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New reforms aimed at simplifying the internal operation of companies

The Bill on business growth and transformation and the Bill for the modernization of business transfers are important items on the Minister of Economy and Finance's end-of-year agenda.

While one Bill is promoted by the government and the other by the Parliament, both aim at simplifying the internal operation of companies.

This article focuses on two measures intended to remedy the shortcoming of previously implemented schemes that have been sometimes contested.

Article authored in colloboration with Emilie Yildiz, corporate lawyer

Reform of the obligation to inform employees of any contemplated sale of their company

The Law on social and solidarity economy dated July 31, 2014, commonly known as the "Hamon Law", imposed on small- and medium-sized businesses[1] the obligation to inform their employees of any contemplated sale of their company.

This obligation to provide information initially applied to business owners who intended to transfer, free of charge or against consideration, their going concern or the majority of the share capital of their company, in order to make it possible for all or part of the employees to submit a purchase offer.

The contemplated transaction could not be implemented before the expiry of a 2-month period from the date on which the employees were informed thereof and failure to inform the employees incurred a heavy sanction as the Commercial Court had the power to order the nullification of the transaction.

As soon as it started being implemented on November 1, 2014[2], this obligation raised much controversy. Indeed, first of all, the scope of application of the obligation – which targeted "transfers" and, therefore,

included situations where employees could not possibly submit a purchase offer – was too large. Secondly, the disproportional nature of the sanction that could be imposed in case of non-compliance – i.e. the nullification of the transaction – jeopardized the legal certainty of the company.

Fully aware of these issues, the Government amended this legal framework in the Law on growth, economic activity and equality of economic opportunities of July 10, 2015, commonly referred to as the "Macron" Law. The publication of its Implementing Decree was addressed in one of our former articles[3]. Actually, the obligation to provide information became only applicable in case of a contemplated sale of the business and the sanction was no longer the nullification of the sale but a civil fine that could not exceed 2% of the price.

Despites the laudable objective to encourage employee buyouts, the counter-productive effect of this set of rules – due to a timeline that was at the same time too short to allow employees to get organized but long enough to undermine the company and make it vulnerable in the eyes of clients and suppliers – had made it inoperative. As a result, the Bill for the modernization of business transfers[4] quite simply removes the obligation to provide information to employees prior to the sale of the business.

This Bill was adopted by the Senate in first reading on June 7, 2018 and referred to the National Assembly.

Reform of the obligation to appoint statutory auditors

The bill on business growth and transformation[5], known as the "PACTE Bill" in French, amends the rules[6] governing the appointment of statutory auditors in order to alleviate the burden on small commercial companies as it reduces the number of cases where such companies have the obligation to appoint a statutory auditor.

Even if the Bill stipulates that the applicable thresholds will be set forth in a forthcoming Decree of the Council of State[7], the PACTE Bill provides for an alignment with EU Directive 2013/34 of June 26, 2013, known as the "Accounting Directive", i.e. the mandatory appointment of a statutory auditor for companies that exceed at the close of a financial year the limits of at least two of the three following criteria: A balance sheet of 4 million euros, a turnover of 8 million euros and 50 employees.

Joint stock companies and limited partnerships with shares, currently under the obligation to appoint in any cases a statutory auditor without threshold-related requirements, would be concerned by the new rules.

In addition, in order to avoid the set-up of legal schemes to circumvent the obligation to appoint a statutory auditor, parent companies controlling subsidiaries that do not exceed the new to-be-defined thresholds, will still have the obligation to appoint a statutory auditor if the group as a whole exceeds such thresholds.

The Bill was recently adopted in first reading by the National Assembly on October 9, 2018 and, once adopted by the Senate, its provisions should become applicable as from the beginning of the first financial year that will follow the publication of the Implementing Decree that will set forth the thresholds applicable for the appointment of statutory auditors, and in any event by January 1, 2019 at the latest. However, the current mandates of statutory auditors should continue until their expiry[8].

Reform of the multi-representation of legal entities

Alongside these two reforms, a third one concerning the internal operation of companies entered into force on October 1, 2018.

Indeed, Law n°2018-287 of April 20, 2018[9] ratifying Ordinance n°2016-131 of February 10, 2016 for the reform of contract law, the general regime of obligations and proof of obligations[10] has amended the text of this Ordinance.

As a result, Article 1161 of the French Civil Code that deals with conflicts of interests with respect to representation and that specifically forbids the representation by a single person of several parties to a contract or the conclusion of a contract between a represented person and his/her/its representatives, has just been amended to exclude from its scope of application the representation of legal entities.

The legislator has thus limited the scope of application of Article 1161 to natural persons exclusively. This Article indeed now reads as follows *"In the case of representation of natural persons, a representative may not act on behalf of several parties to an agreement which have opposing interests"*.

As such, effective since October 1, 2018:

- The restriction no longer applies to legal entities that are subject to the specific rules of French corporate law;
- The multiple representation of several natural persons will be prohibited only in case of opposing interests;
- The represented person retains in any case the possibility to authorize or to ratify multiple representation.

It is nonetheless regrettable that the notion of conflict of interest has not been defined. Indeed, as an example, is it possible to consider that a natural person pursues the same interest as the other natural persons that he/she represents under a sale contract?

[1] Companies with less than 250 employees and an annual turnover not exceeding 50 million euros, or an annual balance sheet total

[2] Cf. publication of Decree n°2014-1254 of October 28, 2014 on the obligation to inform employees prior to the sale of the company

[3] Cf. article entitled "Macron Law: Publication of the Implementing Decree on the obligation to provide information to employees prior to the sale or the transfer of the business"

[4] http://www.senat.fr/leg/ppl17-343.html (in French)

[5]https://www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=99F4BA6525B4A48E4BC5882A2F15C676.tplgfr33s_1?idDocument=JORFDOLE000037080861&type=contenu&id=2&typeLoi=proj&legislature=15 (in French)

[6] Article 9 of the Bill

[7] Articles 9, 9°, 12° and 16° of the Bill

[8] Article 9, 18° of the Bill

[9]https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=99F4BA6525B4A48E4BC5882A2F15C676.tplgfr33s_1?cidTexte=JORFTEXT000036825602&dateTexte=20181024 (in French)

[10] Cf. article entitled "French contract law reform: What consequences on the rules of representation within corporate groups"