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M&A Transactions and consultation of the works council: foreign groups faced with a french tartuffery

The number of cross-border M&A transactions between foreign groups – notably US groups – with French subsidiaries has increased over the past few months.

Pursuant to Article L. 2323-19 of the French Labor Code, the works councils of the French subsidiaries of the selling group must be consulted in case of change in their ownership structure or in case of sale of some of their assets making up an autonomous branch of activity.

The same obligation also applies for the works councils of the French subsidiary(ies) of the acquiring group through which the deal is completed at the local level.

Non-compliance with the obligation to inform and consult the works councils of the French subsidiaries involved in the M&A transaction constitutes an offense. Specifically, the managers of such subsidiaries are likely to be prosecuted for obstruction, an offense punished by a fine and even theoretically by a term of imprisonment.

The works council(s) must be consulted prior to the completion of the M&A transaction, i.e. before the conclusion of a final agreement, whatever the form this agreement may take. French courts have ruled that the signature of an agreement in principle before the consultation of the works council of the target company was illegal insofar as the completion of the transaction was solely dependent on the grant of administrative authorizations. In this particular case, the court held that the decision to make the deal was in fact final and definitive since the fulfillment of the condition relating to the grant of administrative authorizations was outside the control of the parties.

Under applicable French labor rules, there are only two cases where the works council can be consulted after completion of a transaction: when a company files a take-over bid and when a company is involved in a transaction subject to merger control procedures.

In the first case, the employer of the company which is the target of the take-over bid and the employer of the

company submitting such bid must immediately convene their respective works council to inform them of the proposed takeover bid.

In the second case, the employer must convene the works council within three days as from the publication of the press release on the contemplated merger issued either by the competent French Competition Authority (*Autorité de la concurrence*) or by the European Commission. The legal provision applies to all economic entities based within the French territory that are directly or indirectly affected by the merger transaction.

By contrast, French law does not contain any provision for listed foreign groups or merger transactions that are subject to clearance by foreign competition authorities.

As a result, foreign groups involved in cross-border transactions extending to French entities face a dilemma: either they launch the works council consultation process within the French entities impacted by the deal before informing the market and their own competition authority – thereby violating their local securities and antitrust laws – or they first inform the market and notify their local competition authority – thereby violating French labor law.

I already pointed out this absurdity in an article entitled "Autistic France", published on October 26, 2002 in the French leading daily newspaper Le Figaro and co-authored with Mr. Thierry Virol, a well-known expert in these issues who is today a founding shareholder of the company Alixio chaired by Mr. Raymond Soubie.

At that time, we explained that foreign companies were "*trapped between securities laws that require public announcements immediately regarding information that might influence the company's share price listing and French labor rules which call for consultations with employees prior to informing the public".*

Nothing has been done since then to remedy this situation.

Because nature abhors a vacuum, it has become a customary practice to include in share purchase agreements condition precedents, pending the opinion of the works council(s) on the contemplated transaction, even though in reality the selling and acquiring groups have definitely finalized the terms and conditions of the deal.

To be legally valid, such conditions precedent must specify that the parties will be entitled to waive the sale of the French entities in the event the works council(s) issue(s) a negative opinion.

Yet, no one is fooled. The opinion of the works council is not binding but merely advisory. The parties to the transaction can disregard a negative opinion issued by the works council and complete the transaction without being exposed to criticism.

This is just about keeping up appearances.

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