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Focus on the employment measures contemplated by the so-called “Macron Law”: The liberalization of the economy and the flexibilization of the labor market are still a long way off!

The so-called “economic growth and activity” Bill, commonly known as the “Macron Bill”, was adopted on July 10 by the French Parliament, after a long and turbulent process. Published on August 7, the “Macron Law” came into force on August 8, even though the implementation of many measures is conditioned upon the publication of implementing decrees or deferred to a subsequent date.

It seemed like a never-ending journey. We had already outlined in our December 2014 e-newsletter the key measures contemplated by the Macron Bill but the legislative saga was then a long way from coming to an end.

Obviously, although the text is dense and despite the amount of time it took to have it adopted, the Macron Law looks more like a catalogue of – albeit useful and necessary – dispersed measures than an extensive structural reform, as had been announced.

This article is designed to outline the key labor- and employment-related measures that can affect businesses.

After months of discussions, the Macron Bill was adopted on final reading by the National Assembly, the day following the ultimate use by the Government of Article 49.3[1] of the French Constitution and in the absence of any resolution of no-confidence. It was high time that the parliamentary process closed, given the bulge in the number of articles (307) and pages (not less than 316!) over the last few weeks. Published on August 7, the Macron Law came into force on August 8, even though the implementation of many measures is conditioned upon the publication of implementing decrees or deferred to a subsequent date. In this respect, on August 7, the Government posted on the Legifrance website[2] a "schedule of implementation of the Law".

The key labor- and employment- related measures of the Macron Law, following its legal review by the Constitution Council, are outlined below[3]:

1. The contours of the obligation to provide information to employees in case of contemplated sale of the business

In order to make it possible for all or part of the employees to submit a purchase offer, the so-called "Hamon Law" on social and solidarity economy dated July 31, 2014 imposed on companies with less than 250 employees the obligation to inform each employee individually of any contemplated sale of the majority of the share capital, failing which any such sale could be nullified.

The Macron Law has adjusted this obligation to provide information to employees.

As such, if information has not been provided to employees prior to any such sale, the sanction is no longer the nullification of the sale – a sanction deemed too much stringent – but a financial penalty. In this respect, the Constitutional Council, asked to rule on an application for a priority preliminary ruling on the issue of constitutionality, held on July 19, 2015 that the "Hamon Law" provisions providing for the nullification of the sale contravened entrepreneurial freedom and, consequently, ordered the repeal of such provisions with immediate effect.

Henceforth, failure to comply with this obligation to provide prior information shall expose the company to a civil fine that cannot exceed 2% of the sale price. This fine will be imposed by the court, at the request of the Public Prosecutor, in the framework of a liability action.

In addition, the Macron Law further limits this obligation to provide information by imposing it only in case of sale of a business going concern or at least 50% of the shares making up the capital of a *Société à Responsabilité Limitée* (limited liability company) or *Société Anonyme* (joint-stock company), which means that it no longer applies to contributions, intra-group transfers, transfers concluded for no consideration, transfers in lieu of payments, etc.

Lastly, the Macron Law has specified the terms and conditions in which the information must be provided to employees: When the information is provided by registered mail, return receipt requested, the "*date of receipt of the information is the date of first presentation of the letter*", no longer the date on which the letter is actually delivered to the addressee. As such, the information shall be deemed received by the employee even if he/she is away from his/her home and has not necessary had knowledge of such letter thereafter. Further, the obligation to provide prior information does not apply if, during the twelve months preceding the sale, an information mechanism has been put in place to provide employees with information about staff buyout opportunities.

A Decree that will set the effective date of this new scheme is expected to be published in December 2015. In the absence of any such Decree, the new provisions will, in any event, become applicable as from February 6, 2016.

2. Liberalization of Sunday openings

Goods and services retail store located in certain designated geographical areas (touristic areas, international touristic areas, trading/shopping areas, train stations with an exceptional influx of tourists) will be allowed, as of right, to open on Sundays (by granting to all or part of their staff rest time on a rotational basis). A Decree that will fix the criteria to be applied to delineate these areas was published on September 24, 2015. These criteria are:

- 1°) Having an international reputation, due to an internationally renowned offer in commercial, cultural, patrimonial or leisure activities;
- 2°) Being served by transport infrastructures of national or international scope;
- 3°) Having an outstanding influx of tourists residing out of France;
- 4°) Enjoying a significant flow of purchases made by tourists residing out of France, assessed by purchases amount or by their share in the total turnover of the area.

