

CONCENTRATION AND MERGER TRANSACTIONS: INFORMATION AND CONSULTATION TO THE WORKS COUNCIL IN FRENCH LAW

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Abstract

The aim of this paper is to deal with the rules that apply to the information and consultation of the Works Council within the scope of a concentration-merger transaction and analyze the new rules applicable in regard to the time frames available to the Works Council to render an opinion or within which it is considered to have rendered an opinion.

El objetivo de este trabajo es analizar las reglas que se aplican en el derecho francés a la información y la consulta del Comité de Empresa en el marco de una operación de concentración o transacción de fusión y analizar las nuevas normas aplicables en lo que respecta a los plazos de que dispone el Comité de Empresa para hacer su dictamen, o dentro de los cuales se considera que han realizado su dictamen.

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Keywords: Works Council, concentration and merger transactions, information and consultation workers' representatives

Palabras clave: Comité de Empresa, concentración y transacciones de fusión, información y consulta de los representantes de los trabajadores

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France has had Works Council legislation ever since 1945, long before the adoption of Directive 2012/14 on information and consultation of employees. That legislation was amended several times with a view to increasing the level of consultation between management and staff representatives. In 1982, an obligation on employers was created to consult with their Works Council (*comité d'entreprise*) prior to implementing a decision that leads to substantial changes in the workforce, the organisation of the company or the content of the work. In 2005, an obligation was introduced for large companies (300+ employees) to consult with their Works Council with respect to staff planning and training.

Until the *Loi relative à la sécurisation de l'emploi* and its implementing Decree of 27 December 2013, there was no firm time limit within which the Works Council had to complete the consultation process. By law, the consultation had to continue until the Works Council considered itself to be fully informed. Depending on the complexity of a topic, the Works Council could delay the consultation process for weeks or months, arguing that it had not been fully informed yet.

Following the election of President Hollande, the new government launched negotiations between the social partners that eventually led to the *Accord National*, which in turn led to the adoption, on 14 June 2013, of the *Loi relative à la sécurisation de l'emploi* (in English the 'Secure Employment Act') and an implementing Decree of 27 December 2013. This legislation brings a significant change by restricting on Works Councils' ability to delay the consultation process,

One of the first questions to be asked in a concentration and merger transaction process is whether there will be a requirement to inform and consult any Works Council in connection with the transaction, as this can be a time-consuming and onerous procedure. A company with more than 50 employees is required to have a Works Council. This Works Council in a French company is made up of elected employees, union representatives and a management representative.

French law requires employers to share information and consult with the Works Council and, if necessary, with the group council or European group council in the face of mergers or acquisitions.

Under article L. 2323-19 of the French Labor Code an employer must inform and consult with the Works Council "*regarding any modification in the economic or legal organization of the company, including among others, in the event of a merger, sale, (...), or acquisition or sale of a subsidiary within the meaning of Article L. 233-1 of the French Commercial Code*". The employer must consult with Works Council members regarding the effects that the contemplated transaction may have on employees.

Management is not required to obtain Works Council consent to contemplated transactions, but a formal information and consultation procedure must precede management's decision concerning proposed business combinations. If the Works Council submits a negative opinion, management may elect to disregard the Works Council's views and proceed with the transaction. Nonetheless, management must not relegate the information and consultation procedure to an empty formality. In particular, management must not bind the company irreversibly before receiving the opinion of the Works Council and must maintain the freedom of choice to seek modification or require revocation of the transaction in accordance with the views expressed in the Works Council report. Non-involvement of the employee representatives constitutes a criminal offence punishable by a sentence of up to one year's imprisonment and a 3,750€ fine. The company itself can be sentenced to a fine of up to 18,750€ in addition to this.

There has to be a means of dialogue and exchange of views between employee representatives and management of a group, at such time, in such fashion and with such content as to enable employee representatives to express an opinion within a «reasonable time». The transaction cannot be signed until such opinion has been given, which means that signature may potentially be significantly delayed if the opinion is not provided promptly. It could for example lead to a suspension of operations until the opinion of employee representatives is given.

On June 14, French law for labor market reform (referred to as "*Loi de Sécurisation de l'Emploi*") was enacted. This reform comes on the heels of a nationwide agreement entered into on January 11, 2013 between trade unions and employers' unions for the purpose of introducing more flexibility and security into the employment market.

In particular this reform sets time limits for Works Councils to provide consultation on business decisions. This is of course of particular influence when a concentration or a merger process is going on.

