

Shop Committee Consultation Rules in French Business Transfers

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I. Introduction

French law requires employers to share information and consult with the shop committee (*comité d'entreprise*) in the face of mergers or acquisitions. The shop committee 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 obliged to obtain shop committee consent to contemplated transactions, but a formal information and consultation procedure must precede management's decision concerning proposed business combinations. If the shop committee submits a negative opinion, management may elect to disregard the committee's views and proceed with the transaction. However, 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 shop committee and must maintain the freedom of choice to seek modification or require revocation of the transaction in accordance with the views expressed in the shop committee report.

There is sharp controversy as to the appropriate point in time for management to disclose the pendency of a transaction to the shop committee, with potentially explosive labor consequences if the timing is wrong. We explore in this article how far the parties to a transaction may go before triggering the obligation to present the matter to the shop committee. We also discuss the required procedural steps in the consultation process and the nature of information that must be revealed to the shop committee.

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1. French companies employing a minimum of fifty employees are required to organize the election of a shop committee. 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 fifty employees, as well as a central shop committee (*comité central d'entreprise*) to oversee the operations of the entire company.

II. Scope of Obligation to Consult with Shop Committee

Companies on both ends of acquisition transactions are obliged to inform and consult with their shop committees. Under Article L. 432-1 paragraph 8 of the French Labor Code (Labor Code), an employer must inform and consult with the shop committee “regarding any modification in the economic or legal organization of the company, notably in the event of a merger, a sale . . . or an acquisition.”² The employer must consult with committee members regarding the effects the contemplated transaction may have on employees.

Failure to inform and consult the shop committee where required by the Labor Code constitutes a criminal offense on the part of management. Penalties include 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 7,500.³ Although the legal validity of a transaction is not affected by a violation of the information and consultation rules,⁴ courts will, upon appeal by an interested party, suspend the consummation of the transaction pending fulfillment of management’s duties under the Labor Code.⁵

The nature of the information and consultation duty differs between the acquirer and target companies. Article L. 432-1 paragraph 8 of the Labor Code, read in connection with Article L. 233-1 of the French Commercial Code, provides that the shop committee of an acquiring company must be informed and consulted prior to the purchase of more than 50 percent of the shares of a target entity.⁶

French courts have 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.⁷ In fact, one French court held that where a German parent of a French subsidiary entered into a joint venture with a U.S. company, the shop committee of the French subsidiary must be informed and consulted, given the potential ensuing reorganization of the corporate group.⁸

Article L. 432-1 paragraph 8 of the Labor Code further provides that management must inform the shop committee as soon as it becomes aware that the company is a target of a takeover attempt.⁹ Case law goes further to establish that where management is actively involved in a sale of more than 50 percent of the company’s stock, it is obliged not only to inform the shop committee but also to consult with it prior to the consummation of the transaction.¹⁰ The *Cour de cassation* has affirmed that a consultation duty exists, particularly where managers participate in the preparation of a tender offer as prospective investors or as corporate officers.

2. CODE DU TRAVAIL [C. TRAV.] art. L. 432-1 para. 8, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002).

3. C. TRAV. art. L. 483-1, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002).

4. Cass. Soc., Nov. 28, 2000, n°98-19594.

5. TGI Lyon, Oct. 18, 1984, Dr. Ouvrier 1984, 459.

6. CODE DE COMMERCE [C. COM] art. L. 233-1, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002).

7. Cass. Crim., June 18, 1991, n°89-82.729, Union Départementale (FDT).

8. TGI Lisieux, Jan. 6, 1994, référé, Knorr Dahl.

9. C. TRAV. art. L. 432-1 para. 8, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002).

10. Cass. Civ., Mar. 2, 1978, Haulotte; Cass. Civ., Apr. 4, 1979, Venot PIC.

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 conditions, to determine whether the shop committee must be informed and consulted. In one case, the *Cour de cassation* 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.¹¹

French Law No. 2001-420, dated May 15, 2001, known as the "new economic regulations" law (NRE Law), has devised a specific information and consultation track that applies in the case of tender offers.¹² Immediately after the filing of a tender offer, the president of the target company must convene the shop committee. The committee may summon the offeror to the meeting and may declare the offer friendly or hostile. Within three days of the filing of a tender offer prospectus, the offeror must submit the prospectus to the shop committee.¹³ The shop committee must convene for a second time within fifteen days after publication of the prospectus in order to review its terms. The offeror may be summoned again to this meeting to express its position and outline its plans.¹⁴ If the offeror is summoned to a meeting of the shop committee but fails to appear it may be subject to the harsh penalty of loss of its voting rights in the target company.¹⁵