Mayors will be entitled to allow non-food retail shops to open 12 Sundays a year (instead of 5, as currently applicable under French law), effective as from January 1, 2016. Yet, for the year 2015, mayors may elect to allow such shops to open 9 Sundays. The list of Sundays during which such stores can open will be drawn up before December of each year. Beyond 5 Sundays per year, mayors must seek the opinion of the competent inter-communal organization.

In any event, for a retail store to open on Sundays, a collective agreement must have been entered into and include mandatory provisions (such as indemnities for child care expenses and the right for employees to change their mind) and wage-related compensatory measures (for which the Macron Law does not impose a minimum amount). In stores with less than 11 employees, if there is no such collective agreement, the approval of the majority of employees on the wage-related compensatory measures will be sufficient.

Shops that are already opened on Sundays under the previously applicable legal regime will have two years to enter into a collective agreement and comply with the new scheme.

3. Reform of the Labor Courts

1. The media echoed a measure that should have been a flagship measure of the labor and employment section of the Macron Law: The introduction of a mandatory sliding scale capping the damages that French Labor Courts may award in case of dismissal without cause.

   This measure, aimed at reassuring employers and making the risks associated with Labor Court proceedings more predictable (which, we believe, is, in principle, a good thing) has been much debated and several trade unions, unions of lawyers and unions of judges have taken steps to have this measure declared illegal. And this is what happened: In its decision of August 5, 2015, the Constitutional Council invalidated the sliding scale, holding that the legislator had breached the principle of equality before the law by applying the criterion of the company size to fix the minimum and maximum amounts of damages that could be awarded. But to cap the damages that may be due to an employee dismissed without cause, the legislator must apply criteria that take into account the loss suffered by the employee, such as the seniority, but not the size of the company.

   French Minister of Economy Emmanuel Macron declared, however, that "*works will be carried out quickly to adapt this scheme to respond to the legal issue raised by the Constitutional Council*".

   While the mandatory scale of dismissal indemnities initially provided for by the Macron Law has been invalidated, the indicative baseline of compensation owed to the employee dismissed abusively or without cause provided for under Article 258 4° of the Macron Law remains effective.

   Codified in Article L. 1235-1 of the French Labor Code, this indicative baseline of compensation will fix the sums likely to be paid to the employee, depending, notably, on his/her seniority, his/her age and whether the relevant employee has found a new job or not. The relevant amount is paid without prejudice to indemnities payable to the employee as per the applicable legal provisions, collective bargaining agreement or employment contract.

   Use of this baseline shall be left to the discretion of the Labor court judges. As such, it shall be optional, unless the employee and the employer jointly ask for its application, in which case, the judge will be required to apply it strictly.

   This baseline of compensation will be set forth in a Decree of the Council of State expected to be published in October 2015. As the application of this baseline is optional, it should be immediately applicable to disputes pending before Labor Courts.

2. Pursuing its objective of reforming and shortening the proceedings before Labor Courts, the Macron Bill replaced the conciliation board by the conciliation and orientation board ("COB") that will have wider powers and the duty to refer the parties to the appropriate adjudication panel if conciliation falls through. As such, in disputes concerning a dismissal or a request made to the judge to order the

termination of the employment contract, the COB may, with the consent of the parties, refer such parties to an adjudication panel sitting in small committee (one judge elected by the employers and one judge elected by the employees) that will render its decision within a three-month period. The parties may otherwise be directly referred to an adjudicating judge chosen from and among the judges of the First Instance Court wherever the nature of the case or both parties so request. Lastly, if a party does not appear without legitimate cause, the COB may hear the case in small committee. In that situation, it shall adjudicate the case on the basis of the exhibits produced and arguments raised by the appearing party and communicated to the opponent. In addition, if a Labor Court ceases to function or if there are serious difficulties rendering the functioning of a Labor Court impossible, the First President of the Court of Appeals shall be entitled to appoint one or several judges within the jurisdiction of the Court of Appeals to hear the cases registered on the cause list of the Labor Court.

