COMPARATIVE LABOR LAW DOSSIER
SUCCESSION AND TRANSFER OF BUSINESSES IN FRANCE

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Introduction

French law has been inspired very early by the succession and transfer of businesses with the Act of 19 July 1928 which introduced what has become in 2008, Article L.1224-1 in the French Labor Code (previous article L. 122-12) according to which all employment contracts existing on the date of the transfer continue between the new employer and the company's staff. This article thus permits to deviate from the contract's relative effect principle resulting from Article 1165 of the French Civil Code.

It is noteworthy to mention that in French law, an employee cannot object to a transfer, and the only other realistic option is resignation. However, terminations directly before, during, or immediately after a transfer is highly scrutinized and more likely than not deemed null and void.

Next, article L.1224-2 of the French Labor Code (hereinafter Labor Code) dating back to a law of 28 June 1983, implements the principle laid down in the Council Directive 2001/23/CE concerning the transferor's obligations in a situation of transfer which are described next.

However, certain Directive's provisions (such as article 7 §6 concerning the information of the transferor's employees when there is no staff representatives in the company) are not transposed in French law and are not binding for the employee since the Directive is not precise and unconditional and cannot be invoked during a dispute since the French state did not take, within the time limits allowed by the directive the necessary measures of transposition. This is why the French judges interpret the provisions concerning the transfer of businesses considering the Directive 2001/23/CE.

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The complexity of the definition and the delimitation of the notion of "transfer of business" raises many practical questions and leads to massive case law.

1.b. What is the national law that implements the Council Directive 2001/23/EC?

The provisions of the Council Directive 2001/23/CE are implemented in French law by Articles L.1224-1 and L.1224-2 of the Labor Code.

The obligation under Article 7 paragraph 6 of Directive 2001/23/EC has not been implemented into French law so employment contracts are automatically transferred through the application of Article L. 1224-1 of the Labor Code, which does not provide for an obligation of information by the employer (Court of Cassation, Social Chamber, 17 December 2013).

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

Article L. 2323-19 of the Labor Code requires in any case of transfer both the transferor and the transferee to inform and consult their respective Works Council (if any) in respect of the proposed transfer. The Works Council must be provided with complete information (at least three days before its meeting) concerning the date of the transfer, the reasons for the transfer, the identity of the transferee, a description of its respective group activities and the possible consequences of the project on the employees. "Consultation" means that the works council members will be asked to give their opinion on the prospective project. The opinion issued by the Works Council is not binding on the transferor's decision to transfer the business.

2.1. The situation of transfer of businesses is found in several scenarios in French law

Indeed, according to Article L.1224-1 of the Labor Code:

> *"In the event of a change in the employer's legal situation, notably, as a result of inheritance, sale, or merger of the undertaking, a change in its legal form or its incorporation, all employment contracts in force on the date of this change in the employer's legal situation continue between the new employer and the undertaking's staff*".

This article provides a non-exhaustive list of the forms that a transfer of businesses may take, such as sale, inheritance, transformation of a business, or even sale of a company.

It should be noted that it does not apply in cases of creation of an economic interest grouping ("GIE"), of a European partnership ("GEIE") and the taking over of an undertaking in financial difficulties by its former employees.

According to Court of Cassation, employment contracts will automatically be transferred if the operation involves the transfer of an autonomous economic entity which retains its identity and where the activity is continued or renewed.

Courts look at the circumstances as a whole to determine whether there is a transfer of an economic entity. A transfer is deemed to have taken place when the transferee take possession of the property and rights comprising the entity, even if the transfer documents have not been signed at the date. A lease of the business ("*location-gérance"*) can constitute the transfer of business under Article L.1224-1 of the Labor Code. If the organization of the activity remains the same, a transfer can take place by means of a series of outsourcing or franchising deals.

An autonomous economic entity is defined as "*an organized grouping of individuals and tangible or intangible assets that enables the continued running of an economic activity with its own objective*" (Court of Cassation, Social Chamber, 7 July 7, Bull. civ. V, n°. 363).

Therefore, the following is necessary and sufficient in order for Article L.1224-1 of the Labor Code to apply:

- Existence of assets and presence of employees dedicated to the performance of an economic activity;
- Continuation of this activity by a new entity, without any modification made to its "identity".