The NRE Law has also introduced to the Labor Code special information and consultation procedures applying to mergers that create a *concentration* subject to review by French or European Union (EU) antitrust authorities.¹⁶ Under Article L. 432-1 *bis* of the Labor Code, within three days of the submission of a *concentration* notification to French or EU antitrust authorities, the companies involved in the *concentration* must convene a meeting of their respective shop committees. Either shop committee may request the assistance of an expert-accountant at their meetings. If they chose to do so, 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 shop committee may hear the expert's analysis.¹⁷ This special procedure does not apply to tender offers because Article 432-1 paragraph 9 overrides the provisions of Article L. 432-1 *bis*.¹⁸

Curiously, it appears that shop committee meetings required in connection with antitrust proceedings are additional to, and not in lieu of, the standard information and consultation requirements of Article L. 432-1 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.¹⁹ Yet meetings under the special *concentration* rules may not be held until after a notification has been submitted to French and

11. Cass. Civ. Feb., 12, 1991, n°89-86.881, Jais.

12. Law No. 2001-420 of May 15, 2001, J.D., May 16, 2001, p. 7776.

13. C. TRAV. art. L. 432-1 para. 9, available at <http://www.legifrance.gouv.fr/html/fram-codes1.htm> (last visited Sept. 20, 2002).

14. *Id.* para. 10.

15. *Id.* paras. 11-12.

16. C. TRAV. art. L. 432-1 *bis*, referring to C. COM. art. L. 430-1 and to EU Council Regulation 4064/89 of 21 Dec., 1989 O.J. (L 257), as modified by Council Regulation 1310/97 of 30 June, 1997 O.J. (L 40).

17. C. TRAV. art. L. 434-6, available at <http://www.legifrance.gouv.fr> (last visited Sept. 20, 2002).

18. C. TRAV. art. L. 432-1 *bis* para. 3, available at <http://www.legifrance.gouv.fr/html/fram-codes1.htm> (last visited Sept. 20, 2002).

19. See *infra* notes 25-29 and accompanying text.

EU antitrust authorities, and such notification may not be submitted until the parties “are engaged in an irrevocable manner.”²⁰

This additional information and consultation procedure will likely be required in a significant number of French transactions due to the broad scope of the new antitrust notification requirements of the NRE Law. 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 15 million in France.²¹ 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.²²

French Law No. 2002-73, dated January 17, 2002, known as the “law of social modernization” (LMS), introduced a duty to inform the shop committee prior to any public announcement concerning “measures bearing an important effect on work conditions or the employment of workers” or, upon request by the shop committee, following public announcements concerning the “economic strategy of the company.”²³ This new duty does not replace but rather supplements the information and consultation process applying to acquisitions or tender offers.

III. The Timing of Referral to the Shop Committee

Under Article L. 431-5 of the Labor Code, “the management decision concerning the proposed transaction must be preceded by consultation with the shop committee.”²⁴ In making its ultimate decision, management must be capable of taking into consideration the views articulated by the shop committee. Doctrinal authors assert that the management decision should be deemed made at the time the transaction becomes irrevocable.²⁵ Courts have confirmed this principle, holding that management must consult the shop committee prior to the final decision, regardless of the timing of the transaction concerned.

In one case, management executed an agreement on March 27 to be performed several months thereafter and referred the matter to the shop committee on April 1. The *Cour de cassation* invalidated the consultation procedure holding that “it is of no consequence that management has consulted with the shop committee prior to the implementation of the agreement. At the time of its referral to the shop committee, the agreement had already become finally binding.”²⁶

The *Cour de cassation* has long accepted that the pendency of a condition precedent to the closing of a transaction may create valid grounds for postponement by management of shop committee consultation. However, the courts will closely examine the precise wording

20. C. Com. art. L. 430-3, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002); see also Laura Snyder, *Acquiring a Business In France: A Buyer's Guide*, 57 Bus. Law. 793, 805-806 (2002).

21. C. Com. art. L. 430-2, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002).

22. *Id.* at 430-1.

