

Overview of the provisions of the so-called “florange law” related to takeover bids, double voting rights and allocation of free shares

Two years after the promise made by François Hollande to the employees of ArcelorMittal, the Law aimed at recapturing the real economy, known as the “Florange Law” (the “Law”) has just been published^[1].

For the record, the bill, introduced on May 15, 2013 in response to the stir caused by the closure of the blast furnaces in Florange (Moselle), was definitely adopted on February 24, 2014 but was then referred to the Constitutional Council for constitutional review. The Council quite recently ruled that the challenged provisions set forth in Title III of the Law^[2] were constitutional. This article provides an overview of the main provisions of this Title.

1. Introduction of a minimum acceptance threshold for takeover bids and reduction of the so-called “speeding ticket” threshold at 1%

In order to discourage creeping takeovers, Article 5 of the Law provides for the introduction of a new Article, i.e. Article L.433-1-2, in the French Monetary and Financial Code. Pursuant to this new Article:

- If, as of the closing date of the takeover bid, the bidder, acting alone or in concert within the meaning of Article L.233-10 of the French Commercial Code^[3], does not hold a number of shares representing **more than 50%** of the equity securities or voting rights, the **bid will automatically lapse**.
- In addition, when the elapsed bid **was a mandatory bid**, the **bidder**, acting alone or in concert within the meaning of Article L.233-10 of the French Commercial Code, is **deprived** – for any General Meeting of Shareholders (“GMS”) that could be held until such bidder acquires the required number of equity securities – **of the voting rights attached to the equity securities held in the company for the fraction of ownership exceeding:**
 - either the **30%** threshold of equity securities or voting rights, if the takeover bid has been filed by

a person, acting alone or in concert within the meaning of Article L.233-10 of the French Commercial Code, who has crossed, directly or indirectly, the threshold of 30% of equity securities or voting rights^[4];

- or the **number of shares the bidder held in the company prior to the bid plus 1% of the equity securities or voting rights**, if the bid was made by a person, acting alone or in concert within the meaning of Article L.233-10 of the French Commercial Code, who holds, directly or indirectly, **between 30% and 50%** of the equity securities or voting rights and increases, **within a period of less than 12 consecutive months, such shareholding interest by at least 1%** of the equity securities or voting rights.
- The **person who**, acting alone or in concert within the meaning of Article L.233-10 of the French Commercial Code, **has launched a mandatory takeover bid or holds**, directly or indirectly, a number of equity securities or voting rights representing **between 30% and 50%** of the share capital or voting rights and has **launched a bid that has elapsed, may not increase its ownership** of equity securities or voting rights unless it/he/she **informs the *Autorité des marchés financiers*** (French Financial Market Authority, hereinafter the “AMF”), and **files a draft bid** to acquire a determined number of equity securities. If this provision is not complied with, this person shall be deprived of the voting rights attached to the equity securities held in excess of the number of equity securities or voting rights it/he/she initially held in the company.

In addition, Article 6 of the Law amends Article L.433 of the French Monetary and Financial Code that now stipulates that any natural person or legal entity, who/that is a shareholder of a company having its registered office located in France and the shares of which are admitted to trading on a regulated market of a Member State of the European Union or another State that is a contracting party to the Agreement on the European Economic Area, acting alone or in concert within the meaning of Article L.233-10 of the French Commercial, **comes to hold**, directly or indirectly, more than **30%** of the equity securities or voting rights, **or holds**, directly or indirectly, **between 30% and 50%** of the equity securities or voting rights, and **increases, within a period of less than 12 consecutive months, such shareholding interest by at least 1%** – and no longer 2% – of the company’s equity securities or voting rights, **must immediately inform the AMF and file a draft bid** to acquire a determined number of equity securities. If this provision is not complied with, **the voting rights attached to equity securities held in excess** of the 30% threshold or in excess of his shareholding interest increased by the above-mentioned 1% of the share capital or voting rights **are suspended**.

