Domestic and European Works Council Consultation Rules in French Business Transfers (Updated)

French law requires employers to share information and consult with the works council (comité d'entreprise) in the face of mergers or acquisitions. The works council in a French company is made up of elected employees, union representatives and a representative of management. From its inception in 1945, it was conceived as a medium for cooperative dialogue between employers and employees.¹

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.² 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.

Furthermore, pursuant to EC Community Directive of September 22, 1994, as recast by Directive 2009/38/EC of the European Parliament and of the Council of May 6, 2009 on the establishment of a European Works Council or a procedure in Community-scale entities and Community-scale groups of entities for the purposes of informing and consulting employees (the “Directive”),³ European works councils may also need to be informed and consulted in certain business combination transactions.⁴

As implemented under French law, the Directive is designed 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,

¹ French companies employing a minimum of fifty employees during twelve months (whether consecutive or not) over a three-year period (calculated on a monthly basis) are required to organize the election of a works council. A company that operates at more than one site is required to set up one or more “establishment committees” (comité d’établissement) for each location employing more than 50 employees, as well as a central works council (comité central d’entreprise) to oversee the operations of the entire company.
³ As implemented into French law by Ordinance No. 2011-1328 of October 20, 2011.
⁴ Directive CE 94/95/CE dated September 22, 1994
on the basis of information provided about the proposed transactions to which the consultation is related, that may then be taken into account by the company or the corporate group, without prejudice to the responsibilities of management. The arrangements for informing and consulting employees must be defined and implemented in such a way as to ensure their effectiveness and to enable the entity or group of entities to make decisions effectively. The consultation processes of European and national works councils have different objectives, and the two processes are intended to be cumulative. We also discuss in this memorandum the coordination of information and consultation procedures of domestic and European works councils.

General Scope of Obligation to Consult with Works councils with respect to business combinations

Companies on both ends of acquisition transactions are required to inform and consult with their works councils. Under Article L. 2323-19 of the 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.

Furthermore, where there are “exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies,” the European works council (or, if applicable, the select committee), has the right to request a meeting with the employer so as to be informed and consulted regarding the contemplated transaction. It has the right to meet, at its request, the central management, or any other more appropriate level of management within the EU-wide company or group of companies having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees’ interests.

The nature of the information and consultation duty differs as between the acquirer, the seller, and the target company.

Consultation of the acquiror’s works council

If the acquiror has a works council in France, it must be informed and consulted prior to acquiring a stake in another entity, whether or not such entity already exists or is in the process of being formed. Although the acquisition of a stake is separately defined by Article L. 233-2 of the French Commercial Code as the acquisition of 10% to 50% of the share capital of another entity, the French Supreme Court has held that in the absence of a specific cross-reference to the Commercial Code in Article L. 2323-19 of the Labor Code, the acquisition of less than 10% of the equity of a target company triggers the obligation to inform and consult with the works council.

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5 Article L 2341-6 of the Labor Code, implementing Article 2(1)(g) of the Directive.
7 An information and consultation procedure of employees may be set up by agreement in Community-scale entities or Community-scale group of entities (as defined below) instead of establishing a European works council.
8 Article L. 432-1 §3 of the former Labor Code.
9 Pursuant to Article L. 233-1 of the French Commercial Code, an entity is deemed to be a subsidiary of another if it holds more than 50% of its share capital.
11 A select committee comprising five officers must be formed.
14 Article L. 432-1 §3 of the former Labor Code.
Consultation of the seller’s works council

The seller’s works council must also be informed and consulted if it sells a subsidiary in which it holds more than 50% of the equity. According to case law, the seller’s works council must be informed and consulted no matter how insignificant the subsidiary may be to the seller.\(^{16}\)

Consultation of the target’s works council

- In case of a direct change of control

By statute, the target company must inform its works council upon becoming aware that another entity is acquiring a stake in its share capital.\(^{17}\) In 1978, in a landmark ruling, the French Supreme Court extended the scope of this rule by holding that where the “negotiated sale of part of the target’s share capital is used as a means of placing the target under the control of another entity,” the target is required not only to inform its works council but also to consult with it prior to proceeding with the transaction (Haulotte ruling).\(^{18}\) The Court reasoned that it is foreseeable that such a change of control would necessarily affect work conditions for the target’s employees.

In assessing whether a direct change of control has occurred, certain French doctrinal authors recommend assessing control in accordance with Article L. 233-3 of the French Commercial Code, which defines “control” broadly as: \(^{19}\)

- the ownership of a majority of voting rights at shareholders meetings (de jure control test);\(^ {20}\)
- a contractual right to direct by itself a majority of voting rights pursuant to an agreement entered into with other shareholders or members of the company in question (contractual control test);
- ownership of sufficient voting rights to exercise de facto control over the outcome of shareholder meetings (de facto control test); or
- the right to appoint or remove a majority of the members of the administrative, management or supervisory board (e.g., the board of directors) (board control test).