23. Law No. 2002-73 of Jan. 17, 2002, J.D., Jan. 18, 2002, p. 1008.

24. C. Trav. art. L. 431-5, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002).

25. MAURICE COHEN, *LE DROIT DES COMITÉS D'ENTREPRISES ET DES COMITÉS DE GROUPE*, 465 (4th ed., 1997).

26. Cass. Crim., Dec. 13, 1994, n°93-85.092.

of closing conditions to ensure that closing is not inexorable at the time the contract is signed and that management has the actual ability to refrain from closing if it decides to take negative views expressed by the shop committee into account.

In one case, parties to a transfer agreement conditioned the performance of their obligations upon receipt of certain administrative authorizations. The *Cour de cassation* held that the parties had violated their duty to inform and consult with the shop committee, since “the transfer had already been realized upon the signature of the agreement. The parties could not voluntarily retract their obligations and the closing had been conditioned upon external events entirely independent of the parties’ control.”²⁷

In another case, involving the merger of the automotive manufacturers Peugeot and Talbot,²⁸ the *Cour de cassation* approved the information and consultation process although the shop committee was informed of the impending transaction only after management had issued a press release announcing its plans. Management submitted to the shop committee a highly detailed reorganization program, which was ready for final implementation upon receipt of requisite corporate and administrative authorizations. Yet the Peugeot-Talbot case was distinguished by the court from the cases discussed above on the basis that the merger agreement, although signed, remained subject to approval by the general shareholder meeting at the time it was referred to the shop committee. 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 shop committee prior to a vote at the general meeting.

Similarly, in a case involving the mandatory sale of water springs by the Nestlé group pursuant to an order of the EU antitrust authorities, the *Cour de cassation* held that information and consultation duties had been satisfied where Nestlé had submitted the asset transfer agreement to the shop committee for review prior to EU approval and prior to a required general meeting of the company’s shareholders.²⁹

IV. Consultation with the Shop Committee as a Closing Condition

There is considerable debate among practitioners as to whether merger and acquisition agreements may be signed subject to a condition of shop committee review. Many take the view that the parties should complete the information and consultation procedure before signature of any binding agreement, and it is common for parties to conduct the process while the underlying agreements are in draft form. This approach reduces the risk of challenge by the shop committee, but also forces parties to reveal the pendency of a transaction without any contractual certainty that the transaction will proceed on the draft terms.

We believe that such a condition precedent is permissible, but the wording of the condition must not permit a closing regardless of the content of the shop committee’s opinion. Hence, for example, a condition precedent stating merely that the transaction will be completed subject to completion of the information and consultation process could be held invalid as an infringement of the consultation right, since a closing would occur under this condition upon completion of the process, regardless of the views expressed by the shop

27. Trib. Corr. Lyon, June 27, 1980, *Droit ouvrier* 1981, p. 255; see also Cass. Crim., Nov. 10, 1981, D. 1982, IR, p. 313, Killen.

28. Cass. Crim., Nov. 28, 1984, *Droit ouvrier* 1981, p. 370, Peugeot-Talbot.

29. Cass. Crim., Nov. 30, 1999, n°98-82.279, Vittel.

committee during the consultation. Therefore, the condition must permit the seller to retract its agreement if the shop committee expresses negative views, so as to give the seller the freedom to take those views into account.

Management must be free to withdraw from the transaction following shop committee consultation, as otherwise the consultation right would be rendered void of potential effect. Accordingly, the condition should suspend the closing pending conclusion of the information and consultation process and submission of a *positive* opinion by the shop committee. The closing condition should be stipulated for the benefit of the seller so that it can be waived at its sole discretion.

The practical consequences of such a condition precedent would depend on the course of action chosen by the shop committee. If the shop committee submits a positive opinion, the transaction would be brought to a close, subject to the satisfaction of any additional closing conditions. If the committee submits a negative opinion, management may choose either to accept the remarks of the committee and propose modifications to the agreement or to reject the committee's reservations and renounce the closing condition. In either case, the agreement remains revocable pending the submission of a positive opinion by the shop committee or the waiver of the closing condition by the seller.

V. The Information and Consultation Process

In practice, the shop committee is convened two or three times in the course of a transaction. Management notifies the shop committee 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 shop committee with general information concerning the transaction and reviews the documents attached to the written convocation.

