves. Voluntary leaves based on an economic cause must be included in a social plan and cannot, like in other countries, be dealt with before a social plan is implemented, in order to limit the scope – and therefore the cost - of such social plan. The social plan will set forth a package for employees who are willing to leave the company, including some of the following benefits: payment of a lump sum, relocation assistance in case of mobility, trainings, redeployment services, etc.

b. calling for employees willing to reduce their working time. If some employees agree to reduce their working time, the number of lay-offs can be reduced. Volunteers will be granted some kind of financial compensation; for example, the working time is reduced by 50 % but the salary only by 40 %.

c. searching alternative positions. The employer has a very strong duty to search for alternative positions to be offered to employees threatened by a lay off and present a "redeployment plan" which is at the heart of the social plan. The alternative positions can be within the company, within the business unit or even outside the business unit (with companies in the same geographical area, even competing ones). The employer must offer any identified position to any employee who fits the job description. This obligation is severely interpreted by case law and must be carefully respected.

d. Training employees. There is a very strong duty to train employees so they can apply to alternative positions within the company (in France and abroad) and remain employed. This is part of the redeployment plan.

(ii) to cushion the social impact of the dismissals

a. payment of a specific severance indemnity to each dismissed employee. Although a specific indemnity is not set forth by French law, it is deeply rooted in practice. The specific severance indemnity can be the same lump sum for all dismissed employees, or can depend on their seniority. It is the first item the WC will check when they are presented the draft report.

b. outplacement services. The employer must offer the services of an outplacement firm which will locate a number of counsellors on-site at the company, who will establish a provisory "outplacement desk". The soon-to-be dismissed and dismissed employees can seek assistance for their job search: identification of their skills and possible career evolution, drafting of resumes, search of job offers, application for trainings etc.

c. redeployment offers. For each dismissed employee, the employer must search redeployment opportunities within the group of companies to which it belongs at a worldwide level.

Failure to offer any and all redeployment opportunities within the group of companies worldwide can lead to heavy condemnations to damages. In 2009, the sock manufacturer Olympia did not offer redeployment opportunities in its Romanian facilities, assuming employees who were made redundant in France would not accept to be relocated in Romania for a ridiculous wage of 200 euros / month anyway, so that there was no point in offering them.

Olympia was heavily condemned to damages for failure to include these redeployment offers in its social plan. Unable to face the financial burden of these condemnations, Olympia went bankrupt which led to the lay-off of all remaining employees.

Following this widely commented case, a new law was passed in 2010, easing redeployment obligation: when the employer belongs to a group of companies with subsidiaries abroad, a mobility questionnaire is submitted to each concerned employee, so that the employee can express whether she/he would consider being relocated abroad and if so under which conditions (minimum wages etc).

Thanks to this new requirement, employees, already undergoing the traumatic experience of losing their job, do not have to face "indecent" redeployment offers in low-cost countries, while companies do not face the risk of being condemned for not having extended such offers.

d. assistance for specific projects: employees who wish to start their own business, or relocate to another place of living because they have found a new job, can be granted a specific allowance (e.g. cost of moving) if their project falls into the scope of the social plan.

The draft informational report containing these measures is subject to a heated debate with the WC whose role is to increase inasmuch possible the amounts and benefits granted to the concerned employees.

This draft report is also reviewed by the state labour authorities whose goal is to ensure that the social impact of the social plan, that is the number of newly registered unemployed, remains as limited as possible. The state labour authorities will particularly focus on the outplacement measures designed to help dismissed employees to find a new position as soon as possible.

If the state labour authorities determine that the social measures entailed in the social plan are not sufficient, in the light of the financial capacities of the "group" ("group" meaning the parent company and its subsidiaries including the French company), they may compel the employer to add new measures.

1.4. Risk management

The announcement of a social plan in France often triggers a strike, which must be carefully anticipated. To this end, basic measures include:

- the building of inventory and storing of such outside of the plant in order to be in a position to face its delivery commitments despite a strike. A strike can otherwise be very detrimental to the company, in particular in the automotive industry where suppliers commit to deliver "just in time" meaning that the supplier must pay important contractual damages for every minute beyond the agreed delivery time.

- let the police know in advance that the news of a social plan is about to be broken so they are ready to step in if things get out of hand. In this specific context, the police is informed before the WC that a social plan is about to be launched. This could qualify as a violation of the WC's right to prior information but this is common practice

- have a bailiff ready to come to the plant and issue an official statement identifying employees who are going beyond the rights granted to strikers. For example, strikers are not allowed to prevent non-strikers from working, to block the trucks on their way to deliver customer orders or to deteriorate the premises. Should this happen, the employer can petition the court (fast track procedure) to ask, on the basis of the bailiff's statement, that the identified employees be summoned to cease their unlawful actions.