Control is presumed whenever an entity owns directly or indirectly more than 40% of voting rights and no other person holds directly or indirectly a greater percentage of voting rights.\(^{21}\) Unlike the first four control tests, which constitute irrebuttable presumptions of control, the 40% presumption may be rebutted by contrary evidence.\(^{22}\)

The de facto control test widens the scope of the de jure control test by encompassing circumstances in which an issuer’s capital is so spread out among multiple shareholders or the attendance rate at shareholders meetings is so low that an investor is able to exercise de facto control with a percentage of voting rights that is less than 50%. In determining de facto control, the AMF examines, inter alia, the existence of “directors in common, cash management, services, offices or registered offices in common, common or complementary corporate objects.”\(^ {23}\)

- In case of an indirect change of control

The Supreme Court in Haulotte ruled solely upon a direct change of control (i.e., transaction where the shares being acquired are those of the French target itself). Most of the case law interpreting Article L. 233-3 of the Labor Code (Article L. 432-1 §3 of the former Labor Code).

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19 Implementing Art. 2(l) of the Transparency Directive.
20 Under the de jure control test, holding only 50% of the shares of a company does not suffice to establish control, so long as none of the other criteria below apply.
21 French Commercial Code, Art. L.233-3, II.
2323-6 of the Labor Code\textsuperscript{24} involves such direct changes of control. There are, to our knowledge, very few published cases where a French court specifically reviewed the question of a French subsidiary's obligation to inform and consult with its works council in connection with an indirect change of control. In all cases reviewed, the works council's causes of action were dismissed.

In the first such ruling (\textit{Cino del Duca}), the works councils argued that consultation should be required in the case of an indirect change of control on the basis of the overarching obligation\textsuperscript{25} to inform and consult with the works council on all issues involving the organization, management and overall operations of the company and, in particular, on all measures likely to affect the number of employees, working hours, or working conditions.

The French Supreme Court rejected this argument, holding that where the indirect change of control (in this case, the sale of a majority of the equity of the parent company) (i) does not bring about a change in management, capital structure or business of the subsidiary; (ii) does not result in nor is aimed at transferring the control of the subsidiary to a third party; and (iii) does not constitute a "sale of control," the employer of the subsidiary has no obligation to consult with its works council.\textsuperscript{26}

The second ruling (\textit{Trigano} case) involved a claim by a subsidiary's works council that it should have been consulted prior to the privatization of the parent company. The Court dismissed the works council's argument on the ground that "only the works council of the company being acquired should have been consulted, not the works council of the subsidiary." The Court cited \textit{Cino del Duca} approvingly before concluding that "where the parent company is being sold, the works council of the subsidiary does not have to be consulted if its status with respect to its parent company is unaffected. In other words, there is no change of employer for the subsidiary, which is the essence of the obligation to consult under Article L. 2323-6 of the Labor Code.\textsuperscript{27}

The Bourges Court of Appeals has held that "as a matter of constant case law, when applying Article L. 2323-6 of the Labor Code,\textsuperscript{28} it is only the works council of the entity being acquired that should be informed and consulted and not the works councils of any of its subsidiaries.\textsuperscript{29}

Following the French Supreme Court's ruling in \textit{Cino del Duca} and progeny, international groups must carefully analyze the facts and circumstances surrounding the change of control to determine whether the acquisition of a foreign parent company may lead to changes in management, capital structure or the business of its French subsidiaries, or if it may otherwise affect its employees.

Even though a transaction may have been negotiated entirely outside of France with little or no involvement by management of the French subsidiary, lower courts have applied the French Labor Code as a matter of public policy whenever the subsidiary is registered in France or operates a business in France. As a Paris lower court ruled, "it cannot be seriously argued that if the plaintiff is the works council of an entity registered in France (...) having its business operations in France, that it is not subject to the requirements of the French Labor Code (...), as the Labor Code's provisions must be applied as a matter of public policy and cannot be disregarded because of international market practices."\textsuperscript{30}

As an illustration of the foregoing, a lower court has held that where a German parent of a French subsidiary entered into a joint venture with a U.S. company, the works council of the French subsidiary should have been informed and consulted, given the potential ensuing reorganization of the corporate group.\textsuperscript{31}

\begin{footnotesize}
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\item Article L. 432-1 of the former Labor Code.
\item Article L. 2323-6 of the Labor Code (Article L. 432-1 §1 of the former Labor Code).
\item Cass. Crim. 22 March 1983, affaire Cino Del Duca.
\item Article L. 432-1 of the former Labor Code.
\item CA Bourges, 16 décembre 2004, n° 2004/561 PP/AB.
\item TGI Paris, 9 April 2001, Marks & Spencer.
\item TGI Lisieux, January 6, 1994, référé, Knorr Dahl.
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press that it had decided to shut down its stores in France, the Paris lower court held that the works council of the French subsidiary should have been informed and consulted given the effect on employment in France, even though management of the French subsidiary had not been involved in the decision-making process and had not been informed of the decision until the last minute.\footnote{32 TGI Paris, 9 April 2001, Marks & Spencer.}

