Employee entrepreneurship

Business owners considering a significant sale must now give staff the opportunity to make a competing offer. There are practical ways to deal with the new rules

In July 2014, France adopted the so-called Hamon Law, which includes a set of measures designed to encourage entrepreneurship among employees of small and mid-sized companies (*petites et moyennes entreprises* or PME). In August 2015, the so-called Macron Law modified some important aspects of these measures. However only in January 2016, upon the publication of two implementing decrees, did all of these provisions fully come into force.

In order for PMEs to comply with these new laws, an employer is now subject to sale disclosure obligations. They must inform their employees of the contemplated sale of a controlling stake in the company so that the employees can make an offer to purchase that interest. Additionally, an employer must inform its employees once every three years about the legal, financial and other conditions that generally apply to the acquisition of a company. The sale disclosure obligation is distinct from the information and consultation process that a company with a works council subject to French law must undertake prior to the sale of a business. In many instances, information will now have to be provided both at the employee and the works council level.

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Not all PMEs are subject to these obligations. The sale disclosure obligation applies to a PME with:

- fewer than 50 employees (meaning the entity is exempt from the requirement to establish a works council), or
- 50 to 249 employees (meaning it will have a works council), but only if the PME has either a turnover of €50 million ($56.3 million) or less, or total assets valued at no more than €43 million.

A company with 250 employees or more is not covered by the sale disclosure obligation. But a company that falls into either of the categories above is covered, even if it is part of a corporate group that, on a consolidated basis, is above these thresholds. The triennial information obligation must be provided to employees of a company with fewer than 250 employees.

Sale disclosure obligation

Transactions involving the sale of a controlling interest include:

- sales of an interest representing more than 50% of the ownership of a *société à responsabilité limitée* or SARL (a type of French limited liability company);
- sales of shares or other securities that provide access to the majority of the capital of a *société anonyme* or SA (a corporation) or of a *société par actions simplifiée* or SAS (simplified corporation); and
- the sale of a business as a going concern.

With respect to an SA and an SAS, even the sale of a very small percentage interest in the company will trigger the sale disclosure obligation, if it would give the buyer control of the PME in question.

Under the Hamon Law, the sale disclosure obligation used to be triggered by any contemplated transfer, meaning any sale, gift, exchange, contribution and so on. As a result, many intra-group restructurings were caught by the mechanism. Responding to the criticism about the broad range of transactions covered, the Macron Law narrowed substantially the obligation, so that today it concerns only sales, but intra-group sales still fall under the sale disclosure obligation.

The sale disclosure obligation does not apply to sales between certain direct family members, nor does it apply to sales in bankruptcy proceedings. In addition, an exception introduced by the Macron Law exempts a transaction from the sale disclosure obligation if the triennial information obligation has been provided within the 12 months preceding the sale. It should be noted that the language providing for this exemption, read literally, would allow someone to make the argument that the exemption is available only if information on the specific sale (or at least on a specific sale) was provided. In light of the other provisions of the law, a less literal interpretation is the one that makes most sense. The French National Association of Corporations has highlighted this interpretation issue, but for the time being there is no guidance by the French Government or courts that clarifies this point.

The chief executive officer is charged with providing the employees the sale information, regardless of whether he or she is the seller. If the seller is someone other than the chief executive, the seller must notify the executive, who in turn must inform 'without delay' each of the employees (by a hand-delivered notice, registered letter or other similar means). In the case of a company with a works council, the information must be given to all the employees no later than the time at which such information is provided to the works council pursuant to the consultation process.

The obligation is to inform the employees of the contemplated sale, but there is no obligation to provide them with any of the terms and conditions of such sale, or with the name of the potential buyer.

Once the employees of a small PME that does not have a works council are informed of a contemplated sale, they have two months to make an offer. No binding agreement for the sale may be signed until this two-month period expires, unless each and every employee confirms, prior to the end of the two-month period, that he or she is not interested in making an offer. Obviously, to preclude any dispute in the future, the confirmation from the employees should be in writing.

The law is silent as to whether the two-month waiting period is applicable to larger PMEs with a works council. As this

seems to be the result of an oversight by the legislature, it is reasonable to assume that a similar two-month period will be deemed to apply in this case also.