It is well-established that these conditions are cumulative and as a consequence, taking over assets remains an element without which Article L.1224-1 of the Labor Code cannot apply:

> "*Merely having another company continue the same activity does not suffice for there to be a recognized transfer of an autonomous economic entity*" (Court of Cassation, Social Chamber, 26 June 2008, n° 07-41.294).

In situations where Article L.1224-1 of the Labor Code applies, the transfer of the employment contracts to the new employer concerns all the employees assigned to the transferred economic entity and who hold an employment contract in force with the transferor on the date of the transfer. The fact that the term of the contract is fixed or unfixed does not matter.

Article L.1224-1 of the Labor Code is considered to be part of public law. Therefore, the employment contract's transfer is obligatory both for the transferee and for the employees who cannot block the change of employer.

Contrary to the position taken by the European Court of Justice (ECJ, 24 January 2002, Case n°51/00, Temco), Court of Cassation considers that the employee does not have the right to object to the transfer. In the past, it considered that the refusal by the employee of a transfer under L.1224-1 had to be treated has a resignation (Court of Cassation, 5 November 1987, Bull. Civ. V, n° 616).

The only exception was where the transfer involved an essential change to the employment contract, in which case the employee could legitimately refuse the amendment of the employment contract imposed by the transferee and indirectly refuse the transfer of his/her employment contract.

Since then, the French *Cour de Cassation* has however changed its position and no longer treats such a refusal as a resignation. The employee assigned to a transferred undertaking has only two options: either resign or keep working for the transferee. The employee's refusal to work for the transferee allows the latter to dismiss the employee for serious misconduct (Court of Cassation, Social Chamber, 25 October 2000, Bull. Civ. V, n° 307).

2.2. How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement?

When the conditions of application of article L.1221-1 of Labor code are not fulfilled, the parties can voluntarily provide the application of this article in a collective bargaining agreement.

2.3 How does French law regulates the situation of transfer of business derived from a transfer of a group of workers?

As already discussed above, the application of Article L.1224-1 of the Labor Code requires that the operation involves the transfer of an "autonomous economic entity" and that it retains its identity and where the activity is continued or renewed.

The autonomous economic entity is defined by French case law as "*an organized group of people and assets dedicated to the running of a business which has its own objective*". The existence of a client base and the means of carrying out a business (premises, equipment and inventory) are the main factors in considering whether the business concerned forms an economic entity. However, case law does not necessarily require those two criteria to be satisfied. In some cases, a transfer of clients without the means of carrying out a business may be regarded as the transfer of an economic entity.

The entity is defined as an organized sets of people and tangible or intangible elements permitting the exercise of an economic activity which pursues a specific objective (Court of Cassation, Social Chamber, 7 July 1998).

The courts in France have, over the years, extended the scope of article L. 1224-1. Careful review of the facts of each matter will be required to assess whether a transfer has taken place and who has been transferred. The fact that the transferee has taken over some of the employees does not automatically trigger the application of article L. 1224-1, but is one of the criteria for its application

Application of the article L.1224-1 will depend on the transfer of operating components used for the execution of the activity: it can be tangible elements such as premises (Court of cassation, Social Chamber, 25 October 2006, RJS 2007, n°14) or intangible such as the brand or the customer (Court of Cassation, Social Chamber 14 May2003, RJS 2003, n°985).

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

In French law, the principle established in various steps is that a dismissal can't be motivated by a transfer of businesses.

Court of Cassation held for the first time in a case dated 20 January 1998 that a dismissal which its sole cause is the transfer of the businesses is considered is to be without any effect:

> "*Mais attendu que si comme le soutient exactement le pourvoi, la cession du fonds de commerce exploité par la société Pompes Maroger a entraîné le transfert d'une entité économique autonome, dont l'activité a été poursuivie par la société Vallat-Irrig-Elec qui était tenue, en application de l'article L. 122-12 du Code du travail de reprendre les contrats de travail des salariés, il en résulte seulement que les licenciements prononcés par le mandataire liquidateur étaient sans effet*". (Court of Cassation, Social Chamber, n° 95-40.812)

In a case dated 20 March 2002, Court of Cassation specified that the employee had an option right. In fact he can request the transferee the continuation of its contract illegally broken up or request author of the illegal dismissal the compensation for the prejudice resulting therefore:

> "*Le salarié peut, à son choix, demander au repreneur la poursuite du contrat de travail illégalement rompu ou demander à l'auteur du licenciement illégal la réparation du préjudice en résultant*". (Court of Cassation, Social Chamber, 20 March 2002, n° 00-41651).

