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Closing the Entrepreneurial Gap: Liberalizing Employment Law to Restore French Competitiveness

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Closing the Entrepreneurial Gap: Liberalizing Employment Law to Restore French Competitiveness

*By Kelly Hamren**

Abstract: Malaise in the European economy, and particularly in France, is both a result of dampened entrepreneurial activity and a continuing drag on economic competitiveness. In France, rather than undertaking much needed structural reform, the government has relied heavily on tax increases and heightened public spending to stimulate growth. This Note contends that French reforms should instead focus on liberalizing French employment law to encourage entrepreneurial activity. Because entrepreneurship requires innovation and creates new economic opportunities, it is increasingly viewed as one of the most important means of resuscitating depressed economies. By its very nature, entrepreneurship capitalizes on the formation of new ideas and the development of innovative products and services. Statistically, France has lower levels of entrepreneurial activity than the United States, China, Brazil, and many other European countries. France's government institutions and legal framework play a critical role in contributing to its low levels of start-up activity. Rigid hiring and firing laws favor employees and do not lend themselves to the type of quickly changing and shifting workforces needed by start-up businesses. The costs and legal implications of hiring, firing, and expanding create risks that often seem to outweigh the rewards for French entrepreneurs. This Note provides an in-depth overview of the specific policies and practices in French employment law that restrict growth in France's entrepreneurial sector. It concludes with a prescriptive analysis for restructuring the French legal system to help encourage entrepreneurship and stimulate job creation in the face of declining French competitiveness.

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I. INTRODUCTION

When France’s industry minister wrote to an American CEO proposing the possible sale of a failing French tire plant, the CEO responded,

“How stupid do you think we are?”¹ In a controversial letter, Maurice Taylor, the CEO of Titan International, expressed derision regarding the French “so-called” work ethic, writing that “[t]he French workforce gets paid high wages but works only three hours. They get one hour for breaks and lunch, talk for three and work for three.”² Stirring indignation throughout France, *The Economist* suggests that the severity of the French reaction exposed a nerve, because “[f]or every measure of hyperbole and gratuitous insult in Mr. Taylor’s letter there was also a grain of truth.”³ The grain of truth to this statement is reflected in France’s declining competitiveness, record high unemployment, and an economy teetering on the brink of recession.⁴

This Note explains the French economy’s struggle to remain competitive by examining the ways in which France’s rigid employment laws deter entrepreneurial activity, one of the key drivers of economic growth. Restrictive employment laws are a key contributor to the French economy’s declining competitiveness because they inhibit entrepreneurial activity in three important ways. First, rigid hiring and firing procedures increase the costs of entrepreneurial risk and decrease firm productivity. Second, complex regulatory requirements triggered by increases in workforce personnel inhibit firm growth and encourage inefficient allocations of labor. Third, large social security contributions impose prohibitive start-up costs for entrepreneurs.

In order to illustrate the harmful impact of rigid employment laws on France’s economic performance and levels of entrepreneurship, Part II of this Note begins by addressing the declining competitiveness of the French economy and providing an overview of France’s entrepreneurial gap. Next, Part III discusses entrepreneurship more generally, placing particular emphasis on the role of legal institutions in shaping entrepreneurial activity. Then, expanding on these theoretical principles, Part IV examines specific employment laws that stifle French entrepreneurship, thereby stunting economic growth. Finally, Part V concludes with a prescriptive analysis, suggesting that French employment laws need to be reformed in order to close France’s entrepreneurial gap and boost national competitiveness before the country’s economy continues to deteriorate.

¹ Emmanuel Jarry & Catherine Bremer, *Titan CEO Scoffs at France’s Work Ethic and Its ‘So-Called Workers,’* HUFFINGTON POST (Feb. 20, 2013, 1:18 PM), http://www.huffingtonpost.com/2013/02/20/titan-ceo-french-workers_n_2723996.html.

² *Id.*

³ Arnaud Montebourg vs. “The Grizz,” *ECONOMIST* (Feb. 21, 2013, 3:16 PM), <http://www.economist.com/blogs/charlemagne/2013/02/french-business>.

⁴ *Id.*

II. FRANCE'S DECLINING COMPETITIVENESS

France is lagging behind its European neighbors at enacting substantive reform and is struggling to remain competitive. The following part provides an overview of France's economic challenges within the context of the euro crisis and highlights one of the main sources of the country's economic malaise—low levels of entrepreneurship. As France trails behind other European economies in competitiveness, it also suffers from an interrelated lack of entrepreneurial activity.

