T O O U R F R I E N D S A N D C L I E N T S

M e m o r a n d u m

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Collective Dismissals in France (updated)

Restructuring of production facilities, closing or relocation of factories and reduction of the workforce are often inevitable in the aftermath of corporate acquisitions or mergers. French labor laws impose stringent requirements that can make collective dismissals prohibitively expensive and time consuming. Violations of these complex regulations frequently result in litigation and can give rise to severe financial penalties or even the judicial nullification of an entire downsizing plan.

This memorandum sets out the current conditions for implementing a collective dismissal, the procedural requirements and the sanctions for improper dismissal.

Conditions for Implementing a Collective Dismissal

Legally Valid Causes for Dismissal

Employers may not dismiss employees without legally valid cause. French law distinguishes between "personal" causes, related to the employee's own behavior, and "economic" causes, related to the business itself.[1] Employers must propose an economic rationale to justify large-scale layoffs.

Valid economic grounds for collective dismissals include only the following: (a) serious, current business or financial difficulties faced by the company; (b) necessary responses to changing technology; (c) reorganization of the business to preserve its competitiveness; or (d) permanent closure of the entire business due to events outside the management's control, such as fire or flood.[2]

Courts are traditionally reluctant to allow dismissals on economic grounds and have been restrictive in their interpretation of the types of difficulties that will be deemed legally sufficient. For instance, low profitability when a company is not already in serious economic difficulty, market losses or decreases in sales are not considered valid economic cause.

Impossibility to Retrain, Adapt or Reassign Employees Being Dismissed

An employee may only be dismissed on economic grounds if all efforts have been made to train the employee in acquiring new skills, and if the employee cannot be reassigned within the company or to

[1] *French Labor Code, Article L.1233-3.*
[2] *French Labor Code, Article L.1233-3; Cass. soc., June 23, 1999, no. 97-42.224; Cass. soc., January 16, 2001, no. 98-44.647.*

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businesses within the group to which the company belongs. The employee must be reassigned to a position of the same category as the one he currently holds or an equivalent position. Failing this, and subject to the employee's express consent, he can be reassigned to a position of a lower category. Reassignment offers must be precise and communicated in writing to each employee individually.[3]

Employers are bound by this obligation to reassign irrespective of the company's headcount or the number of employees affected by the redundancy plan and regardless of whether an employment safeguard plan (as described below) has been set up. Efforts to reassign must commence from the first consultation meeting with employee representatives and continue until the date of official notification of dismissals.

Within a corporate group, the employer must ensure that the range of reassignment offers is as wide as possible. Reassignment offers must thus also include available positions in group companies located outside France. Reassignment offers, in particular offers for positions abroad, must be serious and made in such a way as to satisfy the general principle of good faith. The employer is required to help employees adapt to their new positions and to make offers that meet the employees' legitimate expectations, in particular with regard to working conditions and compensation.

Certain collective bargaining agreements may require, in addition, that the employer seek possible reassignments outside the company, thus extending the range of reassignment offers. This is, for example, the case in the metal workers collective bargaining agreement.[4]

Labor law judges require earnest efforts to reassign employees, failing which dismissals can be voided. A particular risk arises when a company dismisses employees on economic grounds while it or one of its affiliates is simultaneously in the process of hiring others. Following a collective dismissal in France, recruitment must be carefully monitored and coordinated across the corporate group.

Order of Priority of Dismissals

Dismissals may be conducted only in a certain order of priority based on a number of criteria set out in a collective bargaining or company-specific agreement. In the absence of such an agreement, the employer must decide the order, after consulting with the shop committee, based on applicable legal criteria that include, among others, seniority, number of dependents, professional capacities and disabilities.[5]

Procedural Requirements

Collective dismissal procedures are usually lengthy and complex. The nature of the applicable procedure depends on a number of factors, including (i) the company's total headcount (the procedure becomes

[3] *French Labor Code, Article L.1233-4.*
[4] *Cass. soc., May 28, 2008, Priou c/ Sté Moulinex.*
[5] *French Labor Code, Article L.1233-5.* However, there is no legal requirement to determine an order of priority for dismissals when all of the employees being dismissed belong to the same professional category of employees.

increasingly complex if the company employs 50 persons or more); (ii) the number of employees being dismissed (in particular, if ten or more employees are being dismissed); and (iii) the presence of employee representatives (such as a shop committee).

