

NEW FRENCH REGULATION

Will the new mandate of compulsory individual notification of employees prior to the sale of a company prove a hindrance to business?



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Wishing to keep the electoral promises made during his candidacy, last November French President François Hollande implemented a measure aimed at facilitating the transfer of companies to their employees.

The origin of this promise resides in the fact that numerous family-held companies disappear because nobody wants to take them over. The lawmaker thus envisioned the individual employee notification before any contemplated sale as a solution.

As a consequence, under articles 19 and 20 of the law it is now compulsory for all employers with less than 250 employees to individually notify them before any transfer of the business or sale of the majority of the share capital of a company. The penalty for the breach of this obligation is the voiding of the sale (!).

The law entered into force on November 1st, 2014. What can be said after 3 months of application?

WHEN DOES THE LAW APPLY? WHEN IS THE INDIVIDUAL NOTIFICATION TO BE CARRIED OUT?

The law covers all legal commercial entities with the exception of general or limited partnerships.

The notification obligation does not apply when the sale occurs within the family circle. The law maker did not want employees to be tempted to make an offer that would harm family stability. Companies under court supervision or liquidation procedures are also excluded from the scope of the law.

As far as the timing of the notification is concerned, it shall be carried out « *when the owner of the business wants to sell it* » or « *when the owner of a shareholding representing more than 50% of the shares of a limited liability company or of a corporation or securities giving access to the majority of the share capital of a corporation wants to sell them.* »

The notification date depends on if the company has an elected workers' council. A two-month delay has to be respected if there is no workers' council whereas, if there

is one, the individual notification process shall take place on the start date of the notification and consultation process with the workers' council.

The conditions of the notification are defined in a decree dated October 28, 2014. It may be achieved (i) at the occasion of a meeting during which all employees sign a register of attendance, (ii) through billboards, subject to the employees signing a register showing that they have had knowledge of the information posted, (iii) by email with dated acknowledgment of receipt, (iv) by letter handed over to each employees with dated acknowledgment of receipt, (v) by certified mail with acknowledgement of receipt or (vi) by extra legal act (!).

MULTIPLE QUESTIONS INCURRED BY THE PRACTICAL IMPLEMENTATION OF THE REGULATION

Once technical issues linked to the nature of the shareholding (a single shareholding representing more than 50% or several shareholdings jointly representing more than 50%) or to the level of the notification (at the level of the company whose shares are sold or, if it does not have employees, also at the level of its subsidiaries?) are resolved, several practical issues remain unsolved.

As a matter of fact, how is it possible to ensure that the information remains confidential, particularly with regard to the market and competitors, when each employee has to be individually informed about the project? Of course each employee will be reminded of their confidentiality obligation, but it is, at best, nearly impossible to enforce and is often an empty promise.

How is the exclusivity period granted to a potential purchaser to be reconciled with the course of the information and the wish of an employee to make an offer? Is it necessary to make a specific condition in this respect? Without any doubt.

What information is to be provided to employees interested in making an offer? Shall they be granted full access to data room as any other potential purchaser?

Certainly. In this case, how best ensure the confidentiality of information given to them? Is the signature of a non-disclosure agreement sufficient to secure the company against the disclosure and/or use of confidential information that the employee would never have had knowledge of otherwise? Necessary? Certainly. Sufficient? No.

What if the employer favors an employee's offer over another potential purchaser's and the company files for bankruptcy a few months later? Would it be possible to hold the company liable? It is not excluded.

Furthermore, notifying the employees of the contemplated sale may be disruptive and trigger a significant loss of motivation among the employees, stressed by the prospect of the cession and its possible consequences on their personal situation. How best deal with such effect?

These are only a few questions that the shareholder has to resolve as soon as he intends to sell his shares.

Fully conscious of these difficulties, in October 2014, the Medef (the leading French employers' organization) called for discussions between employers and law makers on the drafting and implementation of decrees to limit the constraints linked to these provisions which it sees as a hindrance to normal business and a new attempt to inbound investment in France. Their demands remain unanswered.

WHAT CAN WE SAY AFTER 3 MONTHS?

First thing: few employees are interested in making an offer.

If the lawmakers do not know it, employees do: nobody becomes an entrepreneur from one day to another, specifically of a company employing 249 employees. Managing a company requires technical, business and management skills and financial resources that are not easily nor instantaneously attained. Few may obtain the financial arrangements necessary to acquire a profitable company or to invest in a company making losses to ensure its recovery.

Consequently, most of the time employees do not make an offer.

This is probably the reason why today the law is so challenged, even by those who implemented it...

As a matter of fact, how is it possible to ensure that the information remains confidential, particularly with regard to the market and competitors, when each employee has to be individually informed about the project?

The Prime Minister thus commissioned the French Deputy, Mrs. Dombre-Coste, on January 12, 2015, to make a report on the application of the law and, more generally, to issue recommendations to ease and assist the transfer and sale of businesses.

The report's conclusions were rendered on March 15, 2015. Within the scope of her mission, Mrs. Dombre-Coste conferred with the national employers' organisations in order to gather their thoughts on the new regulation.

For them, the law could be appropriate when applied to very small businesses with few employees. It is, however, unrealistic for companies employing 249 employees, particularly in the event that the failure to inform one employee jeopardizes the whole sale process.

An amendment to the law will be presented to the Senate on April 7 in order to secure the sale process while confirming the right of the employees to individual notifications. As a first step, the amendment will modify the

penalty for failure to inform. Instead of the voiding of the operation, the employer will have to pay a civil fine that should amount to 3% of the sale price. Furthermore, the law will no longer apply to intra-group partial share transfers or sales. Finally, the information letter to be sent to all employees by certified mail (if this information mode is chosen) will be taken into consideration as of the date of its sending. This implies that an employee is deemed to have been individually informed as soon as the letter has been sent to him.

Employers' organizations did, of course, hope for the full repeal of the law. This was, however, not realistic.

If the desired outcome of the law is the promotion of entrepreneurial values and the encouragement of employees wishing to participate in the running of a business to do so, one should remain realistic. Providing employees the opportunity to make an offer does not effectively promote entrepreneurship. The leverage is elsewhere; probably in the creation of state guarantees and appropriate taxation or even in the reduction of social security charges.

ABOUT THE AUTHOR:

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