A. Europe's Financial Crisis and the French Economy

According to a recent report published by the World Economic Forum (WEF), “[s]ince the beginning of the financial and economic crisis in 2008, Europe has been in the eye of a storm, facing an intense financial crisis, decline in economic performance and growing public discontent.”⁵ In the wake of the financial crisis of 2008, economic activity in Europe suffered a sharp decline,⁶ European governments had to bail out banks, Iceland went bankrupt,⁷ and a sovereign debt crisis in the “Eurozone”⁸ triggered widespread concern over the potential breakup of the euro.⁹

The Eurozone debt crisis erupted in late 2009 in reaction to Greece's disclosure that the country had previously misreported national deficit levels.¹⁰ The disclosure severely damaged investor confidence, causing Greek bond spreads to rise to unsustainable levels while also galvanizing

⁵ BEÑAT BILBAO-OSORIO ET AL., WORLD ECON. FORUM, REBUILDING EUROPE'S COMPETITIVENESS REPORT 27 (2013) [hereinafter EUROPE'S COMPETITIVENESS], available at http://www3.weforum.org/docs/WEF_RebuildingEuropesCompetitiveness_Report_2013.pdf.

⁶ According to a report prepared by the European Commission, “[i]n mid-2013 GDP in the EU and the euro area [was] respectively 2.4% and 3.1% below the pre-crisis levels of early 2008.” EUROPEAN COMM'N, DIRECTORATE-GENERAL FOR ECON. & FIN. AFF., EUROPEAN ECONOMIC FORECAST: AUTUMN 2013 10 (2013) [hereinafter FORECAST: AUTUMN 2013], available at http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee7_en.pdf.

⁷ Sheyna Steiner, *Timeline: Evolution of the European Debt Crisis*, YAHOO! FINANCE (Oct. 29, 2012, 3:01 AM), <http://finance.yahoo.com/news/timeline-evolution-european-debt-crisis-070133430.html>.

⁸ The term “Eurozone” will be used to refer to the 17 EU member states that use the euro as their currency, covering: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Spain, and Slovenia. REBECCA M. NELSON ET AL., CONG. RESEARCH SERV., THE EUROZONE CRISIS: OVERVIEW AND ISSUES FOR CONGRESS 1 (2012), available at <http://www.fas.org/sgp/crs/row/R42377.pdf>.

⁹ Uncertainty regarding the integrity of the euro peaked at the end of 2011 and the first half of 2012. FORECAST: AUTUMN 2013, *supra* note 6, at 12–13. See also Stefan Kaiser, *Euro Crisis Reprise: End to Bailout Programs Signals Recovery*, SPIEGEL ONLINE (Nov. 15, 2013, 11:27 AM), <http://www.spiegel.de/international/europe/end-of-bailout-programs-in-spain-and-ireland-signals-euro-crisis-recovery-a-933650.html> (“The summer of 2012 was horrific for Europe. The euro zone seemed on the verge of collapse, investors were reluctant to lend money to debt-burdened countries and interest on Spanish and Italian bonds breached the psychologically critical 7-percent mark.”).

¹⁰ NELSON ET AL., *supra* note 8, at 2.

international concern regarding the debt levels of other Eurozone countries.¹¹ In the end, five Eurozone governments—including Greece, followed by Ireland, Portugal, Spain, and Cyprus—had to borrow money from the International Monetary Fund (IMF) and other Eurozone governments through the European Central Bank (ECB) to avoid defaulting on their sovereign debt.¹² Today, however, effective crisis management and economic reforms undertaken by a number of euro-area countries have helped restore international confidence in the euro and “uncertainty has receded but remains elevated.”¹³ As a result of extensive structural adjustments,¹⁴ the countries that suffered the most during the Eurozone crisis have reduced labor costs,¹⁵ increased labor market flexibility,¹⁶ boosted their export ratios,¹⁷ and made significant progress at correcting fiscal imbalances by reigning in their deficits.¹⁸

Whereas other Eurozone countries have already engaged in extensive structural reforms to boost economic performance,¹⁹ France has struggled to keep pace.²⁰ Galvanizing considerable international publicity and provoking the ire of French officials,²¹ a controversial issue of *The Economist* recently ran an attention-grabbing cover that depicted France as a ticking time bomb with an image of seven French baguettes bound by the tricolor flag and a lit fuse at the bundle’s center.²² As the Eurozone’s

¹¹ *Id.*

¹² Steiner, *supra* note 7.

¹³ FORECAST: AUTUMN 2013, *supra* note 6, at 12–13.