However, if the employee is informed by the transferee before the expiry of the notification of its intention to continue the contract without any modification, the change of employer is imposed on it:

> "*Mais attendu que le transfert d'une entité économique autonome entraîne de plein droit le maintien, avec le nouvel employeur, des contrats de travail qui y sont attachés et prive d'effet les licenciements prononcés par le cédant pour motif économique ; que si le salarié licencié à l'occasion d'un tel transfert a le choix de demander au repreneur la poursuite du contrat de travail rompu ou de demander à l'auteur du licenciement la réparation du préjudice en résultant, le changement d'employeur s'impose toutefois à lui lorsque le cessionnaire l'informe, avant l'expiration du préavis, de son intention de poursuivre, sans modification, le contrat de travail*". (Court of Cassation, Social Chamber, 11 March 2003, n°01-41842).

On the contrary, the employee keeps its option right if the transferee informs him/her of its intention to continue the contract only after the expiry of its notice period following its dismissal:

> "*Mais attendu que le changement d'employeur consécutif à la cession d'une entité économique autonome ne s'impose au salarié antérieurement licencié pour motif économique qu'à la condition que le cessionnaire l'informe, avant l'expiration du*

> *préavis, de son intention de poursuivre, sans modification, l'exécution du contrat de travail*". (Court of Cassation, Social Chamber, 25 October 2007, n° 06-42437).

As a conclusion, the employee dismissed in violation of article L.1224-1 of Labor Code has several possibilities.

It should be noted that the burden of reparation for the damage suffered is on the transferor or the transferee according to their shares of responsibility in the loss of job, the first by taking the initiative of a dismissal and the second by preventing the continuation of the employment contract.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

The employment relationships which existed at the time of the business are transferred from the transferor to the transferee by operation of law (article L. 1224-1 of the French Labor Code).

The transferor's rights and powers under or in connection with the employment contracts are also transferred to the new employer. For example, the "disciplinary power" of the former employer is transferred to the new employer, who can dismiss a transferred employee for fault occurring prior to the transfer.

The employees to be transferred are those who worked in the transferred part of the business on the date of the business transfer, whether on a full time basis or otherwise. Indeed, employees may be transferred when only a part of their work is relevant to the business transferred. In the event of transfer of part of a business, the principle of continuation of employment contracts applies only to the employees working in the part of the business transferred. An employee partially deployed in the transferred part of the business will become an employee of the new employer for the purpose of that specific activity.

Above all, two situations have to be distinguished depending on the fact that the main activity after the transfer of businesses remains the same or not.

If the main activity remains the same after the transfer (for example in the situation of a merger where the transferee is engaged in the same activity as the transferor), the collective bargaining agreement applicable will not change since it applies to all the companies which are in sector.

The situation is different when there is a change of the main activity for example in the hypothesis of a merger where the transferred activity becomes a small part of the activity of the transferee. In fact in this case, the transferee will be engaged in a different sector and the collective bargaining agreement applicable is different.

However in this context, Article L.2261-14 of the Labor Code which applies to transfer of undertakings, provides that a collective agreement will continue to apply after a merger or a sale for example, until a substitute agreement is concluded, or in the absence of one, for a period of one year from the end of the notice period that is to say three months. If no substitute agreement has been concluded after 15 months, employees will keep their acquired individual rights ("*avantage individual acquis*") under the agreement.

According to the Article 3 of the Council Directive 2001/23/EC:

> "*Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year*".

It follows from the foregoing that French regulation is in compliance with the Council Directive.

If a new agreement is concluded between the unions and the transferee before the end of the period of 15 months, the new agreement will replace the previous collective agreement. During this period, transferred employees will be covered by the collective agreements of both the transferor and the transferee and will benefit from the most favorable rights and advantages provided by both. Any comparisons must be between similar types of advantages.

However, if during this period no agreement is concluded the employees under the previous collective agreement keep their acquired individual rights. The amendment of the agreement's terms is possible only with the employee agreement and will follow the procedures which apply to changes to employment contracts.