To prevent companies from circumventing stricter procedural requirements by staggering dismissals over time, the French Labor Code contains a number of anti-avoidance rules. For instance, in companies with over 50 employees that dismiss more than ten employees over a consecutive three-month period without exceeding ten or more dismissals during any 30-day period, further dismissals on economic grounds over the next three months are subject to the stricter procedural requirements governing dismissals of ten or more employees within a same 30-day period.[6] Likewise, if, over a calendar year, a company dismisses more than 18 employees on economic grounds without implementing an employment safeguard plan (as described below), it is required to set up such a plan for any further dismissals on economic grounds envisaged over the three-month period following the end of such calendar year.[7]

Employee Information and Consultation

Collective dismissals on economic grounds require prior consultation with employee representatives.[8] The number and timing of such consultation meetings vary depending on the number of employees being dismissed, the organization of the business, the number of establishments involved in the dismissal plan, the response of the shop committee, and whether union representatives are to be dismissed. In most cases, a minimum of two meetings is required,[9] and four or more meeting may be required depending on specific circumstances. Meetings may be required at the corporate or group level, as well as within each individual establishment.[10]

Companies must inform and consult with their shop committees concerning the collective dismissal plan (commonly known as a Title III consultation) and regarding the effect on the company's general business operations (commonly known as a Title IV consultation). These information and consultation procedures may be conducted concurrently.[11]

Information to be disclosed

For purposes of the Title III consultation, in its initial notice, the employer must send to the shop committee information regarding the proposed collective dismissal together with the notice for the first

[6] *French Labor Code, Article L.1233-26.*
[7] *French Labor Code, Article L.1233-27.*
[8] *French Labor Code, Article L.1233-28.*
[9] The timing of these meetings is strictly regulated in accordance with the number of employees affected by the dismissal. For instance, the interval between the first two meetings cannot be more than 14 days, if the number of dismissals is less than 100; 21 days, if the number of dismissals is more than or equal to 100 and less than 250; or 28 days, if the number of dismissals is more than or equal to 250 *(French Labor Code Article L.1233-29 and L.1233-30).*
[10] French companies employing a minimum of 50 employees during 12 months (whether consecutive or not) over a three-year period (calculated on a monthly basis) are required to organize the election of a shop committee. A company that operates at more than one site is required to set up one or more "establishment committees" (*comité d'établissement*) for each location employing more than 50 employees, as well as a central shop committee (*comité central d'entreprise*) to oversee the operations of the entire company.
[11] *French Labor Code, Article L.1233-30.*

meeting of the shop committee. Such information must include: (i) the economic, financial or technical ground(s) for the proposed dismissal; (ii) the proposed number of dismissals; (iii) the professional categories affected and the criteria proposed for the order of priority of the dismissals; (iv) the number of employees employed within the business (on a permanent or temporary basis); (v) the provisional timetable for the dismissals; and (vi) the proposed economic measures.[12]

In addition, companies with fewer than 50 employees must send information to their shop committees regarding the measures they intend to implement in order to avoid or reduce the number of dismissals and to facilitate the reassignment of those employees whose dismissal is unavoidable. Companies with 50 employees or more must send the employment safeguard plan described below.[13]

With respect to the Title IV consultation, the company is under a general requirement to ensure that the shop committee is provided with precise information in writing so as to enable it to make an informed decision. There is no specific list of documents or information that must be provided.

Assistance from an accounting expert

If ten or more employees are to be dismissed within a 30-day period, the shop committee may retain, at the company's expense, an accounting expert to review the grounds for dismissals and their economic rationale. Broad discovery powers are granted to the accounting expert to review and audit documents. The accounting expert has the same access rights to the company's financial records as the company's statutory auditors. If the shop committee decides to retain an expert at its first meeting, the company must then convene a second meeting for the Title III consultation, as described above.[14]

The Program for Social Cohesion Act[15] simplifies the information and consultation process to some extent by providing that employers may negotiate with employee representatives to develop simplified information and consultation methods for collective dismissals.[16] This provision may eliminate some redundant meetings, particularly in corporate groups with many establishments and shop committees with overlapping competencies.