Specific Procedure in the case of Tender Offers

With respect to the acquiror’s works council

Until 2005, the Labor Code required a bidding company intending to make a tender offer to inform and consult with its works councils prior to launching a tender offer. In light of insider trading risks, French law specifically excludes public tender offers from the scope of Article L. 2323-6 of the Labor Code.\footnote{33 Article L. 432-1 ter of the former Labor Code.} Instead a separate rule requires the bidder to convene its works council for a meeting within two days following publication of a notice of filing of the preliminary tender offer prospectus (\textit{avis de dépôt du projet d’offre}) with the French Financial Market Authority (the “AMF”) while exempting it from the obligation to inform or consult with its works council prior to filing a tender offer. At such meeting, the bidder must provide its works council with written information regarding the contents of the tender offer and consequences for employees.\footnote{34 Article L. 2323-25 of the Labor Code (Article L. 432-1 ter of the former Labor Code), as interpreted by Ministerial Response given to François-Noël Buffet, JO Sénat Q, November 29, 2007, p. 2190.}

With respect to the target’s works council

There is also a specific procedure for the target company, which applies only in the case of tender offers. Immediately after publication of the notice of filing of the preliminary tender offer prospectus (\textit{avis de dépôt du projet d’offre}) with the AMF, the president of the target company must convene the works council for a meeting.\footnote{35 Ministerial Response given to François-Noël Buffet, JO Sénat Q, November 29, 2007, p. 2190.} The works council may summon the bidder to the meeting and may declare the offer friendly or hostile. Within three days of the filing of the final tender offer prospectus approved by the AMF, the bidder must submit the prospectus to the target’s works council.\footnote{36 Articles L. 2323-21 and 22 of the Labor Code (Article L. 432-1 §4 of the former Labor Code), as interpreted by Ministerial Response given to François-Noël Buffet, JO Sénat Q, November 29, 2007, p. 2190.}

The target company must then convene a second meeting for the purpose of reviewing the prospectus within fifteen days after publication of the prospectus final tender offer prospectus approved by the AMF, or if a shareholders’ meeting of the target is convened to resolve upon potential takeover defenses, prior to that meeting.\footnote{37 Article L. 2323-23 of the Labor Code (Article L. 432-1 §6 of the former Labor Code), as interpreted by Ministerial Response given to François-Noël Buffet, JO Sénat Q, November 29, 2007, p. 2190.} The works council may summon the bidder to this meeting to outline its financial and industrial policies, its strategic plans for the target, and the effect the bidder expects the offer to have on the target’s general interests, employment, and the location of its business and headquarters.\footnote{38 Article L. 2323-23 of the Labor Code (Article L. 432-1 §6 of the former Labor Code).} If the works council decides to summon the bidder to the meeting, the bidder must be given at least 3 days prior notice of the meeting.

If the bidder is summoned to a meeting of the works council but fails to appear, it may be subject to a harsh penalty: the loss of its current or future voting rights in the target company. Voting rights are restored the day after the bidder has been heard by the works council of the target company or if the works council declines to summon the bidder to a new meeting within 15 days following a meeting at which the bidder fails to appear.\footnote{39 Article L. 2323-24 of the Labor Code (Article L. 432-1 §7-§8 of the former Labor Code).}
As in the case of Article L. 2323-19 of the Labor Code, as applied to private transactions, the procedure devised to deal specifically with public tender offers is silent as to whether French subsidiaries should also be informed and consulted upon their parent company becoming the target of a tender offer.

To our knowledge, there are no published cases dealing with such an indirect change of control. According to Article L. 2332-2 of the Labor Code, whenever the central works council of a takeover target has been informed and consulted, it is not necessary to inform and consult separately with the works council of each subsidiary of the group. However, this rule applies only where the target company is itself a French entity that has set up a central works council.

In the case of a tender offer for the shares of a non-French company that has one or more subsidiaries in France, the reasoning of the Cino del Duca line of cases discussed above would be relevant. Accordingly, it should be examined whether a tender offer for the shares of the foreign parent company may lead to changes in management, capital structure or business of its French subsidiaries or may otherwise affect its employees.

**Specific Works Council Meetings in the case of Antitrust Filings**

French law has also introduced a separate works council information procedure applying to mergers and acquisitions that create a “concentration” subject to review by French or European Union antitrust authorities. A concentration is defined as the merger of two or more businesses, the acquisition of control of an enterprise, whether by stock or asset purchase, or the creation of a joint venture. Article L. 430-2 of the Commercial Code provides that parties entering into an agreement that creates a concentration are required to notify French antitrust authorities if their joint annual turnover exceeds €150 million worldwide, including more than €50 million in France.

