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New clarifications on the obligation to inform employees in case of a company sale

The law of July 31, 2014, referred to as the "Hamon Law" had established the obligation, for companies with fewer than 250 employees*, to inform each employee at least two months prior to a transfer or sale, in order to enable the employees to make a takeover offer.

Its initial objective was to avoid the risk that – *in the absence of a prospective buyer* – companies could be shut down. But especially and above all – *when a prospective buyer existed* – the law involved the risk of the pure and simple cancellation of the company sale by a court order. Indeed, in case of non-compliance with the information procedure, it enabled any employee to request via a judicial action the voidance of the sale.

Beyond the numerous criticisms sparked by this hastily drafted and adopted law, it was its constitutionality that raised questions, particularly with respect to the rights to free enterprise and the ownership of property. For this reason, the *Conseil d'Etat* referred a question of constitutionality (*Question prioritaire de constitutionnalité*) to the Constitutional Court (*Conseil constitutionnel*) (CE May 22, 2015, n. 386792).

In its decision rendered on July 17, 2015 (decision 2015-476 QPC of July 17, 2015), the Constitutional Court confirmed the constitutional compliance of the obligation to inform, to the extent that it pursues an objective in the general interest by enabling the takeover of a company through any means, and the continuation of its operations. On the other hand, the faculty of a judge to declare void a company sale as a sanction for failing to comply with the obligation to inform was declared not being conform to the French Constitution.

At the same time, the law "to promote growth, activity and equal economic opportunities" of August 6, 2015, called the "Macron law", takes into account certain criticisms raised regarding the measures and, in part, modifies them. It thus limits its scope, lightens the methods of application and reduces sanctions in case of non-compliance.

1. **Limitation of the scope to the sale of the company only**

By replacing the initial expression, "cession" (transfer) by "vente" (sale), the Macron law clarifies the scope of the obligation to inform (C. com. art. L. 141-23 s. and L. 23-10-1 s. modified). In accordance with its initial objective, the law therefore concerns only the sale of a company, excluding any other form of transfer (donation, exchange, etc.).

In other words, from now on, the obligation to inform applies only in case of the sale of the business as a going concern or of any participation representing more than 50% of shares, stocks or securities giving access to the capital of a company.

Regrettably, despite requests from the economic sector, the case of intra-group sales has not been addressed. Apparently, the initial objective of preventing the shut down of a company does not justify also including internal reorganizations within the scope of the law. These seem to remain bound by the obligation to inform.

Likewise, cases of partial transfers leading to a takeover as well as those of progressive transfers by successive installments of the share capital should have been clarified.

2. **Simplification of informing methods**

On a formal level, the Macron law significantly simplifies the methods for informing employees.

Thus, employees may be informed by any means that clearly establishes the date on which the information was received. Moreover, with respect to registered letters with acknowledgement of receipt, the Macron law specifies that the date of reception of the information is henceforth the date of the first presentation of the letter, and no longer that on which the letter is actually delivered to its recipient (C. com. art. L. 141-25, L. 141-30, L. 23-10-3 and L. 23-10-9 modified).

In the event that the employees indeed wish to make an offer to take over the company, they were previously required, under the Hamon law, to contact the owner of the business/of the shares directly. Again, the Macron law simplifies the procedure by allowing employees, when the owner is not the operator or the managing director, to directly contact the latter, who will in turn pass on the proposal to the owner (C. com. Art. L. 141-23, L. 141-28, L. 23-10-1 and L. 23-10-7 modified).

Lastly, from now on it is established that if during the 12 months preceding the sale, measures for informing the employees have already been implemented concerning the possibilities for taking over the company, the obligation to inform employees is lifted.

3. Modification of sanction for non-compliance with the obligation to inform: civil fine instead of cancellation of the sale

The main contribution of the Macron law lies in the modification of the sanction in case of failure to comply with the obligation to inform.

Indeed, the principal reproach leveled against the Hamon law had to do with the legal insecurity arising from the risk of voidance of the company sale in case of non-compliance with the information requirements. This threat has now been replaced by a system of civil fines proportional to the amount of the sale, up to a maximum amount of 2% of the purchase price. The amount of this fine can therefore be proportionally very significant.

The new civil sanction resulting from the Macron law will enter into force no later than February 6, 2016. However, the decision of the Constitutional Court has been applicable since its publication in the Official Journal. Therefore, the risk of cancellation of the sale due to the failure to inform the employees if definitively eliminated.

Therefore, the Macron law brings some welcomed corrections to one of the most denounced measures. Yet the fact remains that the current measures persist in complicating the process for the sale of a company. Let us hope, therefore, that further corrective measures are still to come.

* all companies with fewer than 50 employees, and companies with fewer than 250 employees and with an annual turnover not exceeding 50 million euro and/or an annual balance sheet total not exceeding 43 million euro