Court of Cassation had the opportunity to defined the notion of acquired individual right as one which, at the date when the collective agreement ceased to apply, assured the

employee either remuneration or a right which it benefited from personally and which corresponded to a right which was already in existence and not only merely potential:

> "*L'avantage qui, au jour de la dénonciation de la convention ou de l'accord collectif, procurait au salarié une rémunération ou un droit dont il bénéficiait à titre personnel et qui correspondait à un droit déjà ouvert et non simplement éventuel*". (Court of Cassation, Social Chamber, 13 March 2001, n° 99-45651).

Employment contracts are automatically transferred where the Employee Transfer Rules apply, without any modification whatsoever. The terms and conditions of the transferred employees should therefore not be modified after the transfer.

The courts do sometimes accept that the transferred employment contract can be modified following the transfer, but on the strict conditions that both:

- The employee expressly agrees to the modification (that is, they accept the modification in writing, while entering into an amendment to their initial employment contract).

- The new employer does not actually commit fraud to the Employee Transfer Rules. Courts notably rule for fraud where the new employer has proposed a new employment contract to the transferred employees on the day of the transfer (Court of Cassation, Social chamber, 9 March 2004, No. 02-42.140), or when the proposed modification actually meant that the employee was downgraded (Court of Cassation, Social chamber, 14 January 2004, No. 01-45.126).

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

First, the modification of workers' labor conditions established in the employment contract by the transferee is prohibited by French law. In fact, changes in contract of employment require the employee's consent.

Two situations can be distinguished: the change of contract's essential elements and that of employee's working conditions. Whereas changing working conditions does not require the employee's consent, if the employer wants to change an essential element of the contract, he will need the employee's consent.

Article L.1222-6 of Labor Code provides:

> "*Lorsque l'employeur envisage la modification d'un élément essentiel du contrat de travail pour l'un des motifs économiques énoncés à l'article L. 1233-3, il en fait la proposition au salarié par lettre recommandée avec avis de réception*".

Next, benefits that have become mandatory as a result of a common practice within the transferor, collective atypical agreements (such as agreements not signed with trade unions, but rather with the Work Council) and unilateral commitments of the employer are transferred to the transferee.

According to French case law (Court of Cassation, Social Chamber, 23 September 1992, Dr. soc., 1992, p. 926) a "*benefit that has become mandatory as a result of a common practice is binding on the new employer*".

However, the new employer may terminate such rules after informing the employees' representatives and complying with a sufficient prior notice of termination to be given to each employee concerned.

With regard to mandatory and optional profit-sharing plans, they are immediately terminated upon the transfer toward the transferred employees. If not profit sharing plan is in force within the transferee, the latter must enter into negotiations within six months from the date of the transfer (for an "*accord d'intéressement*") and six months from the date of the end of the financial year during which the transfer took place (for an "*accord de participation*"), with a view to setting up a profit sharing plan.

There is no obligation to reach agreement but negotiations must be concluded in good faith.

Concerning saving plans, it is possible to provide that they will not be transferred to the transferee. In the absence of such a provisions, depending on how such scheme was set up (by company collective agreement of unilateral commitment of the employer), the general rules described above should apply.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

As French case-law currently stands, pension commitments that employees affected by the transfer had with the transferor are not transferred to the transferee. For example, concerning the retirement benefit, it has been judged that it does not constitute an acquired individual right (Court of Cassation, Social Chamber, 20 January 1971, n° 70-40.181, Bull. Civ. V, n° 36).

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Yes. In accordance with article 3.1 of the Council Directive, article L.1224-2 of the Labor Code provides that the transferee will be liable for all obligations for which the transferor was responsible at the date of the transfer as long as the change of employer does not take place in the context of insolvency proceedings and that any agreement between the transferor and transferee exists.

As a consequence, employees can make claims for amounts due before the transfer, but can also choose to make claims against the transferor.

According to Article L.1224-2 of the Labor Code, the transferor must reimburse the transferee with any amounts paid by the transferee for debts arising before the transfer, unless the costs were taken into account in the transfer agreement.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

In the context of a transfer, the mandates of the transferor's personnel representatives are maintained if the company preserves its autonomy or becomes an establishment that is distinct from the transferee.

Court of Cassation interprets Article L.1224-1 of the Labor Code in a rather broad way. In fact, it has been judged that the transferred company only needs to withhold its autonomy in fact, even though it has lost its formal or legal autonomy (Court of Cassation, Social Chamber, 28 June 1995, RJS 8-9/95, n° 904). In other words, it would suffice that the transferred economic entity has maintained its identity and that its business activities has been continued after the transfer.