Under Article L. 2323-20 of the Labor Code, companies involved in the concentration must convene a meeting of their respective works councils within three days of the publication of the concentration notice by French or EU antitrust authorities. At the meeting, works councils may request the assistance of an expert, in which case management must provide the expert with access to “the documents of all the companies concerned by the concentration,” and must convene a second meeting in order that the works council may hear the expert's analysis. This special procedure does not apply to tender offers, in which case Article L. 2323-21 overrides the provisions of Article L. 2323-20.

On October 26, 2010, the French Supreme Court materially expanded the scope of this works council information procedure by extending it to the works councils of direct or indirect subsidiaries of the parties involved in the concentration. In the case at hand, Schering-Plough Corporation filed in August 2007, a concentration filing with the European Commission pursuant to Article 4 of Council Regulation (EC) No. 139/2004 to acquire sole control of Organon BioSciences N.V. from Akzo Nobel N.V. by way of purchase of shares. Shortly thereafter, the central works council of two French entities held indirectly by Organon BioSciences N.V. requested the assistance of an expert to review the contemplated transaction. Organon and Schering-Plough filed for a preliminary injunction (référé) to quash this request on the ground that the French entities were not parties to the concentration. The French Supreme Court refused to enjoin the works council’s request on the ground that “notifying parties” should be interpreted broadly to encompass all entities that are part of the notifying group, including those that are controlled directly or indirectly by it. In reaching this conclusion, the Court noted that Organon BioSciences N.V. was a holding company.

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40 Article L. 432-1 §3 of the former Labor Code.
41 Articles L. 2323-21 and 22 of the Labor Code (Articles L. 432-1 §4 et seq. of the former Labor Code).
42 Article L. 439-2 §4 of the former Labor Code.
43 Lamy comité d’entreprise, §423-8, November 2006.
44 Article L. 2323-20 of the Labor Code (Article L. 432-1 bis of the former Labor Code).
45 Article L. 432-1 bis of the former Labor Code.
47 Article L. 2323-20 of the Labor Code (Article L. 432-1 bis §3 of the former Labor Code).
48 Cass. Soc. October 26, 2010, No 09-65.56 (Diosynth, Organon, Schering Plough)
without any employee representatives that had been formed by Akzo Nobel for the sole purpose of its
initial public offering. The Court added that it could not be denied that this transaction would have some
predictable effect on the organization, commercial policy or employee compensation and could thus
impact employees of the two French subsidiaries.

Curiously, it appears that works council meetings required in connection with antitrust proceedings are
additional to, and not in lieu of, the standard information and consultation requirements of Articles L.
2323-21 and 22 of the Labor Code. As discussed in detail below, management must conclude the
standard information and consultation process before the transaction under consideration becomes
irrevocable. Yet meetings under the special concentration rules may not be held until after a notification
has been submitted to French and EU antitrust authorities, and such notification may not be submitted
until the parties "are engaged in an irrevocable manner."

This additional information procedure is required in a significant number of French transactions due to the
broad scope of antitrust notification requirements.

Other Procedures related to Business Transfers

In the event that a company sells a business division, courts assess the impact of the transaction on the
company's organization, management structure, and general market position, to determine whether the
works council must be informed and consulted. The French Supreme Court has held that before
determining whether a consultation duty exists, the trial court must examine the effects of a transfer of a
division, which in that case involved seven workers in a business with more than 3,000 employees.

French courts have also held that the information and consultation duty extends to cases where the
acquirer purchases a "unit of production" if the transaction triggers a change in the economic or legal
organization of the acquiring company.

The French Supreme Court held that an internal corporate restructuring involving the transfer of the
shares of a subsidiary to a holding company higher up the chain of control constituted a transaction that
could have an impact on the employees of the subsidiary and thus triggered the obligation to consult the
works council of the subsidiary whose shares were being transferred.

In addition, employers have a duty to inform the works council prior to any public announcement
concerning "measures that significantly affect work conditions or the employment," or, upon request by
the works council, following public announcements concerning the "economic strategy of the company."

These specific duties do not replace, but rather supplement, the information and consultation processes
applying to acquisitions or tender offers.

European Works council Information and Consultation in Cross-border Transactions

The information and consultation of employees at the European level must occur at the relevant level of
management and employee representation according to the subject under discussion. To achieve that
purpose, the Directive provides that the competence of the European works council and the scope of the
information and consultation procedure for employees governed by the Directive must be limited to
transnational issues. Matters are considered to be transnational where they concern:

- "Community-scale entity" or "Community-scale group of entities" as a whole; or

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49 Article L. 432-1 of the former Labor Code.
50 See infra notes 18-22 and accompanying text.
793, 805-806 (2002).
55 Introduced by French law No. 2002-73, dated January 17, 2002, known as the "Law of Social Modernization."
• at least two entities or establishments of the entities or group situated in 2 different member States of the European Union.\footnote{58}

The European works council must be informed, among others, as to the structure, economic and financial situation of the Community-scale entity or group of entities, the probable development of its business, substantial changes concerning its organization, or mergers.\footnote{59}

Where there are exceptional circumstances or decisions affecting the employees’ interests to a considerable extent, particularly in the event of relocations, the closure of establishments or entities or collective redundancies, the select committee of the European works council or, where no such committee exists, the European works council must be informed. It then has the right to meet, at its request, management so as to be informed and consulted regarding measures affecting the employees’ interests to a considerable extent.