¹⁴ Among these structural adjustments, in order to promote growth, many Eurozone countries have engaged in labor market reform, cut pension and welfare entitlements, streamlined administrative procedures, and deregulated product markets. HOLGER SCHMIEDING & CHRISTIAN SCHULZ, LISBON COUNCIL, *THE 2013 EURO PLUS MONITOR: FROM PAIN TO GAIN 28* (2013), available at <http://www.lisboncouncil.net/publication/publication/101-the-2013-euro-plus-monitor-from-pain-to-gain.html>.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 50.

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 21.

¹⁹ For example, Southern European countries—such as Portugal, Spain, and Italy—are undertaking labor market reforms that include (1) aligning collective wage-bargaining with business needs, (2) introducing more flexible work-time arrangements, and (3) relaxing restrictions on hiring and firing. EUROPE’S COMPETITIVENESS, *supra* note 5, at 12.

²⁰ SCHMIEDING & SCHULZ, *supra* note 14, at 10 (observing that, as of late 2013, “France remains the only major European economy which is beset by serious health problems and has not yet done much about it”); see also William Horobin & Gabriele Parussini, *S&P Cuts France’s Credit Rating by One Notch to Double-A*, WALL ST. J. (Nov. 8, 2013, 1:28 PM), <http://online.wsj.com/news/articles/SB1000142405270230309504579184984164551794> (quoting the observation of Frederik Ducrozet, a senior economist at Crédit Agricole, that “when you look at price competitiveness, there is absolutely no doubt that France is lagging the structural adjustment that Germany has gone through over the past decade”).

²¹ Angélique Chrisafis, *France Blows up at Economist’s ‘Ticking Time-Bomb’ Cover*, GUARDIAN (Nov. 16, 2012, 11:55 AM), <http://www.guardian.co.uk/world/2012/nov/16/economist-front-cover-france>.

²² *The Time-Bomb at the Heart of Europe: Why France Could Become the Biggest Danger to*

second-largest economy, France's failure to undertake meaningful reform could pose a significant threat to European recovery, which has led the Lisbon Council, an economic think tank, to describe France as "[t]he sick man of Europe."²³ French underperformance along a variety of economic measures highlights the need for economic reform. At its highest level of joblessness in over fifteen years,²⁴ 11% of the French population is currently unemployed.²⁵ France is also "suffering from a widening prosperity gap" in terms of per capita GDP.²⁶ In 2010, France placed eleventh out of a total of fifteen European economies, "ranking higher than only the Southern European Economies of Spain, Italy, Greece, and Portugal."²⁷ The government was forced to raise its estimated 2013 budget deficit from 3.7% to 4.1% of France's GDP,²⁸ and real GDP growth was projected at a mere 0.1% for 2013.²⁹ Analysts also anticipated that fixed capital investment would contract by 2.5% in 2013.³⁰

B. France's Competitiveness Challenge

Both in Europe and in France, lagging economic competitiveness is at the heart of the current financial crisis. In its annual Global Competitiveness Report, the WEF defines competitiveness as "the set of institutions, policies, and factors that determine the level of productivity of a country."³¹ By driving the rates of return that can be obtained for investments in a particular country's economy, productivity serves as a

Europe's Single Currency, ECONOMIST, Nov. 17, 2012, at 13 [hereinafter *Time-Bomb*].

²³ Hugh Carnegie, *PMI Indicators Raise Worries over French Economy*, FIN. TIMES (Jan. 2, 2014, 2:51 PM), <http://www.ft.com/cms/s/0/ad21a5c0-739f-11e3-a0c0-00144feabdc0.html#axzz2qicqk8q>. According to the Lisbon Council, in contrast to significant reform efforts by the four euro members—Greece, Ireland, Spain, and Portugal—whose economies fueled the euro's crisis, "[w]e still find only very limited progress in France." SCHMIEDING & SCHULZ, *supra* note 14, at 3. The European think tank continued: "The country needs to slash expenditures, cut taxes and go far beyond the minor labour market reform of early 2013. Otherwise, France could wind up at the very bottom of the European ranking in as little as three years." *Id.*

²⁴ Mark Deen, *French Workers Who Talk for 3 Hours Don't Cut It, Titan Says*, BLOOMBERG (Feb. 20, 2013, 1:19 PM), <http://www.bloomberg.com/news/2013-02-20/french-workers-who-talk-for-3-hours-don-t-cut-it-titan-says.html>.

²⁵ EUROPEAN COMM'N, DIRECTORATE-GENERAL FOR ECON. & FIN. AFFAIRS, EUROPEAN ECONOMIC FORECAST: WINTER 2013 1 (2013) [hereinafter FORECAST: WINTER 2013], available at http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee1_en.pdf.