In addition, the Act requires that companies and corporate groups with more than 300 employees negotiate with employees' representatives at least once every three years to determine appropriate means of informing and consulting with the employees on the business's strategy and employment planning.[17]

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[12] *French Labor Code, Articles L.1233-10 and L.1233-31.* The economic measures consist of actions contemplated by the company to address the business or financial difficulties it is facing.

[13] *French Labor Code, Article L.1233-32.*

[14] The second meeting must take place no earlier than the 20th day and no later than the 22nd day after the first meeting; the third meeting must take place within the 14-, 21- or 28-day deadlines mentioned above.

[15] Act No. 2005-32, dated January 18, 2005, concerning the Program for Social Cohesion, Official Journal, January 19, 2005, p.864 (the "Act")

[16] *French Labor Code, Article L.1233-21.*

[17] *French Labor Code, Article L.2242-15.*

Employment Safeguard Plans

Collective dismissals in larger companies impose additional obligations on the employer that are intended to limit the economic impact of the dismissals.

In companies with over 50 employees, dismissal of ten or more employees within a 30-day period requires the employer to establish in advance an "employment safeguard plan" so as to limit the number of dismissals and facilitate reassignment, particularly for older workers or those with special circumstances that would make it more difficult for them to find a new job.[18]

The employer must list the actions it intends to take in order to improve the situation of the dismissed employees and to alleviate the need for future collective dismissals. The employment safeguard plan may include such measures as:[19]

1. reassigning employees within the company to positions of a category the same as or equivalent to that of their current positions or, with the relevant employees' express consent, to positions of a lower category;

2. creating new lines of business within the company;

3. facilitating reassignment outside the company, in particular by helping to create new jobs within the community;

4. helping employees to start their own enterprises or to acquire existing businesses;

5. training, accrediting prior experience or retraining employees in order to facilitate their reassignment inside or outside the company to equivalent positions;

6. reducing or adjusting the number of working hours, together with measures to reduce overtime within the company where the volume of overtime shows that the company's work is organized on the basis of an aggregate number of working hours that is clearly in excess of 35 hours per person per week or 1,600 hours per person per year and the reduction of overtime could help preserve all or part of the positions that the company intends to terminate.

Labor unions play an important part in the negotiation and application of collective dismissal programs. Each company's shop committee must be consulted on the content of the employment safeguard plan, which often entails protracted negotiations with the employees' representatives.[20]

Furthermore, the employment safeguard plan must include procedures to monitor the effective implementation of the measures contained in the reassignment plan. The company is required to consult

[18] *French Labor Code, Article L.1233-61.*
[19] *French Labor Code, Article L.1233-62.*
[20] The shop committee does not have a veto over the employment safeguard plan, and its rejection of the plan does not halt the dismissal process. However, the shop committee has the ability to delay adoption and implementation of the plan. It has the right to request modifications to the plan, and rejection of these requests by the management must be adequately justified in writing.

regularly with the shop committee to report on the implementation. Local labor authorities also monitor the process to determine compliance by the company with its commitments.[21]

Involvement of the French Labor Authorities

The employer must also submit the plan to the French labor authorities (no earlier than the day after the date set for the first meeting with the shop committee). The labor authorities are responsible for ensuring that the company complies with procedural requirements in the negotiation and implementation of the economic safeguard plan.[22] They may make proposals to modify or expand the plan, and the employer must respond to those proposals in writing. Labor authorities may also issue an opinion that the plan is substantively deficient. The employer may not dismiss employees under the plan until it has responded in writing to the deficiency opinion.[23]

Outplacement Plans

Companies with over 1,000 employees must also provide paid outplacement leaves of up to nine months to allow each affected employee to take part in retraining and job-search programs.[24]

Companies with fewer than 1,000 employees must offer a personalized outplacement agreement to each employee who is to be dismissed on economic grounds. The agreement must include coverage for post-employment services, career guidance, an evaluation of professional skills and training intended to facilitate reassignment.[25]