This information and consultation meeting must take place as soon as possible on the basis of a report drawn up by management. An opinion may be delivered at the end of the meeting or within a reasonable time. This meeting must not affect the prerogatives of management. For purposes of this meeting, the company may be represented by the employer or his/her representative or any other appropriate level of management of the Community-scale entity or group of entities having its own powers of decisions.\footnote{60}

The Timing of Referral to Works councils

French Works council

Management’s decision to proceed with a proposed transaction must be preceded by a consultation with the works council.\footnote{61} In making its ultimate decision to proceed with a proposed transaction, management must be capable of taking into effective consideration the views articulated by the works council.

Legal scholars assert that management’s decision should be deemed made at the time the decision to enter into the transaction has become binding or irrevocable.\footnote{62} Courts have confirmed this principle, holding that management must consult the works council prior to management’s final decision to enter into the transaction, regardless of the timing of the transaction concerned.

Acquisitions

On this basis, the French Supreme Court has ruled that the consultation of the target’s works council must occur prior to the execution of a binding share purchase agreement even if the consummation of the transaction is subject to certain conditions precedent, such as regulatory or antitrust conditions.\footnote{63} Similarly, the Supreme Court invalidated a consultation procedure that occurred shortly after execution of a purchase agreement holding that “it is irrelevant that management consulted with the works council prior to the closing of the transaction. At the time of its referral to the works council, the agreement had already become legally binding.”\footnote{64}

\footnote{56} A “Community-scale entity” is defined as an entity with at least 1000 employees within the Member State and at least 150 employees in each of at least 2 Member State.

\footnote{57} A “Community-scale group of entities” is defined as a group of entities with the following characteristics: (1) at least 1000 employees within the Member State; (2) at least 2 group entities in different Member States and (3) at least one group entity with at least 150 employees in one Member State and at least one other group entity with at least 150 employees in another Member State.

\footnote{58} Article L 2341-8 of the Labor Code, implementing Article 1(3) and (4) of the Directive.

\footnote{59} Article L 2343-2 of the Labor Code, implementing Article 1(a) of Annex 1 to the Directive.

\footnote{60} Article L 2343-4 of the Labor Code, implementing Article 3 of Annex 1 to the Directive.

\footnote{61} Article L. 2323-2 of the Labor Code (Article L. 431-5 of the former Labor Code). The only exception to this rule is for bidding companies electing to inform and consult with their works councils after publication of the tender offer statement pursuant to Article L. 2323-25 of the Labor Code (Article L. 432-1 ter of the former Labor Code).

\footnote{62} Maurice Cohen, Le droit des comités d'entreprises et des comités de groupe, LGDJ, 4e éd., 1997, p. 465.


\footnote{64} Cass. Crim., December 13, 1994, n° 93-85.092.
On the other hand, the consultation should not occur too early in the process. For instance, in a competitive bid process, the Versailles Court of Appeals held that the seller was not required to consult with its works council when appointing a financial adviser with respect to the divestiture of one of its subsidiaries. The Court held that the works council should be consulted only with respect to “matters that have fully matured.”

In light of these constraints, it has become common for parties to conduct the information/consultation process while the underlying agreements are in draft form. This approach reduces the risk of challenge by the works council, but also forces parties to reveal the pendency of a transaction without any contractual certainty that the transaction will proceed on the draft terms.

To partially mitigate this second risk, certain practitioners have developed a practice whereby, once the terms of the purchase agreement have been agreed to by the parties, the purchaser writes a put option in favor of the seller granting the seller the right but not the obligation to sell its shares in the target at the negotiated purchase price in accordance with terms and conditions negotiated in a purchase agreement annexed to the put option and initialed by both the buyer and the seller. In consideration for this put option, the seller agrees not to enter into any discussions or negotiations with any third party during the pendency of the works council information and consultation procedure. This approach leaves significant execution risk on the buyer as the seller is not fully bound by the terms and conditions negotiated in the purchase agreement annexed to the offer. The buyer must instead rely on the seller’s good faith in accepting to execute the initialed purchase agreement once the information and consultation process is duly completed. Furthermore, this approach remains untested in court. Under this process, parties must draft press releases carefully so as not to give the impression that they have entered into a binding agreement prior to completing the information/consultation process.