Under the Macron law, if a sale is completed in violation of the sale disclosure obligation, the party responsible (the seller and/or the company's chief executive) may be subject to a civil penalty of up to two percent of the value of the sale. Initially, under the Hamon Law, the penalty was to invalidate the transaction, but the French Constitutional Council struck down that portion of the law as unconstitutional, as it found that the sanction was "excessively detrimental to entrepreneurial freedom." The application of the sanction may only be requested by a prosecutor and only in the context of a civil case in which an employee is seeking damages for the employer's failure to provide the required information. This sanction would be in addition to any damages that may be awarded to the employees.

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Somewhat paradoxically, the mechanism begins and ends with the obligation to provide information, meaning that the law does not require that an offer made by an employee in this context be accepted, or even considered. The seller has no obligation to respond to the offer or to negotiate with the employee, and the decision not to pursue the offer made by an employee does not need to be justified in any manner. After the expiration of the required period, the seller is free to sell to a third party, even on less favourable terms.

In a company without a works council, if the contemplated sale does not take place within two years after the expiration of the two-month period, the obligation is triggered again. In a company with a works council, the obligation is renewed if the contemplated sale does not take place within two years after the date at which all employees were informed of the sale provided that if during this two-year period the works council is consulted about a potential sale, the running of the period is suspended between the date on which the consultation of the works council begins and the date on which they render their opinion or when the delay to render such opinion expires.

Triennial information obligation

The information to be provided every three years to encourage entrepreneurship among employees includes:

- the main milestones of a plan to acquire a company, highlighting the advantages and difficulties for the employees and seller;
- a list of agencies that can provide support, advice or training concerning the acquisition of a company by its employees;
- an overview of the legal aspects of the acquisition of a company by its employees, highlighting the advantages and difficulties for the employees and seller;
- an overview of mechanisms to provide financial assistance and support for the acquisition of a company by its employees;
- the key valuation criteria relevant for the company, as well as its capital structure and foreseeable evolution; and,
- if applicable, the context and conditions of a capital increase of the company that the employees can subscribe to.

The triennial information must be presented in writing or orally to the employees at a meeting called by the chief executive officer or someone to whom the chief executive has delegated this responsibility. The obligation to provide the information described in the first four bullet points may be satisfied by indicating to the employees links to internet sites that have this information; this is not the case for the information covered in the last two bullet points, since it is specific to the company in question.

The information about a potential capital increase open to the employees needs to be provided only if the company is considering such an increase. SAs and SASs in which employees do not hold at least three percent of the capital are already obliged under French law to have their shareholders vote every three years on a resolution approving a capital increase that is reserved for the employees. As a practical matter, this is seldom approved by the shareholders for various reasons, including that when a company is a subsidiary within a group, any mechanism to open the shareholding to the employees is implemented at the holding company level, and that in order to do so, specific instruments such as stock options and warrants are used.

It is possible for the timing of the triennial information obligation under the Hamon Law, as modified by the Macron Law, to coincide with the obligation to put to a shareholder vote a resolution to have a capital increase open to the employees. In this situation, the company will have to include the terms and conditions of the proposed capital increase in the information provided under the Hamon Law, even if management is certain that the resolution will be rejected. Since the detailed terms of the proposed capital increase are not usually provided to the employees, a company may want to organise its calendar of compliance with these two obligations so that they do not overlap.

The Hamon Law does not provide any specific penalty for non-compliance with the triennial information obligation, so the exposure would be a claim for damages from the employees.

A practical solution

If a company wants to give its stakeholders the flexibility of selling their interest at any time in a transaction with a very accelerated schedule, the law does not seem to preclude the company from providing to its employees the general information annually (most probably in writing), instead of every three years.

This would mean that, at any given time, the company and the seller would be able to rely on the exemption to the sale disclosure obligation if the triennial information was provided to them within the previous twelve months. Of course, doing this is mainly of interest for companies without a works council since those with one must inform and consult their works council in case of a contemplated sale, which will delay the sale for at least one month.

In all events, chief executives of PMEs covered by the new laws, and stakeholders contemplating a sale, must keep in mind these new requirements under French law.

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