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Mandatory representation of employees on boards of directors or supervisory boards: towards a co-management à la française

The Law on securing employment n°2013-504 of June 14, 2013 has introduced new rules providing for the mandatory representation - with voting rights - of employees on the Board of Directors or Supervisory Board of *sociétés anonymes* (joint-stock companies) and *sociétés en commandite par actions* (partnerships limited by shares) of a certain size.

By the end of 2012, Louis Gallois declared in his pact^[1] that “a balance of view more favorable in the long term within boards of directors or supervisory boards of companies of a certain size (with more than 5,000 employees) would be achieved through the presence, in addition to the shareholders and the management, of at least four employee representatives (without exceeding one third of the total number of board members). Just like the other board members, they would be entitled to vote, including in board committees. [...] France would thus join the 12 European countries that have implemented rules for the representation of employees on the management bodies of private companies of a certain size.”^[2]

Shortly thereafter, the Law Commission of the National Assembly suggested to limit “for now” the number of employee representatives to two^[3].

This has now been done: the **Law on securing employment n°2013-504 of June 14, 2013** has indeed introduced new rules providing for the mandatory representation - with voting rights - of employees on Boards of Directors or Supervisory Boards^[4].

Scope

The new set of rules applies to *sociétés anonymes* (joint-stock companies, hereinafter “SA”) and *sociétés en commandite par actions* (partnerships limited by shares, hereinafter “SCA”):

1. that employ, as of the close of **two consecutive financial years**:
 - at least **5,000 permanent employees**⁽⁵⁾ within the **company and its direct or indirect subsidiaries**⁽⁶⁾, having their registered office located on the **French territory**,
 - or at least **10,000 permanent employees** within the **company and its direct or indirect subsidiaries**, having their registered office located on the **French territory and abroad**,
2. and that have the obligation to set up a **works council** as per Article L.2322-1 of the French Labor Code, *i.e.* companies that have employed a minimum of **50 employees** during **12 months** (whether consecutive or not) over the **last three years**.

Exemptions

The following companies are not subject to the new set of rules:

1. the direct or indirect **subsidiaries** that are themselves subject to the obligation to appoint employees at the board level;
2. companies that have less than **50 employees**;
3. companies where the board comprises one or more member(s) **elected** by the employees, as well as their direct and indirect subsidiaries insofar as the number of such members is at least equal to that provided for by the new set of rules.

Implementation

Within **six months** following the **close of the second of the two financial years** showing that the requirements to have employee representatives at the board level are met, and **after consultation**, as the case may be, of the Group Works Council (“GWC”), Central Works Council (CWC) or Works Council (“WC”), **the extraordinary general meeting** (“EGM”) must **amend the company’s by-laws** to specify the conditions in which the board members representing the employees must be designated. The EGM can chose between several options:

1. **Elections** in the conditions set forth in Article L.225-28 of the French Commercial Code;
2. **Appointment** by, as the case may be, the **GWC, CWC or WC**;
3. **Appointment** by the **trade-union(s)** that obtained the greatest number of votes in the first round of the elections provided for under Articles L.2122-1 and L.2122-4 of the French Labor Code;
4. **When at least two employee representatives must be designated**⁽⁷⁾: one must be designated according to one of the three aforementioned options, and the other must be appointed by the **European Works Council** (“EWC”) or, in case of a Societas Europaea (“SE”) by the employee representative body or, if there is not such body, by the SE committee.

If the above is not complied with, any employee may initiate summary proceedings and request the President of the Court to **order** the Board of Director to convene an EGM and to submit to the shareholders draft resolutions to amend the by-laws, **subject to a penalty**.

*? In companies that meet these criteria as of June 17, 2013, the general meeting to be held to amend the by-laws in view of the election or appointment of the employee representatives must take place by **2014 at the latest**.*

The employee representatives must be elected/appointed to the Board no later than **6 months** as from the date of the general meeting that resolved to amend the by-laws^[9] and gender equality rules must be applied:

1. When the employee representatives are **elected**, the candidate and his/her substitute must be of different gender;
2. When the employee representatives are **appointed**, gender equality must be strictly respected.

