REPRINT FINANCIER WORLDWIDE

MARCH 2014

FINANCIER WORLDWIDE corporatefinanceintelligence

LABOUR & EMPLOYMENT

Setting maximum time-periods: the end of 'never-ending' Works Council consultations?

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One of the difficulties of French employment law has for many years been the uncertainty which employers faced when launching a consultation procedure: they knew when they introduced the consultation but in some cases had no idea when it would be closed because there was no set deadline forcing the Works Council to render its opinion. In an effort to put an end to this situation, on 11 January 2013 representatives of employers' and trade-union organisations at the national level agreed the principle of blocking the consultation procedure within a fixed time-period. This national collective bargaining agreement was then incorporated in a more detailed Law that was passed on 14 June 2013.

Under French law, it is only in a couple of exceptional cases that the Works Council has a right of veto; otherwise, all that the employer needs is for the Works Council to express an opinion, whether for or against the contemplated issue. As soon as the Works Council has given its opinion, the employer may proceed with its project. Works Councils have for many years considered that the absence of a right of veto deprived them of any power to influence

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employers' decisions; as a result, they often delayed their opinion to bargain and obtain concessions from the employer. This has over the years led to unfortunate situations where, for instance, an international project was deferred due to the French Works Council refusing to deliver its opinion, leading in some cases to court action.

It is in this context, therefore, that the Law of 14 June 2013, which also reformed substantial parts of French employment legislation, and a Ministerial Decree of 27 December 2013, gave effect to the agreement mentioned above.

Pursuant to the Law and the Decree, the Works Council has strict deadlines within which to form its opinion when being consulted on a given number of issues. Failing an opinion within the deadline, it is deemed to have been consulted and to have delivered a negative opinion.

Consultations concerned

The new consultation period applies to most cases where the Works Council must be consulted prior to the employer making a given decision: consultations on the organisation and general management of the company, conditions of work, mergers and acquisitions, etc.

Unfortunately, a few consultations are not listed in the text and are therefore excluded from this provision – for instance, consultation on the transfer or dismissal of a 'protected' employee or on the In-house Regulations, are not limited in time.

Consultations with a duration fixed by law, including that of collective redundancies concerning 10 or more people in a company employing 50 or more people (two, three or four months depending on the number of terminations of contracts), are not listed either.

The consultation period

The Law provides that the duration of the consultation should be determined in advance by agreement with the Works Council.

The duration of the consultation may be fixed one by one, on the occasion of each consultation procedure, or globally for all consultation procedures.

In all instances, the duration of the consultation period must be sufficient with regard to the subject matter of the consultation but it may not be less than 15 days even by agreement. This must therefore lead companies to prepare sufficiently in advance of launching the consultation. The many instances where French management or HR management are informed of a project at the last minute, leading them to meet with the works council in a haste, and try to force its members to deliver an opinion on the spot, will be more risky in the future, as the Works Council may not be blocked within less than 15 days.

Failing such an agreement with the Works Council, the duration of the consultation procedure is now determined by the abovementioned Decree.

The consultation procedure will last a maximum of one month, increased to two months if the Works Council resolves to appoint an expert to assist it, and to three months if the Health & Safety Committee (CHSCT) also needs to be consulted (four months if a 'Single H&S Coordination Body' (*Instance de coordination des CHSCT*) has been appointed).

Of course, those periods represent the maximum; nothing prevents the Works Council from delivering its opinion faster, but the Works Council may want to use the full period before rendering its opinion, and it is therefore unfortunate that the maximum time periods fixed by the Decree are so long.

The period for consultation

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only opens once the employer has submitted all necessary pieces of information to the Works Council enabling it to make a view on the proposed operation. The Works Council continues to decide freely the extent of the information it requires, subject to a court decision.

There is therefore still some room for the Works Council to manoeuvre in order to delay its opinion, but much less than before, unless it can prove in court that the information it has received is clearly insufficient.

Furthermore, even if the HSC has not given its opinion, and even if the expert appointed by the Works Council has not delivered its report, the deadline is not postponed, and the employer may proceed with its project at the end of the set time period.

The expert's report

On many occasions, the Works Council may decide that it needs the assistance of an expert in a given area in order to provide its opinion. The possibility appointing an expert is sometimes provided for by the law (redundancies, introduction of new technology, warning process, analysis of annual accounts, etc.), but the Works Council may also decide to appoint an expert on other issues (in such cases, the expert is paid by the Works Council out of its functioning budget).

Traditionally, opinion was delayed by the appointment of an expert, when the employer had to wait for the latter to study the project and deliver its report to the Works Council.

Therefore, the Law provides that the expert appointed by the Works Council has a strict time-period in which to provide its report.

This time period is also determined by agreement between the Works Council and the employer at the outset of the consultation procedure. However, failing an agreement with the Works Council on the expert's report, the abovementioned Decree determines the time periods in which the expert must deliver its report. For instance, for the auditor studying the company's strategy, the period is 15 days before expiry of the Works Council's consultation time.

In conclusion, the purpose of the Law is definitely to put an end to Works Councils' delaying tactics and 'never-ending' consultation procedures. Nevertheless, the time periods fixed by the Decree are particularly long; if delaying tactics are rare when the Works Council has been fully informed, consultations on minor subjects may still be delayed up to three or four months if the Works Council sticks to the periods fixed by the Decree. Hence, there is now a greater interest in negotiating with the Works Council rather than relying upon the time periods set by the Decree. ■