As a consequence, since by definition Article L.1224-1 of the Labor Code applies to situations where the transferred economic entity has maintained its identity and its business activities have been continued after the transfer, in accordance with the interpretation retained by the Social Chamber, every protected employee whose employment contract is transferred pursuant to Article L.1224-1 of the Labor Code maintains its office within the transferee.

This interpretation has been criticized by several authors (Jean Savatier, Dr. Soc., 2001, at pages 104 to 326) and in particular by the Council of State (Council of State, 8 January 1997, RJS 2/97, n° 171) which ruled that maintaining the term of

office can only be guaranteed if the transferred entity withholds its formal or legal autonomy. Otherwise, the term of office expires on the date said change comes into force (Council of state, 8 January 1997, RJS 2/97, n° 171).

In practice, the term of office can be reduced or extended to take account of the usual date of elections in the transferee, through a collective agreement between the new employer and the representative trade union organizations existing in the employer or failing this, the union delegates or members of the Works Council concerned.

If the employer does not preserve its autonomy or does not become an establishment that is distinct from the transferee, the mandates of the personnel representatives of the employer come to an end on the date of the transfer. In this case, the former personnel representatives continue to benefit from their protected status: union delegates and members of the Works Council for a period of six months and union representatives for twelve months.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

A distinction must be made between two situations: the presence or not of personnel representative in the company.

When there is not personnel representative in the company, the employer does not have the obligation to inform the employee.

Article 7 §6 of the Council Directive 2001/23/EC provides that when there are no staff representatives in the company, the employees concerned by the transfer must be beforehand informed about date fixed or proposed for the transfer of the motive for the transfer, the legal, economic and social consequences of the transfer.

However, this article has not been transposed yet into French law and does not impose any obligation to the employer to apply it. Consequently, employees cannot ask for repair of damage bound to the absence of information.

When staff representatives in the company exist, the French Labor Code provides the information and consultation obligations of the transferor and transferee, in compliance with article 7 of the Directive 2001/23/CE.

In fact, pursuant to Article L.2323-19 of the Labor Code:

> "*The works council must be informed and consulted on any changes in the economic or legal organization of the company, especially in the event of a merger, sale, or major changes in the production structure of the company, as well as of the takeover or sale of subsidiaries*".

Pursuant to Article L.2323-2 of the Labor Code:

> "*The consultation process must be completed prior to any binding decision being taken by the head of the company*".

Changes in the economic organization of the company means notably the creation, transformation or shutdown of a division, department, office or establishment; it can also mean a substantial change of the internal organization of different divisions or departments in the company; and it can also include contemplated subcontracting or the constitution of an economic interest group (DRT Circ. 12, 30 November, 1984 n°1-4: BOMT n° 84-8 bis).

The Labor Code does not stipulate the number of meetings that must be held, nor does it provide a specific schedule to be followed. It only lays down the principle according to which the Works Council must be allowed a sufficient time period to examine both the documents it was given and the replies to its questions, in order to render an informed opinion.

The Works Council must be provided with sufficiently detailed written information to enable it to render an informed opinion on the plan and to be validly consulted.

If the employer has complied with its information requirements, the Works Council must, in theory, render its opinion in due form.

It is only once this opinion has been obtained that an agreement on the sale of the company's shares can be executed and subsequently implemented.

In this respect, it is important to note that the Works Council does not have a right of veto on the operation: the company may proceed with the sale in spite of a negative opinion given by the Works Council.

Failure to consult the Works Council prior to making a decision to transfer is a criminal offence which carries penalties of up to one year's imprisonment and /or a fine of up to

3.750€. The Works Council may also bring an action before the Court in summary proceedings in order to suspend the transfer until the consultation procedure has been properly carried out.

Concerning the information of employees in particular, Court of Cassation has judged that the provisions of Article L.1224-1 of the Labor Code do not oblige the transferee to individually inform the employee concerned by the modification of the shareholding or the sale of the company where he was employed (Court of Cassation, 14 December 1999, n°97-43.011).

However, Law n° 2014-856 dated 31 July 2014 related to the social and solidarity economy (JO 1 August 2014) has introduced a new obligation for small and medium-sized companies (notably companies with fewer than 50 employees) to provide information to its own employees in case of a contemplated sale of shares or of an ongoing business. The law aims at encouraging the acquisition of a business by the employees, prior to selling the business to a third party (see below).