N.B.: The employee representatives are taken into account neither in the determination of the minimum and maximum number of Board members^[9], nor in the determination of the number of Board members having an employment contract with the company^[10].

Eligibility/appointment requirements

The employee representatives must have entered into **an employment contract** with the company or one of its direct or indirect subsidiaries having its registered office located in France. The employment contract must correspond to an **effective job position** and must have been in force for more than **two years**^[11].

By way of derogation, the second employee representative appointed under #4 above can have an employment contract with the company or one of its direct or indirect subsidiaries located abroad.

By-laws provisions that impose on the Board members the obligation to own shares in the company are not applicable^[12].

All the employees of the company and, as the case may be, of its direct or indirect subsidiaries with their registered office located on the French territory, having entered into an employment contract at least **three months** before the date fixed for the elections are entitled to vote. The ballot is secret.

The tenure as employee representative on the Board is **incompatible** with a mandate as (i) trade-union representative, (ii) staff representative, (iii) member of the WC, GWC, Hygiene, Safety and Working conditions Committee ("CHSCT"), EWC, or, (iv) for SEs, member of the employee representative body or member of a committee of the SE.

When elected or appointed to the Board, any employee holding one or several of such mandates must resign

therefrom within **eight days**. If he/she fails to do so, he/she shall be **deemed to have resigned** from his/her position as Board member.

Term of tenure

The term of tenure is freely determined in the by-laws, but may not exceed **six years**^[131]. Tenure can be renewed, unless otherwise stipulated in the by-laws.

During the performance of his/her duties, the employment contract of the elected/appointed employee representative remains in force. The remuneration he/she receives as an employee may not be reduced because of the tenure as employee representative at Board level^[14].

The mandate as employee-representative Board member shall end in case of resignation, death or expiration, as well as in the following cases^[15] :

1. **Termination of the employment contract;**
2. **Removal for misconduct in the performance of the employee representative duties' as Board member**, pursuant to a summary decision of the First Instance Court, ruling in summary proceedings, at the request of the majority of the Board members.

[1] Pact for the competitiveness of the French industry (commonly referred to as the “*Gallois Report*”), November 5, 2012.

[2] These countries are: Austria, the Czech Republic, Denmark, Finland, Germany Hungary, Luxembourg, the Netherlands, Norway, Slovakia, Slovenia and Sweden.

[3] Information report on the transparency of governance within large companies, n°737, February 20, 2013.

[4] Cf. Articles L.225-27-1 and L.225-79-2 of the French Commercial Code.

[5] Pursuant to Article R.2323-17 of the French Labor Code, the “permanent staff” comprises “*full-time employees registered on the company payroll during the whole reference year and having entered into an employment contract for an indefinite term*”.

[6] In the absence of further information, the concept of subsidiary is to be understood within the meaning of Articles L.233-1, L.233-3 and L.233-16 of the French Commercial Code.

[7] In companies with more than 12 Board members, at least two employee representatives must be

elected/appointed (in companies with less than 12 Board members only one employee representative must be elected/appointed). According to the *Association Nationale des Sociétés par Actions* (French association of joint stock companies, hereinafter “ANSA”), board members representing employee shareholders are not taken into account in the calculation of this threshold (Legal Committee held on July 3, 2013, n°13-037).

[8] If this six-month timeline is not complied with, the employee representatives shall be elected in the conditions indicated in #1 above. Any employee may initiate summary proceedings and request the President of the Court to order the Board of Directors to organize the elections.

[9] The Board has at least three and no more than 18 members (cf. Articles L.225-17 and L.225-69 of the French Commercial Code).

[10] Cf. Article L.225-22 of the French Commercial Code.

[11] The seniority requirement is not applicable when, as of the date of the election/appointment, the company has been incorporated for less than two years.

[12] Cf. Articles L.225-25 and L.225-72 of the French Commercial Code.

[13] Cf. Article L.225-29 of the French Commercial Code.

[14] Cf. Articles L.225-31 and L.225-80 of the French Commercial Code.

[15] Cf. Articles L.225-32 and L.225-80 of the French Commercial Code. According to the ANSA, the by-laws may not provide for other grounds for termination of the employee representative’s mandate as Board member (Legal Committee held on July 3, 2013, n°13-036).

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