Dismissal Procedure

Notification of dismissals

Notification of dismissals cannot be given before the lapse of a certain time period specified by law which varies according to the number of proposed dismissals.[26]

For collective dismissals of fewer than ten employees within a 30-day period in a company with more than 50 employees, each of the employees must be convened to a preliminary interview. The subsequent dismissal letter cannot be sent less than seven business days after the date on which the relevant employee was convened to the preliminary interview. The contents of the dismissal letter are strictly regulated. The letter must state adequate legal grounds and must include certain mandatory

[21] *French Labor Code, Article L.1233-63.*
[22] Labor authorities have between 21 and 35 days to review the plan, depending on the number of dismissals.
[23] *French Labor Code, Article L.1233-53 et seq.*
[24] *French Labor Code, Article L.1233-71.*
[25] *French Labor Code, Article L.1233-65.* It is unclear exactly what outplacement benefits must be provided, and this issue is to be clarified through collective bargaining agreements.
[26] For instance, for collective dismissals of at least ten employees within a 30-day period in a company of more than 50 employees, in the absence of more favorable provisions in applicable collective bargaining agreements, dismissal letters cannot be sent to the relevant employees before the expiration of a minimum period of: 30 days for dismissals of ten to 99 employees; 45 days for dismissals of 100 to 249 employees; and 60 days for dismissals of 250 or more employees. (*French Labor Code, Article L.1233-39.*)

statements.[27] Such an interview is not required for collective dismissals of more than ten employees within a 30-day period in a company with more than 50 employees.

If an accounting expert has been appointed at the request of the shop committee as discussed above, the 30-day period discussed above begins on the 14th day following the date of notification of the dismissal to the relevant labor authorities, which takes place on the first day after the first meeting of the shop committee.[28]

Priority of recruitment

An employee dismissed on economic grounds may request, and his former employer must offer him, any position compatible with his qualifications that becomes available during the one-year period following termination of his employment contract.[29] The employee must be informed in writing of the existence of such right and of its terms of implementation in the notice of dismissal. Any breach of the recruitment priority entitles the employee to damages of at least two months' salary, provided that the relevant employee has at least two years' length of service and the company has at least 11 employees.

Termination payments

Upon dismissal, the employee is entitled to the following minimum payments:

- payment of salary plus benefits for the notice period. Notice can be worked or paid in lieu of it. Notice periods are usually between one and three months. The minimum notice period for an employee with at least two years' seniority is two months;
- dismissal payments calculated as a multiple of monthly salary as determined by the applicable collective bargaining agreement. The statutory minimum amount is 2/10 of a month's salary for each year of service plus 2/15 of a month's salary for each year beyond ten.[30]

In addition, the employer may also have financial liabilities under the employment safeguard plan and outplacement plans.

Sanctions for Improper Dismissal

Potential Sanctions

Dismissals that are held by a court to have been made without valid cause can subject an employer to financial penalties. Damage awards are fixed largely at the court's discretion, and can take into account many factors, including the employee's seniority, age, ability to find another job, and other, more general

[27] The mandatory statements include the existence of a priority for re-employment and the time period within which the employee may challenge the validity of his dismissal.

[28] *French Labor Code, Articles L.1233-39 and L.1233-40.* Accordingly, the notification letters cannot be sent before the lapse of a 45-day period if the number of dismissals is less than 100; a 60-day period if the number of dismissal is more than or equal to 100 and less than 250; and a 75-day period if the number of dismissals is more than or equal to 250.

[29] *French Labor Code, Article L.1233-45.*

[30] *French Labor Code, Article R.1234-2.*

circumstances surrounding the dismissal.[31] Awards of approximately 18 months of salary as damages for improper dismissal are common.

Courts may also order non-monetary remedies, such as the reinstatement of a dismissed employee. Pursuant to case law, "when a layoff procedure is deemed void, the individual dismissals announced by the employer as a result of that procedure are themselves void."[32] A company may thus be held liable for back wages for the entire period and ordered to reinstate the dismissed employees.

