

The obligation to seek a buyer

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The issue of seeking a buyer commonly arises in two situations. The first one corresponds to the closure by a company of one of its establishments that would lead to a project of collective redundancies, better known as “Loi Florange”. The second situation is the one according to which the employer is bound to provide his employees with a sufficient information in order for them to be able to make an offer on buying their company: it corresponds to the “Loi Hamon” and the “Loi Macron”.

I. Obligation to find a buyer in the event of a closure of a company’s establishment: the Loi Florange

The 29 March 2014 law, known as “Loi Florange”, provides for an obligation to seek a buyer within a certain time frame when is projected the closure of an establishment that would lead to collective redundancies and as a consequence to the

implementation of an Employment Protection Plan.

A. Scope

The law applies to the companies subject to the obligation to offer a redeployment leave, that is to say, to simplify, the companies employing in France and in Europe, taking into account the group to which they belong when applicable, at least 1000 employees (on this point, a reference to the Labour Code will be made). This means that a company employing a few persons in France (20 for example) can still be concerned by this obligation.

This obligation does not only concern industry, it also concerns all business sectors, including services. However, the obligation to seek a buyer does not apply to companies that are in judicial reorganisation or judicial liquidation.

“Closure” is to be understood as the cessation of activity of an establishment, the merger of several establishments outside the employment area where they were located, or the transfer of an establishment outside its employment area. The establishment is defined as “an economic entity subject to the obligation of creating an establishment works council”, that is to say an entity with a delimited geographical location, a certain stability over time and a sufficient autonomy.

B. Procedure

The employer shall convene a meeting with the works council on the closure project, before the start of the information-consultation procedure of the employees’ representatives as provided for in redundancies for economic reasons of at least 10 employees on a period of 30 days. It must be noted that these are two different procedures. To avoid any doubt, it is preferable for the employer to convene two meetings with the works council, even if the information provided is the same.

At this meeting, the employer will provide the members of the works council all relevant information on the project, including:

- the economic, financial and technical reasons for the closure project;
- the projected actions to find a buyer;
- the possibilities for the employees to submit a purchase offer, by using if necessary an expert remunerated by the company.

The company shall at the same time give notice to the DIRECCTE (French Labour Inspectorate) of the closure project and to the mayor, as well as the prefect. The

prefect and the territorial authorities can then assist the employer in the process of seeking buyers, which is often the case for municipalities which are concerned about the preservation of jobs on their land.

Once the works council and the territorial authorities are informed of the closure project, the employer shall seek a buyer. Accordingly, he shall:

- inform, by all relevant means, potential buyers of his intent to sell the establishment;
- conceive, without delay, a document presenting the establishment, aimed at the potential buyers;
- if applicable, engage an environmental report;
- give access to the applicants to all information necessary for the purchase of the establishment. To safeguard confidentiality, two exceptions are permitted: for information that may be prejudicial to the interest of the company on the one hand (business information, trade secrets, patents, etc.), and for information that may jeopardize the pursuit of the activity on the other hand.

The employer shall inform the works council of the purchase offers within 8 days. The works council gives an opinion on each offer and is even able to submit its own offer. The company shall then provide each applicant with a reasoned reply. The works council can call upon an expert who is responsible for controlling that the employer conforms with its obligation to seek a buyer.

It should be noted that the employer has in principle no obligation to follow the opinions of the works council.

The search for a buyer must meet strict deadlines, which can however be extended with the approval of the works council (and involvement of the administrative authorities):

- 2 months for closures leading to less than 100 redundancies;
- 3 months for closures leading to 100 to 250 redundancies;
- 4 months for closures leading to more than 250 redundancies.

At the end of this period, if no purchase offer has been received or if the employer dismissed the offers received, the employer shall convene a meeting with the works council and submit a report, that will also be submitted to the DIRECCTE. This report indicates the actions engaged by the employer to seek a buyer, the different offers that were made to him and the reasons why it did not accept these offers.

If, on the contrary, the employer wishes to uphold a purchase offer, it must seek the opinion of the works council, while giving the reasons why it intends to accept the offer, notably given the ability of the offeror to guarantee the performance of activity and employment within the establishment. Whether the opinion is in favour or not, this opinion ends the research period.

Considering that the employer is not forced to find a buyer nor accept an offer, the obligation to seek a buyer must be analysed as an obligation of means. It can actually even be considered as an obligation of means “strengthened”, because the employer will have to prove that it has effectively and fairly sought a buyer.

C. Sanctions

Any breach of the obligation to seek a buyer will lead to the refusal of the administrative authority to validate the Employment Protection Plan, which will force the employer to restart the whole process from the beginning. This will notably be the case if the administrative authority is not convinced by the efforts made by the employer to seek a buyer.

Another sanction remains: the reimbursement of the public aids received by the company in the last two years before the beginning of the redundancies process, with regard to installation, economic development, research or employment, as far as the establishment affected by the closure is concerned.

Moreover, the employees’ representatives can face disciplinary sanctions if they disclose information that they received within the procedure of seeking a buyer. The employer could also be able to seek damages if the confidential information is disclosed with malicious intent. Indeed, the main preoccupation of employers concerned by the obligation to seek a buyer is confidentiality.

II. The purchase of the company by the employees: the *lois Hamon and Macron*

Aimed at facilitating the transfer of companies to their employees, the law sets out two obligations:

- A general obligation of information, delivered at least every three years, in commercial companies employing less than 250 persons, on the possibilities offered to the employees to buy their company, regarding legal aspects,

- advantages, difficulties and aid schemes that are available to them.
- A specific obligation to inform the employees of any sale of business or majority shareholding project, when the company operates as a joint stock company ("*société par actions*") or as a limited company ("*société à responsabilité limitée*"), in order to allow them to make a purchase offer. A breach of this obligation is sanctioned by a civil penalty of 2 % of the purchase price.

Regarding the combination of these two obligations of information on the part of the employer, the law specifies that the prior information that must be given to the employees in the event of a sale of the company is not necessary when the information on the possibilities of purchase (due every 3 years) has been given in the last 12 months. However, as a precaution, we recommend to not disregard the specific obligation of information.

The Decree of January 4th, 2016 recently clarified the content of the triennial general information related to the purchase of a company by its employees:

- main steps of a purchase plan, including advantages and difficulties for the employees and the seller;
 - list of institutions that can provide an assistance for the purchase of a company by its employees;
 - legal aspects of the purchase by the employees;
 - available assistance schemes;
- main criteria of the valorisation of the company, capital structure, foreseeable evolution;
 - context and conditions of a capital transaction for the company and the employees.

The Decree of 2016 also provides that the information shall be given either in writing or verbally by the legal representative of the company at a meeting to which the employees shall have been summoned by all the means that allow them to have knowledge of it. Although the employer is allowed to use "all means", it is safer to use registered mail with acknowledgment of receipt, in order to prevent employees from alleging at a later date a breach of the obligation of the employer to convene a meeting with the employees.

Conclusion: Every company facing a cessation of activity shall ensure to implement the appropriate procedures, notably regarding the extremely expensive consequences that can result from a misunderstanding of certain obligations (and notably the annulment of the Employment Protection Plan and the reimbursement of public aid). Finally, outside any legal obligation, the company can also seek a buyer to divest an activity (which is often not its core business) that it does not want to keep. In the latter case, the procedure of information-consultation of the employees' representatives will be considerably lightened and the confidentiality of communications with the buyers will be better implemented.