**Mergers**

In a 1984 ruling involving the merger of the automotive manufacturers Peugeot and Talbot, the French Supreme Court approved a consultation procedure where the works council was informed of the impending transaction only after management had issued a press release announcing its plans. The Court held that the merger agreement, although signed, remained subject to approval by the general shareholder meeting at the time it was referred to the works council. That condition, the court asserted, was sufficient to deem the agreement revocable and not final, since the shareholders could, if only in theory, take into account views expressed by the works council prior to a vote at the general meeting.

In 2008, the French Supreme Court reversed this line of case law on the ground that the decision to enter into the merger agreement becomes irreversible upon being approved by the board of directors. Under French corporate law, the shareholder meeting merely “ratifies” the board’s decision as it can only approve or reject the contemplated merger but not amend it. On this basis, the Court now holds that works councils must be consulted prior to the board meeting approving a merger.

**Transactions involving multiple steps**

When a transaction is implemented through a series of steps, each involving decision-making, the works council must be consulted prior to each decision.

In a matter involving the mandatory sale of water springs by the Nestlé group pursuant to an order of the EU antitrust authorities, the French Supreme Court held that information and consultation duties had been

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65 CA Versailles 8 juin 2006, JCP E 2006, 2062 et 2762.
67 Management submitted to the works council a highly detailed reorganization program, which was ready for final implementation upon receipt of requisite corporate and administrative authorizations.
satisfied, where Nestlé had submitted the asset transfer agreement to the works council for review prior to EU approval and prior to a required general meeting of the company's shareholders.70

**European Works council**

The appropriate point in time for management to disclose the pendency of a transaction to the European works council is not clearly identified. Neither the Directive (as recast) nor the French implementing law makes such prior consultation a procedural or substantive condition. However, the timing of the information and consultation must be such as to ensure that the information and consultation of employee representatives is “effective” and enables the entities to make decisions “effectively.” This is the overarching principle in light of which all provisions of the Directive must be read. In addition, the Directive now provides that the procedure must enable employee representatives to express an opinion within a reasonable time, on the basis of information provided about the proposed transactions to which the consultation is related, that may then be taken into account by management.

The information of the European works council consists in the transmission of data by the employer to the employee representatives in order to enable them to acquaint themselves with the subject matter and to examine it.71 The consultation must be conducted in such a way that the employee representatives can meet with management and obtain a response, and the reasons for that response, to any opinion they might express.72

To that end, information must be given to employee representatives at such time, in such fashion and with such content as are appropriate to enable employee representatives to undertake an in-depth assessment of the possible impact of this information and, where appropriate, prepare for consultations with management. Similarly, the consultation must occur at such time, in such fashion and with such content as to enable employee representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related.

In light of the Directive’s overarching principle, French courts could apply similar rules as those developed internally with respect to French works councils to ensure that the information/consultation process is truly effective.

This timing issue was raised prior to the recast of the Directive in the Renault/Vilvoorde case. Lower court judges found that Renault’s European works council should have been consulted prior to management’s decision to close down its Belgian site in Vilvoorde, where almost 3,000 employees were employed. This ruling was upheld by the Versailles Court of Appeals on the ground that the consultation procedure should have taken place within such timeframe as would enable the dialogue established with the works council to be truly effective. Such true effect is to be assessed “using reasonable criteria, including at the very least the scope left for comments, disagreements or criticisms, the extent of any damages or the irreversible nature of any such damages likely to be caused or even compliance with a timetable which allows for any necessary steps or reactions, or even for the initial resolutions to be modified.”73

The agreement which establishes the European works council may also set out specific provisions regarding the timing of consultation, which are then applicable. For instance, in a case involving the merger of Suez with Gaz de France, the French Supreme Court held that the consultation should take place prior to the final decision-making on the ground that the agreement which established the European works council expressly provided that in the event of “exceptional national events which are likely to have a serious impact on the interests of the group's employees (such as a merger), the works council is convened to a meeting. It is then consulted within a sufficient period of time so as to allow the matters discussed or the works council’s opinion to be incorporated in the decision-making process.” So as to incorporate the European works council's opinion in the decision-making process, Gaz de France’s

72 Article L 2343-3 of the Labor Code, implementing Article 1(a) of Annex 1 to the Directive.
consultation had to take place prior to any decision. The French Supreme Court held that the date on which the decision should be deemed to have been made is prior to "that of the board meeting held to decide upon the proposed merger, which is irreversible according to the combined provisions of Articles L 236-6 of the French Commercial Code and Article 254, as amended, of the Decree of March 23, 1967." 74

**Coordination of the information/consultation procedures of domestic and European works councils**

Neither the Labor Code nor the Directive (as recast) determines the exact order of consultation as between the European works council and the French works council. 75 However, the Directive has sought to clarify the coordination of the information/consultation procedures of domestic and European works councils.