A second meeting is generally held eight days after the first meeting. During the interim period, committee members may submit written questions to the managers, who are required to provide reasoned responses under Article L. 431-5 of the Labor Code.³⁰ It is usually at the second meeting that the shop committee, if it is satisfied with the amount of information it has received, will provide its opinion regarding the transaction. Otherwise, during the meeting management provides additional information and responses to questions posed by committee members, and a final meeting is scheduled in order for the committee to issue its opinion.

Under Article L. 431-5 of the Labor Code, management must provide to the shop committee only information that is "written and accurate."³¹ Although French labor authorities have asserted that this obligation does not include the submission of the draft agreement,³² several French courts have interpreted Article L. 431-5 to include a duty to disclose transaction documents.³³ Such duty has been enforced by the imposition of daily fines for non-compliance.³⁴

30. 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, Nov. 30, 1984.

31. C. TRAV. art. L. 431-5, available at <http://www.legifrance.gouv.fr/html/frame-codes1.htm> (last visited Sept. 20, 2002).

32. Circ. DRT n°12, Nov. 30, 1984.

33. Cass. Crim., Nov. 28, 1984, n°83-93.094 (requiring employer to provide shop committee with merger agreement and bylaws of the merged company, once these documents become available to management).

34. TGI Lisieux, Feb. 16, 1994 (imposing a daily penalty of FRF 50,000 (7,622 euros) on an employer pending disclosure to the shop committee of a joint-venture agreement); Cass. Soc. Apr. 16, 1996, n°93-15.417,

The Labor Code expressly requires the appointment of an expert-accountant to advise the shop committee in the event of tender offers³⁵ or business combinations constituting *concentrations* and subject to antitrust review.³⁶ Nevertheless, where the transaction does not contemplate the dismissal of employees “on economic grounds,” an expert-accountant will not be appointed.³⁷ In practice, the shop committee 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 obligatory, the shop committee must bear the costs of the expert’s assistance. The employer is responsible for the remuneration of experts where the law mandates their appointment. The time period allotted for examination and deliberation by the shop committee is not extended to accommodate expert-accountant review.³⁸

As discussed above, the consent of the shop committee to the transaction is not required. All that is necessary is that the shop committee provides its opinion, which generally takes the form of “positive,” “negative,” or “no opinion.” Nevertheless, if management rejects the opinion issued by the shop committee, it must submit a reasoned report justifying its refusal.³⁹ Moreover, Article L. 432-1-3 of the Labor Code permits the shop committee to require the appointment of a mediator in case it opposes management’s decision to sell a business or a business division that results in “the suppression of at least 100 jobs.”⁴⁰ The petition for mediation, which may be made no later than eight days following the referral of the matter to the shop committee, automatically suspends the consummation of the transaction pending completion of the mediator’s “mission.”⁴¹ The duration of the mediation proceedings is determined by the parties or, absent their agreement, may not exceed one month.⁴² Much like the opinion of the shop committee, the mediator’s recommendations are not binding on the company.⁴³

Sietam Industries (imposing a daily penalty of FRF 1,000 (152 euros) imposed on employer pending disclosure of due diligence and valuation reports); TGI Lyon, Jan. 27, 1986, *Hersant/Le Progrès* (ordering chairman to provide shop committee with all documents executed in connection with the transfer of shares, subject to a daily penalty of FRF 10,000 (1,524 euros)).

35. C. TRAV. art. L. 432-1 para. 4, available at <http://www.legifrance.gouv.fr/html/fram-codes1.htm> (last visited Sept. 20, 2002).

36. C. TRAV. art. L. 432-1 *bis*, available at <http://www.legifrance.gouv.fr/html/fram-codes1.htm> (last visited Sept. 20, 2002).

37. Cass. Soc., Nov. 26, 1996, n°94-18.575, *Rank-Xerox*.

38. Cass. Crim., Apr. 6, 1993, n°92-80.864.

39. C. TRAV. art. L. 432-10, available at <http://www.legifrance.gouv.fr/html/fram-codes1.htm> (last visited Sept. 20, 2002).

40. C. TRAV. art. L. 432-1-3, available at <http://www.legifrance.gouv.fr/html/fram-codes1.htm> (last visited Sept. 20, 2002).

41. *Id.* at 432-1 para. 3.

42. C. TRAV. art. L. 432-1-3 para. 4, available at <http://www.legifrance.gouv.fr/html/fram-codes1.htm> (last visited Sept. 20, 2002).

43. *Id.* para. 8.