Excessive reactions from unions / employees may take place in a context of a severe crisis in a global economy, which creates a high sense of insecurity for the employees whose jobs are threatened. At the same time, the media report on huge bonuses, stock options and severance indemnities paid out to top management.

This gap between two worlds, for lack of being bridged by an efficient social dialogue, may lead to anger and frustration which possible consequences should not be underestimated.

In this context, it is all the more essential to take the basic security measures mentioned above.

2. Announcement of the reduction in force

In a "group" (by which term we in France mean to encompass the parent company and its subsidiaries), there is a conflict between:

(i) the WC's absolute right to be informed before anybody else on the considered social plan, as mentioned under 1.1. above, and

(ii) the disclosure obligations of the group under the SEC rules.

Therefore, the group's legal department will be in a very delicate situation because, on the one hand, a criminal offence may be constituted if financial analysts are informed of job reductions before the WC, and, on the other hand, SEC regulations impose certain timely disclosures.

The WC has a duty of confidentiality for any information presented by the employer. However, such duty remains virtual as it is very difficult to take any action against a WC who violated this duty. Leakages to the media are common place.

3. Negotiation with the WC, usually assisted by an expert

3.1. The WC: no veto right but a huge bargaining power

As mentioned above, the employer must draft two informational reports: one explaining the economic cause underlying the social plan, and the other detailing the severance packages and outplacement assistance offered to the employees voluntarily or involuntarily leaving the company.

In the frame of a two-step negotiation procedure, each report is to be explained to and discussed with the WC, whose role is to make counter proposals to reduce the number of dismissals and to increase the severance packages.

A social plan can only be implemented after the WC has voted on each steps.

The social plan can be implemented as soon as the WC has voted; whether the vote is positive or negative does not make any difference:

Therefore, the WC has no veto right and cannot prevent the implementation of the social plan at the end of the day.

However, the WC has strong counter-powers which enable it to considerably delay the implementation of the plan, because they can refuse to vote on the basis that they are not sufficiently informed. They can also call for a strike which can be very detrimental to the business. Any delay in the procedure means extended salary payments to employees which the employer had planned on laying off earlier.

In France, the WC has no co-management or co-determination right like, for example, in Germany. Therefore the WC in France does not participate in the decision to proceed with lay-offs.

Instead, the WC in France is granted formal procedural rights which enable them to lay a significant pressure on the employer by threatening to delay the procedure.

Therefore a smooth restructuration can only succeed when both the employer and the WC engage in a transparent and good faith negotiation.

3.2. The WC's expert: unlimited access to information at the "group" level

In most cases, the WC will make use of its rights to appoint an expert, at the costs of the company, to assist it during the negotiation process.

The role of the expert, usually a chartered accountant or an auditor, is to help WC's members to understand the economic situation of the French company and of the "group" and analyse the informational reports submitted to the WC's vote.

Over time, some firms have specialized in this area and are ideologically close to certain unions so that they are appointed by members of such union.

The WC's expert has wide investigative powers, actually the same investigative powers as the auditors of the company. The expert has access to information held by the "group", even if this information is not available at the level of the French company.

In some instances the situation can lead to a dead-end when the "group" refuses to disclose certain information while the expert asserts that same information is required for him to analyse the situation and draft his report.

The group may argue that the disputed information is confidential and not disclosed to the European Works Council and that all subsidiaries represented at the European Works Council should be treated equally.

The expert may reply that the group is the relevant level for the decision-making process and that the French subsidiary is "captive" with no economic or management independence. This statement tends to be accurate in our globalized economy. Therefore, according to the expert, the situation can only be analysed and explained to the WC if the expert is granted access to economic and strategic information at the level of the business unit. A social plan in France is often part of a larger plan at the "group" level.

In parallel, the WC will not vote on the social plan until the expert's report is available to enable them to fully understand the plan.

In case of such blockage, each party can petition the court (fast track procedure). The employer will ask the judge to decide that the WC is sufficiently informed and must vote; while the WC and the expert will ask the judge to issue an injunction for disclosure of the disputed information.

WC's experts, through repeated judicial battles, have managed to build a case law which considerably widens their scope of investigation and recognizes a right to access whatever information they deem relevant, including confidential information held by the group, even if not available at the level of the French subsidiary. The expert's investigation right in France is actually comparable to that of the SEC.