It should be specified, however, that this provision does not apply to persons/entities meeting the above requirements who/that holds, directly or indirectly, between 30% and 50% of the company’s equity securities or voting rights and **increases, within a period of 12 consecutive months preceding the entry into force of the Law, their shareholding interest by at least 1% and by no more than 2%** of the company’s equity securities or voting rights.

These persons/entities must merely **inform the AMF** of any increase in their ownership of equity securities or voting rights and **file a draft bid** in order to acquire a determined number of equity securities, **unless this**

increase remains below 1% of the company's equity securities or voting rights within 12 consecutive months. If this provision is not complied with, these persons/entities shall be deprived of the voting rights attached to the shares acquired in excess of their initial ownership interest.

Article 6 will only become effective as of the 1st day of the 4th month following the enactment of the Law.

Lastly, it should be noted that, contrary to what had been initially discussed, the **threshold that triggers the obligation to file a takeover bid remains set at 30%** of the target company's equity securities or voting rights^[5].

2. Introduction of a new Works Council information/consultation procedure in case of takeover bids

Article 8 of the Law amends Article L.2323-23 of the French Labor Code that now provides as follows:

- **Prior to the issuance of a reasoned opinion by the** Board of Directors ("BoD") or supervisory board on the benefits of the bid and the consequences of the bid for the target company, its shareholders and its employees, the Works Council ("WC") of the target company must be convened and **consulted on the draft bid;**
- The WC must issue its opinion within **one month as from the filing of the draft takeover bid.** If it fails to do so, it shall be deemed to have been duly consulted.

This new provision shall only apply to takeover bids filed as from the 1st day of the 4th month following the enactment of the Law.

3. Abolition of the principle of neutrality of the BoD (or Executive Board) during the bid process

In order to discourage hostile takeovers, Article 10 of the Law amends Article L.233-32 of the French Commercial Code that now provides as follows: during a bid process targeting a listed company, **the BoD or the Executive Board**, following the authorization from the supervisory board of the target company, *"may take any measures, the implementation of which could frustrate the bid, subject to the powers expressly granted to the general meetings of shareholders and within the limit of the corporate purpose of the company"*.

Yet, the by-laws of a company, the shares of which are admitted to trading on a regulated market, may provide that during a takeover bid, the aforementioned provision, as well as any measures for the issuance of warrants enabling the subscription of company's shares on preferential terms and their free allocation to all the company's shareholders that were shareholders before the expiry of the bid period (these warrants being commonly referred to as *"bons d'offre"*, *"bons Bretons"* or *"poison pills"*), must be **previously approved by the GMS** and that any **delegation of power** for a measure, the implementation of which is likely to frustrate the bid, with the exception of measures concerning the search for other bids, granted by the GMS before the

bid process, **is suspended** in case of takeover bids.

This new provision shall only apply to takeover bids filed as from the 1st day of the 4th month following the enactment of the Law.

4. Generalization of double voting rights in listed companies

In order to encourage long-term shareholding, Article 7 of the Law amends Article L.225-123 of the French Commercial Code that now provides as follows: in companies, the share of which are admitted to trading on a regulated market, **double voting rights are automatic, unless otherwise provided for in the by-laws pursuant to a decision adopted after the enactment of the Law**, for all shares **fully paid-up** that have been **registered in the name of the same owner for two years**.

The same apply to double voting rights granted on registered shares allocated free of charge to a shareholder.

It should be specified that:

- By-laws clauses that grant a double voting right in the conditions set forth in Article L.225-123§1 of the French Commercial Code^[6] remain in full force and effect;
- The calculation of the period during which shares are registered in the name of their owner starts as of the entry into force of the Law for the shares of companies that have not adopted a resolution to maintain the “one share-one vote rule”;
- There is an **exemption** to the obligation to file a draft takeover bid for the benefit of any shareholder who (i) holds, as of the entry into force of the Law, more than **30%** of the company’s equity securities or voting rights and, (ii) **“within a period of two years as from this date”^[7]**, crosses the 30% threshold upwards because of the attribution of double voting rights^[8], **“subject to the condition that the percentage of voting rights held after the crossing of the three-tenths threshold be inferior to the percentage of voting rights held as of the entry into force of this article”^[9]**.