²⁶ ERIC LABAYE ET AL., FRENCH EMPLOYMENT 2020: FIVE PRIORITIES FOR ACTION 14 (2012), available at http://www.mckinsey.com/insights/employment_and_growth/french_employment_2020.

²⁷ *Id.*

²⁸ ECONOMIST INTELLIGENCE UNIT, COUNTRY REPORT: FRANCE 4 (Jan. 2014).

²⁹ *Id.* at 6.

³⁰ *Id.*

³¹ WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2012–2013: FULL DATA EDITION 4 (2012) [hereinafter GLOBAL COMPETITIVENESS REPORT 2012–2013], available at <http://www.weforum.org/reports/global-competitiveness-report-2012-2013>.

central component of competitiveness and economic growth that “sets the level of prosperity that can be earned by an economy.”³² The WEF has based its competitiveness analysis on the Global Competitiveness Index (GCI) since 2005, which serves as a comprehensive tool for measuring the microeconomic and macroeconomic foundations of national productivity along a variety of categories.³³ The GCI is calculated by using the weighted average of twelve different “pillars of competitiveness,” which include, among other components of competitiveness, labor market efficiency and innovation.³⁴ Although all twelve pillars are aggregated into a single competitiveness index, measures for each of the pillars are also reported individually to provide “a sense of the specific areas in which a particular country needs to improve.”³⁵

While France has long been considered one of the Eurozone’s economic leaders along with Germany,³⁶ the country’s declining competitiveness has become increasingly pronounced. Not only is France struggling to compete with the United States and other emerging economies outside of Europe, the French economy is facing increasing pressure to remain competitive alongside its European neighbors. France ranked 21st in the WEF’s competitiveness rankings for 2012–2013, falling far behind Germany, which ranked 6th, as well as several other European economies.³⁷ Although Europe’s economic position has gradually improved since 2012, France’s rank was downgraded two spots to 23rd in the competitiveness rankings for 2013–2014.³⁸ On the one hand, the WEF notes that many features of the French economy help to enhance the

³² *Id.* (“Although the productivity of a country determines its ability to sustain a high level of income, it is also one of the central determinants of its returns to investment, which is one of the key factors explaining an economy’s *growth potential*.”) (emphasis added).

³³ *Id.*

³⁴ The complete twelve pillars of competitiveness are as follows: (1) institutions; (2) infrastructure; (3) macroeconomic environment; (4) health and primary education; (5) higher education and training; (6) goods market efficiency; (7) labor market efficiency; (8) financial market development; (9) technological readiness; (10) market size; (11) business sophistication; and (12) innovation. *Id.* at 8.

³⁵ *Id.*

³⁶ See NELSON ET AL., *supra* note 8, at 9 (“The governments of the Eurozone’s two largest economies—Germany and France—have been at the forefront of the EU’s crisis response.”); SCHMIEDING & SCHULZ, *supra* note 14, at 80 (“The French-German alliance is at the core of European integration and the euro.”).

³⁷ According to the Global Competitiveness Report 2012–2013, the following European economies were all ranked ahead of France: Switzerland, which was considered the most competitive country, ranked 1st, Finland was 3rd, Sweden was 4th, the Netherlands was 5th, Germany was 6th, the U.K. was 8th, Denmark was 12th, Norway was 15th, Austria was 16th, and Belgium was 17th. The United States was ranked as the 7th most competitive economy. GLOBAL COMPETITIVENESS REPORT 2012–2013, *supra* note 31, at 13.

³⁸ WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2013–2014: FULL DATA EDITION 28 (2013) [hereinafter GLOBAL COMPETITIVENESS REPORT 2013–2014], available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.

country's growth potential: France has some of the best infrastructure in the world (ranked 4th), high levels of education and training (ranked 24th), a sophisticated and professional business culture (ranked 21st), an impressive capacity for innovation (ranked 19th), and a large market (ranked 8th).³⁹ On the other hand, the WEF also notes that the rigidity of the French labor market, which is ranked 116th due to strict hiring and firing rules and "conflict-ridden labor–employer relations," poses a significant obstacle to French competitiveness.⁴⁰

Rather than addressing the root of the problem through substantive reform, the French government primarily responded to declining competitiveness by increasing spending and raising taxes for most of 2012 and early 2013.⁴¹ As of November 2012, the French state consumed 57% of the GDP, and its public debt had risen to over 90% of the GDP.⁴² French workers also pay the highest aggregate tax rate in the EU at 46% of France's GDP.⁴³ France enacted recent labor reform to improve employer flexibility while also enhancing employee security on June 14, 2013, but many have argued that the measures fall short of the type of employment reform the country needs to revitalize the economy.⁴⁴ According to ING economist Julien Manceaux, although some of the reforms may help stimulate growth in 2014 and 2015, they are "too late [as] Italy and Spain have been adjusting their economies since 2011."⁴⁵