The Directive requires that the information and consultation of the European works council be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles that (i) the information and consultation must occur at the relevant level of management and representation according to the subject matter under discussion and (ii) the competence of the European works council be limited to transnational issues. 76

The arrangements for the links or articulation between the information and consultation of the European works councils and national employee representation bodies must be provided in the agreement establishing the European works council. 77 Where no such arrangements have been defined by agreement or where no such agreement exists, the information and consultation process must be conducted at the European works council level as well as at the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organization or contractual relations are contemplated. 78

On a practical level, logic would dictate that the European works council should be informed or consulted with regard to the cross-border transaction prior to the domestic works councils, with the latter being consulted *a posteriori* with regard to the national consequences of such projects. However, courts decide on a case by case basis and refer, if applicable, to the agreements establishing the European works council. If such agreement makes no provision on this point or if there is no such agreement, then, in principle, the European works council has no preferential right to be informed prior to the French works council.

In a case involving Alstom's restructuring, the Nanterre lower court, while noting that the consultation of the European works councils "does not result in any preferential duty of consultation prior to consultation with each group undertaking," nevertheless stressed that proper consultation at the European level was required "in order for internal consultation to effectively take place." It also held that with regard to cross-border establishments, "there is a logical chronological benefit of an initial consultation at the European works council level, if an overall solution is to be found, and such consultation is likely to have an influence on the project presented for consultation at the national level." 79

In another matter involving the French tobacco company, Seita, a Paris lower court acknowledged in summary proceedings that, despite the lack of any legal provisions governing this issue, the terms of the agreement establishing the European works council should be taken into account. In this case, the European works council was to be informed "properly and in advance of exceptional circumstances which would have a significant effect on the interests of the workers, particularly in the event (...) of the closure of establishments or collective redundancies.” The court concluded that “it seems clear that the

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75 This was highlighted by a Paris court in the Marks & Spencer case with regard to a proposed economic restructuring (TGI Paris, April 9, 2001, n°01-54.016).
77 Article 12(2) of the Directive, as implemented by Article L2342-9(4°) of the Labor Code.
78 Article 12(3) of the Directive, as implemented by Article L2341-9, second paragraph, of the Labor Code.
79 TGI Nanterre, summary proceedings, August 1, 2003.
consultation with the European works council should go to its term, as it is likely to result in modifications or adjustments to the transaction at issue, prior to the commencement of the consultation with Seita’s domestic works council, so that the latter may issue its opinion in full knowledge of the facts.  

Information and Consultation Process

French Works council

Multiple meetings

In practice, the works council is convened two or three times in the course of a transaction. Management notifies the works council of a first meeting, and submits a written description of the contemplated transaction and its estimated impact on employees. During the meeting, management provides the works council with general information concerning the transaction and reviews the documents that were attached to the meeting’s invitation.

A second meeting is generally held approximately eight days after the first meeting. During the interim period, works council members may submit written questions to the managers, who are required to provide reasoned responses under Article L. 2323-4 of the Labor Code. It is usually at the second meeting that the works council, if it is satisfied with the amount of information it has received, will provide its opinion regarding the transaction. Otherwise, management provides during the meeting additional information and responses to questions posed by works council members, and a final meeting is scheduled in order for the works council to issue its opinion.

Written and accurate information

Management must provide “written and accurate” information to the works council. Pursuant to administrative guidelines, management is not required to provide all documents relating to the transaction, such as drafts of transaction documents, unless knowledge of these documents is necessary for the proper conduct of the consultation.

On this basis, the Paris Court of Appeals has held that, in principle, management is not required to provide a draft of the purchase agreement to the works council unless it is essential to ensure the reliability of other information provided. On the other hand, management may be required to disclose a due diligence report performed at the purchaser’s request if necessary for the works council’s full information.

If the works council considers that the description of the contemplated transaction and supporting documents provided are insufficient for the works council to issue an opinion, it may file a petition for an injunction under summary proceedings (référé) requesting an extension of the consultation period and the production of missing documents subject to the imposition of a daily-accumulating penalty for non-compliance.

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80 TGI Paris, October 10, 2003, n°03/59933.
81 If management is unable to provide sufficient information during a meeting, it must prepare a reasoned response for the following meeting. See Circ. DRT, n° 12, November 30, 1984. (Article L. 431-5 of the former Labor Code)
83 DRT circular No. 12 (November 30, 1984).
84 CA Paris, June 18, 2002, RG No. 02-55390.
85 Cass crim November 18, 1997, No. 96-80002.
86 Cass Soc. April 16, 1996, No. 93/15417. TGI Lisieux, February 16, 1994 (a daily penalty of FRF 50,000 (7,622 euros) imposed on an employer pending disclosure to the works council of a joint venture agreement); Cass. Soc., April 16, 1996, n° 93-15.417; Sietam Industries (daily penalty of FRF 1,000 (152 euros) imposed on employer pending disclosure of due diligence and valuation reports); TGI Lyon, January 27, 1986, Hersant/Le Progrès (chairman ordered to provide works council with all documents executed in connection with the transfer of shares, subject to a daily penalty of FRF 10,000 (1,524 euros)).
Confidentiality

Works council members are bound by a duty not to disclose information presented to them as confidential. It is therefore critical that all sensitive information disclosed to works council members be marked as confidential. However, in some cases, this rule may be ineffective in protecting confidentiality to the extent that a simple refusal by the works council’s secretary to sign minutes of the meeting may be enough to relieve works council members of their non-disclosure duties. In addition, violations rarely give rise to sanctions due to the difficulty of identifying the source(s) of the leak and the relative protection enjoyed by works council members.