Section 1 of this paper deals with the rules that apply to the information and consultation of the Works Council within the scope of a concentration-merger

transaction. Section 2 is dedicated to the new rules applicable as regards the time frames available to the Works Council to render its opinion or within which it is considered to have rendered its opinion.

1. Time frame for the Works Council meeting within the scope of the concentration-merger transaction

1.1. Works Council and a concentration-merger transaction

Article L.2323-20 of the French Labor Code provides for the information and consultation of the Works Council (or of the central Works Council) within the scope of a concentration-merger transaction. Hence:

“When a company is a party to a concentration-merger transaction, as defined under Article L.430-1 of the Commercial Code, the employer must hold a meeting with the works council at the latest within three days following the publication of the statement regarding the notification of the contemplated concentration-merger transaction, released by either the French administrative authority in application of Article L.430-3 of same, or by the European Commission in application of Council Regulation (EC) no. 139/2004 of January 20, 2004 on the control of concentrations between undertakings.

During this meeting, the works council or the economic commission discusses the possible appointment of an expert in the conditions set forth in Articles L.2325-35 et seq.. Where an expert is appointed, the works council or the economic commission holds a second meeting in order to discuss the results of the expert’s work.

The provisions of paragraph 1 are deemed to have been satisfied when the works council meets following the filing of a takeover bid in application of the provisions of paragraph 8.”

Thus, in the case in point, it will be necessary to hold a meeting with the Works Council (and not just summon the Works Council to a meeting) at the latest within three days following the publication of the statement relating to the notification of the contemplated concentration-merger transaction released by the European Commission in application of Council Regulation (EC) no. 139/2004 of January 20, 2004 on the control of concentrations between undertakings or by the French Competition Authority.

In the context of the implementation of the abovementioned provisions, and in compliance with the meeting agenda that mentions it, the Works Council will have to hold a vote regarding the possible appointment of an expert.

If the Works Council decides to appoint a “concentration-merger” expert, a second meeting will need to be organized in order to hear the results of the expert’s work.

During parliamentary debates, the term “chartered accountant” initially mentioned in the draft bill that gave rise to article L.2323-20 of the French Labor Code was replaced, at the Government’s request, by the more general term “expert”, thus making it possible to not only appoint chartered accountants, but also legal experts and management experts (OJ National Assembly debates, April 28, 2000, p.3570).

Theoretically, this second meeting, if any, does not prevent the Works Council to render an opinion on the contemplated concentration-merger. However, in practice, in our view, you will need to take into serious consideration the possibility that the Works Council will wait for the results of the expert’s works before rendering its decision.

Failure to comply with the provisions of article L.2323-20 of the French Labor Code constitutes a hindrance to the proper running of the Works Council (*délit d’entrave*), liable to one year’s imprisonment and a 3,750€ fine for individuals and a EUR 18,750 fine for legal entities (article L.2328-1 of the French Labor Code). Moreover, well-established case law states that the subsequent regularization of the situation does not put an end to the *délit d’entrave*, as this is an instantaneous offence (Supreme Court, Criminal Div., January 6, 2004, no. 02-88.240; Criminal Bull. no. 4).

Furthermore, the offence can give rise to a civil action in compensation for the loss suffered by the Works Council (Supreme Court, Criminal Div., March 29, 1973, no. 72-90.784: “*Any hindrance to the proper running of a works council necessarily causes a direct loss for said works council, for which it is fully justified to seek compensation*”).

Lastly, the Works Council can also decide to file a legal action before the summary trial judge with a view to having the transaction suspended up until completion of the information and consultation procedure.

1.2. Terms and conditions for the information given to the Works Council within the scope of the concentration-merger transaction

The French Labor Code does not require any particular formality pertaining to the information that is provided to the Works Council within the scope of the concentration-merger transaction.

However, article L.2323-4 paragraph 1 of the French Labor Code sets forth that:

“In order to allow it to formulate a well-founded opinion, the works council must be provided with precise, written information given by the employer, together with the employer’s well-founded answer to the works council’s observations”.

As regards the information to be provided to the Works Council, in the absence of any legal text in this respect, case law seems to indicate that the amount and precision of the information liable to be requested by the court may vary. Plus, certain lower-court judges may sometimes prove to be far more demanding than the Supreme Court itself on this point.