These new procedures should help shorten Labor Court proceedings which currently last 15 months on average, according to statistics.

Lastly, particular emphasis is placed on the amicable settlement of disputes. Firstly, the possibility to use conventional mediation – so far reserved for cross-border disputes – is extended to any and all disputes concerning an employment contract. The use of the "*procédure participative*" (i.e. a collaborative dispute resolution process) is also encouraged: in that situation, the parties agree to seek an amicable solution with the assistance of their lawyers before any trial. Yet, it remains to be seen how these two alternative dispute resolution methods – that until today did not exist as such under French labor and employment law – will be implemented in practice by employees.

3. The Macron Bill also intends to create a true status as "*défendeur syndical*" (i.e. union defender). Henceforth, union defenders will be entitled to assist the employee or the employer not only before Labor Courts but also before Courts of Appeals. They will be subject to a duty of professional secrecy and bound by the obligation to exercise discretion. They may not be dismissed or sanctioned as a result of their status as union defenders and shall be treated like protected employees in case of dismissal.

   A Decree expected to be published in October 2015 will set (i) the conditions in which a union defender can be registered on a list drawn up by administrative authorities upon proposal of the representative employers' associations and trade unions, and (ii) the compensation scheme for union defenders who exercise their professional activities outside any establishment, or have concurrent employers.

4. The integration of Labor Court judges in the judiciary is strengthened. Article 258 of the Macron Bill includes provisions aimed at professionalizing the function of Labor Court judges. These provisions shall become effective upon the next renewal of judges. Any Labor Court judge who fails to follow the prescribed mandatory initial training within a required timeline shall be deemed to have resigned. In addition, Labor Court judges shall be required to undergo continuous training while performing their judicial duties.

Ethical obligations have been strengthened and the disciplinary procedure completely overhauled. The Macron Law first specifies that Labor Court Judges shall perform their duties with independence, impartiality, dignity and probity, and behave in such a way as to exclude any legitimate doubt in this respect. They shall, in particular, refrain from any public act or conduct that is incompatible with their duties. They may not go on strike if the postponement of the assessment of a case is likely to entail irremediable or manifestly excessive consequences for the rights of one party. Any breach of duties in the performance of his/her functions may be considered as a disciplinary offense and the disciplinary authority shall be vested with a national disciplinary committee chaired by a President of Chamber at the *Cour de Cassation* (French Supreme Court).

It is hoped that these measures will help increase the legal quality of the judgments issued by Labor Courts – a number of judgments lack legal consistency today – and change the behaviors of Labor Court judges sometimes viewed as too much partisan and partial.

A Decree of the Council of State expected to be published in October 2015 will set out the conditions in which the reform of the Labor Courts is to be implemented.

4. So-called "*Délit d'entrave*" (i.e. obstructing the proper functioning of the employee representative bodies)

Obstructing the proper functioning of employee representatives (such as opposing the organization of works council meetings, etc.) is no longer punishable by a prison sentence: The Government has decided to abolish this anxiety-provoking sentence because "*It sent a negative signal to investors*". Yet, the fine is increased from EUR 3,750 to EUR 7,500 .

It should be noted, however, that obstructing the formation of employee representative bodies and breaching the protection status granted to employee representatives remain punishable by one year's imprisonment, in addition to the above-mentioned fine.

In the end, this measure is highly symbolic and has been taken for "marketing" purposes only. This is all the more true as, in practice, prison sentences are rarely imposed when the employer obstructs the proper functioning of the employee representative bodies.

5. Dismissal on economic grounds

The Macron Law, as published, seeks to somewhat soften (without much success however…) the rules governing dismissal on economic grounds set forth by the Law on securing employment dated June 14, 2013. The new rules apply to procedures for dismissal on economic grounds initiated since the publication of the Law.