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

Yes. By contrast with article 5.1 of Council Directive 2001/23/EC, French law allows the transfer of businesses when the company is in bankruptcy proceedings. However, in this case, the transfer of businesses is subject to a specific regime.

In fact, according to article L.1224-2 of Labor Code, in a situation of safeguard, receivership or liquidation proceeding, the new employer is not obliged to the obligations that had the old employer to the employees whose employment contract continues:

> "*Le nouvel employeur est tenu, à l'égard des salariés dont les contrats de travail subsistent, aux obligations qui incombaient à l'ancien employeur à la date de la modification, sauf dans les cas suivants:*
> *1° Procédure de sauvegarde, de redressement ou de liquidation judiciaire ;*
> *2° Substitution d'employeurs intervenue sans qu'il y ait eu de convention entre ceux-ci.*
> *Le premier employeur rembourse les sommes acquittées par le nouvel employeur, dues à la date de la modification, sauf s'il a été tenu compte de la charge résultant de ces obligations dans la convention intervenue entre eux*".

As a result, in a context of a bankruptcy preceding the new employer is only obliged to pay the debts incurred after the transfer.

11. Other relevant issues regarding transfer of businesses

In the French legal system, there is not a specialty in the regulation of transfer of businesses for senior managers.

The new provisions concerning the sale of business and the subsequent employee's information should be noted:

As mentioned above, Law n° 2014-856 has introduced an obligation for small and medium-sized companies to provide information to its employees in case of a contemplated sale of shares or of an ongoing business.

Employees must be provided with “information to enable them to make an offer”. An official Memorandum, published on 30 October 2014, states that the information must simply include a statement of the seller’s wish to sell and a statement indicating that the employees may make an offer. This Memorandum, whilst is an official explanation of the Law, is not however binding in Court.

Employees are obliged to keep the information confidential, but can be assisted by a representative of the Regional Chamber of Commerce and Industry, the Regional Artisan Chamber of Commerce and certain individuals designated by the employees according to criteria to be defined by decree.

The information can be provided to the employees by any means (such as email, registered letter or even formal notice on the Target notice board) provided it is possible to prove receipt of such information by the employees (e.g. read receipts for emails, signed delivery for letters, a signature confirming that they have read the notice displayed, etc.).

The information must be provided to the employees at least 2 months prior to the closing of the proposed transaction. In the case of companies with fewer than 50 employees, if all of the employees respond before expiry of the 2-month period, to confirm that they are not interested in making an offer, the target is not obliged to wait until the end of the 2-month period to complete the transaction.

The obligation to provide information does not constitute a preemptive right for the employees, since the seller should remain free to accept or refuse the offer(s) made by

the employees. In the absence of any published case law on this matter, we assume that the acceptance or refusal may be done on a discretionary basis.

Finally, non-compliance with this obligation can result in the cancellation of the sale. Any employee can bring a claim for cancellation before the Commercial Court within two months from the sale's publication in the event of the sale of an ongoing business, or within two months from the date of the employees' information regarding the sale in the event of the sale of shares.

Moreover, Decree n° 2014-1254 of 28 October 2014 related to employees information in the case of transfer of their company (JO 29 October) has been taken for the application of Law n° 2014-856.

It specifies concepts mentioned in the law and completes the regulatory part of the Commercial Code, specifying information procedures for employees concerning the owner's decision to sale the company. Employee who is interested in buying the company must inform the business leader that he/she will be assisted by a person of his/her choice. This person will be under obligation of confidentiality. The Decree also specifies that a sale happening at the end of an exclusive negotiation is not subject to prior information requirements of employees if the exclusive negotiation contract was concluded before 1 November 2014.

It is also worth noting the particular context of a partial transfer of activity in French regulation:

At first, Court of Cassation judged in the context of a partial transfer of activity to which Article L.1224-1 applies, that the only employees transferred to the transferee were those assigned exclusively to the branch of activity being transferred.

Then, it abandoned this requirement and ruled that the employment contract could be split when employees carried out activity partially within the branch of activity transferred. When an employee works for 40 percent of its time for the transferred activity the contract of employment is partially transferred (Court of Cassation, Social Chamber, 2 May 2001, n° 99-41.960).