The last paragraph of Article L.225-123 of the French Commercial Code – according to which the double voting right could be reserved only to **French shareholders or to those that are nationals of a Member State of the European Union or another State that is a contracting party to the Agreement on the European Economic Area** is **repealed**.

5. Amendment to the rules governing free allocation of shares

Article 9 of the Law amends Article L.225-123 of the French Commercial Code that now provides as follows: the total number of shares allocated free of charge, that may not exceeds 10% of the share capital^[10] as of the date of the allocation decision made by the BoD or the Executive Board, can be increased up to **30%** – and no

longer only 10% - when the **shares are allocated free of charge to all employees of the company**, it being specified, however, that the **number of shares allocated to each employee may not exceed a 1 to 5 ratio**^[11].

[1] Law n°2014-384 of March 29, 2014 aimed at recapturing the real economy, JORF n°0077 of April 1, 2014.

[2] Decision n°2014-692 DC of March 27, 2014.

[3] *"I.- Shall be deemed to act in concert individuals and legal entities who have entered into an agreement to acquire or transfer voting rights in a company or exercise such rights in order to implement a common policy with respect to that company or to gain control of that company.*

II.- Such an agreement is presumed to exist:

- 1. Between a company, the chairman of its board of directors and its general managers or the members of its executive board or its managers;*
- 2. Between a company and the companies it controls within the meaning of Article L. 233-3;*
- 3. Between companies controlled by the same person or persons;*
- 4. Between the shareholders of a société par actions simplifiée in relation to the companies it controls;*
- 5. Between the trustee and the beneficiary of a trust agreement, if the beneficiary is the settlor.*

III. - Persons acting in concert are jointly and severally bound by the obligations imposed on them by laws and regulations."

[4] Or 1/3 of the equity securities or voting rights: for persons/entities governed by Article 92-II-§3 of the Law n°2010-1249 of October 22, 2010 on banking and financial regulation, the threshold of 1/3 of the equity securities and voting rights supersedes this 30% threshold (extension of the so-called "*grandfather clause*").

[5] The bill initially planned to lower this threshold at 25%, as suggested by Louis Gallois in December 2012 in his *Pact for the competitiveness of the French Industry* (commonly referred to as the "*Gallois Report*"). Cf. the article entitled *Towards a tougher legislation on hostile takeovers* published in our [May 2013 e-newsletter](#).

[6] *"A voting right equivalent to twice that attached to other shares, based on the fraction of capital they represent, may be granted by the by-laws to fully paid-up shares for which it can be proved that they have been registered in the name of the same shareholder for at least two years".*

[7] The *Association Nationale des Sociétés par Actions* (French association of joint stock companies, hereinafter "ANSA") considers that insofar as the automatic grant of double voting rights shall only be effective 2 years after the entry into force of the Law, it must be understood here "*after 2 years*" (ANSA,

n°14-007, March 2014).

[8] Or 1/3 of the share capital or voting rights: extension of the so-called “*grandfather clause*” (cf. footnote 4).

[9] The ANSA infers therefrom that the person who crosses this threshold as a result of the automatic allocation of double voting rights “*can benefit from an exemption from the obligation to file a takeover bid but its ownership interest must be capped at the percentage of voting rights that such person held as of the entry into force of the Law*” (ANSA, n°14-007, March 2014).

[10] This threshold can be increased to 15% in companies, the shares of which are not admitted to trading on a regulation market or a multilateral trading facility, and that do not exceed, as of the close of a financial year, the thresholds applicable to small- and medium-sized businesses set forth in Article 2 of Commission Recommendation 2003/361/CE of May 6, 2003, if shares are allocated free of charge only to certain categories of employees within the company.

[11] The ANSA considers that this differential only applies if the 10% ceiling is exceeded (15% in companies defined previously – cf. footnote 8) and up to a 30% ceiling if shares are allocated free of charge of all employees within the company (ANSA, n°14-007, March 2014).

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