1. The scope of application of the criteria used to determine the order of dismissals may henceforth be set

forth in the collective agreement on the "*Plan de Sauvegarde de l'Emploi*" (collective lay-off plan) or in the unilateral document, and may, as such, be applied at a lower level than the one of the legal entity. If defined in the unilateral document, the scope of application may not, however, be within a purview narrower than that of each "*employment area*" where is/are located one or several establishments of the company (Article 288). In practice, a Decree expected to be published in December 2015 will define the notion of "*employment area*".

2. A more significant change concerns the employer's obligation to search for redeployment opportunities: It is now up to the employee whose dismissal is contemplated to request to be informed of any job offers abroad and to specify any potential restrictions with respect to the job characteristics, including, in particular, in terms of wages and location. It is only following that request that the employer will provide the corresponding opportunities to the employee who has expressed his/her interest. As such, as the employee is now the initiator of the search process abroad, another Decree is expected to be published in December 2015 to set the conditions in wish the employee must be informed of the possibility to request such redeployment process. It remains to be seen if this alleged simplification sought by the Macron Law with respect to the search for redeployment opportunities abroad will be actually efficient.

3. The French administration will be entitled to issue a new decision "*sufficiently reasoned*" if its first decision to approve a collective lay-off plan is nullified by an administrative court (Article 291 of the Macron Law). This new approval will have the effect of making the nullification of the first decision "*for the sole ground of insufficient reasons*" "*irrelevant for the validly of the lay-off plan and shall not give rise to the payment of an indemnity by the employer*" (Article 292 of the Macron Law). In other words, the administration will have the possibility to make up for its past errors, whereas previously, a collective lay-off plan could be nullified by its own fault.

4. It should be noted that for "small-scale" dismissals (dismissal of less than 10 employees over a 30-day period), companies no longer have the obligation to give prior notification to the administration (Article 289 of the Macron Bill).

6. Job preservation agreements are now more flexible and secure

These majority collective agreements were introduced by the Law on securing employment in order to enable a distressed company to avoid dismissals through a decrease of wages and an adjustment of the work organization (Article L. 5125-1 of the French Labor Code). But unfortunately, they were not as successful as anticipated (7 agreements signed in 2 years!).

The Macron Law extends the duration of such job preservation agreements from 2 to 5 years, it being specified that an assessment of the application of the agreement must be made after two years. These agreements can

also include a provision according to which it will be suspended "*if the economic situation of the company improves or worsens*".

In the absence of any specific provision in the agreement, the company must inform the employee of the consequences that this agreement will have on his/her employment contract, by registered letter, return receipt requested. The letter must also specify that the employee has one month as from receipt thereof to express his/her refusal. In that case, the employee shall be dismissed on economic grounds and his/her dismissal will necessarily be considered as a dismissal for cause. This clarification is intended to avoid any legal challenge. The employer will not have the obligation to find a redeployment position for the employee but the latter will still benefit from the redeployment leave or from the "*contrat de sécurisation professionnelle*" (professional security scheme). These new rules shall apply to all employment preservation agreements concluded since the entry into force of the Macron Law.

In conclusion, these measures are, after all, pragmatic and useful, though modest, and can be viewed as a step in the right direction.

74% of business leaders interviewed in a survey conducted by Opinion Way for ICC France/La Tribune/ Europe 1 consider that the Macron Law lacks consistency and logic. A feeling that can probably be explained by the density of the text that comprises more than 300 Articles with multiple objectives.

Despite the fact that the text appears, at first glance, heavy going because of its density, its review and analysis leave an after taste of "not enough": Not enough simplification, not enough flexibilization, not enough liberalization, not enough bold measures, etc.

It is not clear whether this catch-all Law will likely restore foreign investors' confidence in France's capacity to re-boost its economy and make its labor market more flexible.

[1] Article 49§3 of the French Constitution: "*The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered passed unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in the foregoing paragraph. In addition, the Prime Minister may use the said procedure for one other Government or Private Members' Bill per session*".

[2] Website of the French government for the publication of legislations, regulations, and legal information.

[3] This article is not intended to provide an exhaustive presentation of all labor- and employment-related measures contained in the Macron Law. Only the most significant measures will be outlined, and this article will not address the measures concerning transnational postings of employees. Such measures will be discussed separately in a future article.

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