In other words, the French subsidiary cannot avoid an injunction to deliver information even if it is proven that such information is not available at the level of said French subsidiary. The "long arm" of the WC's expert can reach out to the group.

This creates, again, a conflict for the "group's" legal department which can be commanded to disclose confidential information to the expert. It should be carefully checked whether such disclosure may enter in conflict with SEC regulations.

Even if the employer wins this legal battle, the company will have lost precious time (6 months including a possible appeal) and money. The implementation of the social plan will be considerably delayed and the salaries will have to be paid while there is most probably not enough work for all employees.

The cost incurred by the procedure usually leads to the reduction of the package offered in the social plan, thereby creating even more frustration for the employees.

4. The risk of litigation during the negotiation of the social plan

Until recently, the risk of litigation during the negotiation of a social plan was "limited" to following scenario: the WC, within 15 days following one of its negotiation meeting with the employer, challenges the validity of the procedure (e.g. the meeting was not properly convened). If the WC prevails in court, the negotiation procedure must be re-started from the beginning. This leads to the whole process being delayed, which is inconvenient; however, the social plan can be negotiated and at the end of the day the RIF can be implemented.

Typically, during the negotiation process, the court could only check the formal regularity of the procedure. The economic cause could only be challenged in court after the social plan had been implemented and the employees terminated (see 6. below) because judges could not interfere with business management decisions.

Several Appellate Courts recently issued very controversial rulings which "nullified" social plans even before they were implemented, for lack of an adequate economic cause. As a consequence, the RIF is not postponed but prevented. This caselaw gives judges the power to appreciate the economic cause upfront and not only after the lay-offs, and therefore to prevent the collective lay-off.

In other words, according to this new case law, employers need to obtain prior authorization from the court to be able to proceed with a RIF.

This case law is criticized because it goes beyond the black letter of law: the French Labour Court provides that a social plan can be cancelled (after the dismissals have been carried out) when an adequate redeployment plan has not been presented to the WC. Here, the social plan is deemed to be void for lack of an adequate economic cause, which is not one of the invalidating reasons set out in the Code.

The French Supreme Court will decide on this hot topic on May 3rd 2012, shortly after this paper is released. An update will be provided by the panel on "French Works Councils and reorganization" on May 14th, 2012.

5. The role of public authorities

The State plays an important role during the whole social plan process:

- the state labour authorities are informed from the beginning and throughout the whole negotiation process. As mentioned above, they can force the company to increase the benefits and outplacement services if they are deemed insufficient.

- after the social plan has been negotiated, the company must pay an allowance to the State for the "reindustrialization" of the area where the company is located. These monies will be used to enhance creation of jobs in the concerned area.

- at each court hearing, if deemed necessary in the light of the importance of the case, the State can be represented by a Public Attorney who will take a position in the dispute at hand, in order to influence the judgement.

The French government keeps a close eye on massive lay-off plans because they negatively impact unemployment figures which are one of the criteria by which public opinion judges the government's action.

6. The remaining risks after a social plan

Returning to our hypothetical that we began with, ABC's managers have been released unharmed after having been sequestrated for a few days; ABC group attracted unsolicited and unflattering media coverage and was labelled a wealthy group blinded by greed; the social plan has been voted by the WC after a fierce battle with the expert regarding access to highly confidential information held by the "group"; the employees have been laid off after having gone on strike; all the benefits and allowances set forth in the plan have been paid out (roughly 30.000 to 80.000 euros per dismissed employee); a specific allowance has been negotiated and paid to the State to enhance job creation in the area.

Is there anything left to worry about?

Well, yes.

Each employee who left, involuntarily but also voluntarily, has an individual right to challenge his or her dismissal in court during the 12 months following dismissal. The vote of the WC, even if positive, does not impact this right, unlike in other countries like Germany. Most of the times, the employee will challenge the economic cause for the social plan as described in the informational report (e.g. "despite their allegations, the group is profit-making"), or the efforts made by the employer to find an alternative position during the social plan and after the social plan ("they re-hired but violated my priority right to any new position with ABC Company"). The employee will typically claim damages for unfair dismissal / violation of the redeployment obligation / of the re-hire priority.

The WC or the unions can also petition the court to ask that the social plan be voided on the basis that the measures are insufficient in the light of the financial means of the business unit. If such claim is successful, all lay-offs based on the voided social plan are also voided and the concerned employees are paid their salary up to the date of the court decision. After the court decision, the concerned employees are either re-hired or paid a 12-month salary indemnification.

If the plant is to be shut down after the social plan, the environmental risk should be carefully reviewed: in France, the last company who operated a plant bears full liability for any potential environmental damage, even if caused by a previous company.