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Towards the enforcement of the pre-emption right granted to Municipalities under the Law n°2005-882 of August 2, 2005

Since the Law n°2005-882 of August 2, 2005 in favor of small and medium sized companies (article 58 of said Law codified in Articles L. 214-1 to L. 214-3 of the French Code of Urban Planning), municipalities can exercise a pre-emption right in relation to the sale of commercial or artisanal businesses and to the assignment of the lease agreement(s) pertaining to such businesses.

This new pre-emption right, which must be distinguished from the pre-emption right which municipalities could already exercise on the “premises” where a commercial or artisanal business is conducted, shall become enforceable upon the forthcoming publication of a Decree.

The creation of this new right aims at allowing municipalities to prevent the disappearance of small shops and avoid the concentration of franchisees in downtown areas.

It is therefore important that any person conducting a commercial or artisanal business be aware that the transfer of such business and of the commercial lease entered into in relation thereto is now subject, under certain conditions and **on pain of nullity**, to this new pre-emption right.

Yet, this new pre-emption right raises certain questions and poses a certain number of difficulties.

This is the reason why law practitioners, legal professionals and authors of legal documents have been waiting

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more than 18 months for the publication of the Decree which should specify the conditions in which this new pre-emption right is to be exercised. According to certain sources, a draft version of the Decree has already been submitted to the competent ministers and the publication of the text is reportedly imminent.

In this context, we have indicated hereunder the outlines of this regulation:

The right of urban pre-emption created by the Law n°2005-882 of August 2, 2005 shall not have a broad scope of application.

As such, prior to being entitled to exercise such right, municipal councils must **delimit, within the territory of the municipality, a so-called “preservation perimeter”** for small shops and artisanal businesses. The creation of this perimeter must be officially acknowledged in a reasoned decision of the municipality.

At the time of each sale, transfer or assignment of a commercial or artisanal business, the person(s) responsible for preparing the legal documentation will have the obligation to enquire with the municipality whether it has issued a decision creating, within the territory where such business is conducted, a preservation perimeter for small shops and artisanal businesses.

If the municipality has created such a perimeter and if the business to be sold, transferred or assigned is located therein, **Seller must sent to the municipality a prior notice detailing the price and the condition of the sale, transfer or assignment.**

If these formalities are not complied with, the sale, transfer or assignment may be declared null and void during a period of five years from the date of completion of the transaction.

If the municipality does not respond to the prior notice within two months from the date of receipt thereof, it shall be deemed to have waived its pre-emption right and Seller will be entitled to complete the sale, transfer or assignment for the price and in the conditions indicated in said notice.

If the municipality decides to exercise its pre-emption right, the Law specifies that **the municipality must, within one year from the date of the sale, transfer or assignment, resell/retransfer or reassign the business or the commercial lease** relating thereto to a company registered with the *Registre du Commerce et des Sociétés* (Registry of Trade and Companies) or *Répertoire des Métiers* (Registry of Trades) in order to ensure the diversity of commercial and artisanal activities within the preservation perimeter. In practice, this means that the municipality has one year to find a buyer which must be a trader or a craftsman.

However, the law does not address the scenario where the municipality fails to find a buyer within the one year timeline...

Many law practitioners, professional associations and legal professionals have expressed their concerns about these measures which, as currently drafted, seem to come up against the economic reality of business world.

The main objection is that the value of the pre-empted business may noticeably decrease between the moment

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the pre-emption right is exercised by the municipality and the re-sale, re-transfer or re-assignment of the same to a potential buyer.

Moreover, the Seller will not be paid the transfer or sale price until the transaction is regularized and the buyer who initially wanted to acquire the business is in practice denied a business opportunity.

Finally, municipalities will have to be careful in exercising this new pre-emption right as they must anticipate the risk to be obliged to compensate Seller for any potential loss resulting from the business remaining unexploited should the municipality not be able to find a buyer within the required timeline.

If some hoped that the measures creating this new pre-emption right would sink into oblivion, it seems now confirmed that this new right will be implemented through the soon-to-be-published application Decree.

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