Generally, the information document that is given to the Works Council members includes:

- A description of the transaction, step by step where applicable;
- A timetable of the transaction;
- A description of the market(s) concerned by the transaction;
- A description of the procedure of notification of the concentration-merger transaction to the European Commission;
- A description of the employment-related consequences of the transaction (in general, the transaction in itself does not involve any employment-related consequences);
- Information of the Works Council regarding its right to appoint an expert.

1.3. Obligation to inform and consult the Works Council in application of article L.2323-6 of the French Labor Code

Moreover, the Works Council will need to be informed and consulted in application of article L.2323-6 of the French Labor Code.

French Supreme Court case law –to which the lower-court judges do not adhere– considers that when the transaction contemplated by the employer requires an

administrative authorization, in principle the Works Council must be consulted once this administration authorization is granted, but before implementation of the contemplated transaction¹.

2. New time frames pertaining to Works Council information and consultation procedure

Article L.2323-3 of the French Labor Code, amended by the Act of June 14, 2013, and the order in application thereof provide for new information and consultation time frames.

Thus, article L.2323-3 of the French Labor Code provides that:

“Within the scope of its consultative powers, defined in Articles L.2323-6 to L.2323-60, the works council can express opinions and make demands.

It must be provided with a sufficient time period to examine a given issue.

Unless otherwise set forth by special legislative provisions, an agreement between the employer and the works council, or, where applicable, the central works council, adopted by a majority of the elected permanent works council members, or failing an agreement, a decree from the Administrative Supreme Court, sets the time frames available to the works council to render its opinions within the scope of the consultations set forth in Articles L.2323-6 to L.2323-60, as well as in Articles L.2281-12, L.2323-72, L.3121-11. These time frames, which cannot be inferior to fifteen days, must enable the works council to effectively make use of its competence, based on the nature and importance of the issues submitted to it and, where applicable, based on the information and consultation of the health, safety and working conditions committee(s).

Upon expiry of these time frames or of the time frame mentioned in Article L.2323-4, last paragraph, the works council will be deemed to have been consulted and to have rendered a negative opinion.

The employer must provide a well-founded account of the action(s) taken following these opinions and demands”.

¹ In this respect, please refer to Supreme Court, Criminal Div., November 30, 1999, *Comité d'entreprise de la SA Vittel et autres*, RJS 05/00, no. 550.

Article R.2323-1 of the French Labor Code specifies that the time frame mentioned for the consultation of the Works Council starts to run with effect from the communication by the employer of the information set forth by the French Labor Code with regard to consultation procedures.

Failing an agreement with the Works Council, the latter is deemed to have been consulted and to have rendered a negative opinion within the one-month time frame. Where an expert has been appointed, the time frame is extended to two months, and to three months when the matter has been referred to the health, safety and working conditions committee (Art. R.2323-1 of the French Labor Code).

Therefore, in short, failing any published case law to date, it is always recommended:

1/ In view of the Works Council meeting, gathering all the information pertaining to the concentration-merger transaction and drafting an information memorandum as thorough as possible. In our view, it is only once the central Works Council members will have been provided with exhaustive, precise and written information that the time frame will start to run. The information memorandum –and its possible addenda– will have to be enclosed with the Works Council meeting summons and related agenda.

2/ During the first Works Council meeting, trying to find an agreement on Works Council information and consultation time frame. In our view, this attempt at an agreement will need to be mentioned in the Works Council meeting agenda and/or in the minutes following this first meeting. In any case, failing any administrative doctrine interpretation and any case law to this date regarding article L.2323-3 of the French Labor Code, we feel it would be wise to consider that this time frame cannot be inferior to fifteen days.

3/ Failing a recognized agreement with the Works Council, reminding the Works Council members (and where applicable, the expert and/or the health, safety and working conditions committee) that the information and consultation time frame will expire at the end of one, two or three-month period.

The clear advantage of the predefined time periods is that at the end of the period, provided all necessary information has been provided to the Works Council, a negative opinion will be deemed to have been rendered by the Works Council, thereby granting such council less nuisance power to hold up a transaction by delaying giving an opinion. This should hopefully give more certainty to employers in terms of a timetable for transactions.

The application of all the rules on consultation before a merger is compulsory: the power of the Works Councils to hinder the completion of a transaction, or project, has not disappeared. In fact, if the Works Council can show that it has not been provided with all the necessary information within the predefined time period, it may obtain in summary proceedings an order extending the period.

This procedure cannot be done overnight as it is necessary to convene the Works Council, provide it with relevant information and then give it time to reflect and ask any additional questions.

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