Similarly, in a different matter, a manager of Alsthom-Unelec was found guilty on obstruction charges for failing to disclose a written confidential restructuring plan to works council members who had refused to sign non-disclosure agreements. The Court found that given the length and complexity of the document, the plan should have been disclosed in writing to works council members in order for the consultation to be effective. The Court held that it was unreasonable for the company to withhold disclosure of the plan until works council members had signed non-disclosure agreements as works council members are bound by a duty not to disclose information presented to them as confidential as a matter of law.

Taking a more pragmatic approach, certain courts have approved the use of data rooms to disclose information to works council members and their advisers even if access to such data room is subject to individuals executing confidentiality agreements.

Appointment of expert accountant

The Labor Code expressly permits the appointment of an expert accountant to advise the works council in the event of tender offers or business combinations constituting "concentrations" and subject to antitrust review. Nevertheless, where the transaction does not contemplate the dismissal of employees "on economic grounds," an expert accountant will not be appointed. In practice, the works council typically requests the assistance of an expert accountant, if only to assess the risk of layoffs. If the appointment of an expert adviser is not mandatory, the works council must bear the costs of the expert's assistance. The employer is responsible for the compensation of experts if their appointment is mandated by law. The time period allotted for examination and deliberation by the works council is not extended to accommodate for expert accountant review.

European Works council

The information provided to the European works council must be sufficiently detailed and complete in order for it to shed light on the effect on jobs at the European level and to allow for an exchange of views and dialogue with management in full knowledge of the facts. Such was found not to be the case, for instance, in the consultation of the European works council of Alcatel Lucent regarding job cuts following the merger of Alcatel with Lucent Technologies. In this case, a Paris lower court held that the document relating to the restructuring plan provided to the members of the works council did not set forth any detailed quantified information relating to the businesses to be downsized, merged or spun-off, to the surplus staff and to the number of jobs to be cut per department, country and category of worker, nor any information regarding the provisional timetable for the intended job cuts. As a consequence, it ordered Alcatel Lucent to provide the European works council with the items of information necessary for it to perform its consultative role.

87 Article L 2325-5 of the Labor Code.
91 Article L. 2323-20 of the Labor Code (Article L. 432-1 bis of the former Labor Code).
In the aforementioned matter involving the GDF/Suez merger, the French Supreme Court also held that “since the procedures for the consultation of the works council and the European works council do not have the same objectives nor the same scope, the information provided during the works council meeting will not necessarily suffice in order for the European works council to be fully informed.” Trial judges are thus required to assess whether or not the information provided to the European works council on the proposed transaction is adequate; it being noted that the role of the European works council is to analyze the effects of the proposed transaction on all the Member States in which the undertaking or the group has a place of business, which thus requires the disclosure of specific information.

Finally, pursuant to the provisions of Article L. 2343-13 of the Labor Code, the European works council may ask to be assisted by an expert of its choice, if required for the performance of its tasks.

Sanctions

Failure to inform and consult with domestic or European works councils where required by the Labor Code constitutes a criminal offense on the part of management, with penalties including imprisonment of up to one year and a fine of up to €3,750, or, in the case of a repeat offense, imprisonment of up to two years and a fine of up to €7,500.

There are no code provisions concerning whether the failure to comply with works council consultation rules affects the enforceability of the transaction itself. Case law is scant with only a few lower courts having ruled on this issue. A Paris lower court has held that even if the consultation procedure has not been followed, the works council is “not entitled to challenge any act relating to transactions that would have otherwise required its prior consultation.” In a similar vein, the Bobigny lower court has held that “even if the works council was not adequately informed, a judge may not, using a summary procedure, void board meeting deliberations.”

Litigation seems to have shifted to court requests for injunctions or restraining orders seeking to suspend the consummation of the transaction pending fulfillment of management's consultation duties under the Labor Code. Using a summary procedure, the works council may seek to block the consummation of the transaction until such time as it has been validly informed and consulted. Several decisions from the French Supreme Court have recognized lower courts' power to suspend a company's decisions pending valid information and consultation of the works council. However, if the information and consultation procedure has been completed by the time the court rules, no suspension can be ordered by the court.

Additionally, the works council may also request the payment of monetary damages for the failure by management to consult it or to consult and inform it regarding a transaction.

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95 Article L. 439-16 of the former Labor Code.
101 Cass. soc., March 6, 2012, n°10-30.815 (n°640 F-D), Sté Total raffinage marketing c/ Comité d'établissement de la Raffinerie des Flandres Total raffinerie des Flandres.
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