The risk of a labor court ordering reinstatement is substantial. For example, in July 1999, Wolber, a subsidiary of Michelin, the leading French tire manufacturer, decided to move one of its production sites from a small city in France to India, at a time when the company was making record profits. Wolber dismissed all 451 of its French employees. The site was subsequently dismantled, and the tools and machinery were transferred to India, sold or destroyed. Five years later, on November 5, 2004, the labor court of Soissons ordered the reinstatement of all 451 workers, including those who had found new jobs with other companies, despite the fact that the factory no longer existed and Wolber itself had been dissolved.[33] As reinstatement at the Wolber plant was impossible in practice, the court ordered Wolber to negotiate with unions representing the dismissed workers to find an alternative.

The French Labor Code was amended to provide that reinstatement of improperly dismissed employees may not be ordered by the labor court if "reinstatement has become impossible, particularly as a result of the closure of the site or the establishment, or the absence of an available position that would allow the reinstatement of the employee."[34]

Where the measures taken by the employer within the scope of a safeguard plan are not considered sufficient (*i.e.*, not sufficiently precise and proportionate to the means of the company), sanctions imposed by the courts may also be severe: in such cases, the courts may annul not only the safeguard plan but also the terminations and reclassifications made pursuant to the plan.

Sanctions may also be imposed in the case of failure to properly consult with the shop committee.

Potential Shareholder Liability

Under French law, only the direct "employer" may be held liable for wrongful discharge of employees in connection with a collective dismissal plan. However, lower courts have held that shareholders deemed to be *de facto* employers are liable for damages to employees of their subsidiaries.

[31] If the court determines that the dismissals are legally void, but the employee does not request reinstatement by the company, the court may award damages of no less than one year's salary. If the employee has at least two years or more of seniority and the court determines that the dismissal lacked "real and serious" legal justification, the court may grant damages of no less than six months of salary. *French Labor Code, Articles L.1235-3 and L.1235-5.*

[32] *Cass. soc., February 13, 1997, nos. 96-41874 and 96-41875.*

[33] *Muriel Gremillet, "Michelin tente un reclassement des ex-Wolber" La Libération, January 6, 2005.*

[34] *French Labor Code, Article L.1235-11.*

In a recent ruling, a lower court ordered a French LBO fund to pay damages for wrongful discharge to the dismissed employees of one of its portfolio companies.[35] The court found that the LBO fund had actively participated in the portfolio company's daily management; gave indirect instructions to employees through the company's management; and participated in the decision making that led to the collective dismissal plan and the judicial liquidation of the portfolio company.[36] If this ruling were to be upheld on appeal, private equity funds will need to ensure that management decisions, and particularly decisions affecting employees, remain in the hands of the portfolio company's direct management.

Statute of Limitations

The costs and uncertainties involved in post-dismissal litigation have led to several reforms to shorten the statute of limitations for challenges to economic dismissal programs:

- Emergency actions requesting a temporary order to halt a dismissal program on the basis of a failure to respect mandatory consultation procedures must be brought within 15 days following one of the required pre-dismissal information and consultation meetings of the shop committee;[37] and
- Actions contesting the validity of an economic dismissal must be brought within 12 months of the notification of dismissal (if the action is brought by the employee) or within 12 months of the last pre-dismissal shop committee consultation meeting (if the action is brought by the shop committee or union, on the employees' behalf.)[38]

Conclusion

France has one of the highest unemployment rates in Europe,[39] and collective dismissals are among the most controversial socioeconomic and political issues in the country. Litigation, with accompanying negative publicity, is a common response to any mass layoffs.

The reforms implemented by the Act will not necessarily result in larger termination payments, but will reinforce the need to properly monitor and implement dismissal programs and to consult with employees' representatives.

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[35] Conseil de Prud'hommes de Lens, Judgment of November 28, 2008 (Bahhate v. Acland Capital Investissements). The fund was ordered to pay between €37,000 and €220,000 per employee.
[36] *Id.*
[37] *French Labor Code, Article L.1235-7.*
[38] *Id.*
[39] The unemployment rate was approximately 8.2% as of the fourth quarter of 2008.

If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or any of the attorneys listed below.

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