As a result of France's failure to engage in more far-reaching reforms, the country's credit rating has suffered a number of significant blows since 2012. Two of the world's leading credit rating agencies—Moody's Investors Service and Standard and Poor's—both downgraded France's sovereign debt from its AAA credit rating in 2012.⁴⁶ Then, in a surprise

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ For example, the Socialist government of French President Francois Hollande passed a tax increase of almost \$40 billion in 2012. Horobin & Parussini, *supra* note 20.

⁴² *Time-Bomb*, *supra* note 22.

⁴³ Phillip Inman, *France Told to Reform Labour Market After Second Credit Rating Downgrade*, GUARDIAN (Nov. 8, 2013), <http://www.theguardian.com/world/2013/nov/08/france-labour-market-reform-credit-rating-downgrade-sandp>.

⁴⁴ See, e.g., Radu Vranceanu, *Who Cares About the Unemployed?*, ESSEC BUS. SCH. (Jan. 28, 2013), <http://knowledge.essec.edu/en/economy-finance/reforming-the-french-labor-market-who-cares-about-.html>; Mark John & Nicholas Vinocur, *France Passes Reform to Ease Hire-and-Fire Rules*, REUTERS (May 14, 2013), <http://www.reuters.com/article/2013/05/14/us-france-reform-idUSBRE94D00F20130514>.

⁴⁵ Horobin & Parussini, *supra* note 20.

⁴⁶ In January of 2012, Standard & Poor's was the first to lower France's previously AAA credit rating to AA+. It attributed the downgrade to "France's relatively high general government debt, as well as its labor market rigidities." *France's Unsolicited Long-Term Ratings Lowered to 'AA+'; Outlook Negative*, STANDARD & POOR'S RATINGS SERVS. (Jan. 13, 2012) [hereinafter *France's Long-Term Ratings*], <http://www.standardandpoors.com/ratings/articles/en/us/?articleType=HTML&assetID=1245327295020>. On November 19, 2012, Moody's Investors Service followed suit, announcing its own downgrade. According to Moody's explanatory report, the primary consideration motivating

move, on November 8, 2013, Standard and Poor's downgraded France's sovereign debt a second time, bringing the rating down one notch from AA+ to AA.⁴⁷ The rating agency criticized a number of recent tax reforms as inadequate to "raise France's medium-term growth prospects," and also cited France's inability to raise employment through sufficient labor and employment reforms as one of the primary reasons for the downgrade.⁴⁸

As with previous credit rating downgrades, the market reacted to Standard and Poor's second downgrade with what has been described as a "Gallic shrug."⁴⁹ On the day of the announcement, the CAC-40 stock index decreased by 0.8%⁵⁰ and the yield spread of French over German debt returned to normal by the close of the European trading day, with "French bonds yielding 46 basis points more than the German benchmark."⁵¹ Although the downgrade's impact on the French debt market has been minimal, the lowered rating underscores France's struggle to improve growth prospects alongside its European peers.⁵²

C. Entrepreneurship and French Regulatory Restrictions

One of the primary factors driving France's declining competitiveness and failure to create growth is the country's lack of entrepreneurial activity. Compared with the United States and other emerging markets, a much smaller percentage of the French population engages in entrepreneurial ventures. According to data collected by the Global Entrepreneurship Monitor (the GEM), in 2010, only 5.8% of France's adult population engaged in "early-stage entrepreneurial activity."⁵³ In contrast, 7.6% of the population in the United States, 14.4% in China, and 17.5% in Brazil were

France's downgrade was the "risk to economic growth, and therefore to the government's finances, posed by the country's persistent structural economic challenges." *Moody's Downgrades France's Government Bond Rating to Aa1 from Aaa, Maintains Negative Outlook*, MOODY'S INVS. SERV. (Nov. 19, 2012) [hereinafter *Moody's Downgrades*], https://www.moodys.com/research/Moodys-downgrades-Frances-government-bond-rating-to-Aa1-from-Aaa--PR_260071. Among these structural challenges, Moody's highlighted "rigidities in labour and services markets, and low levels of innovation" as factors that "continue to drive France's gradual but sustained loss of competitiveness." *Id.*

⁴⁷ Inman, *supra* note 43.

⁴⁸ *Id.*

⁴⁹ Katie Martin, *Le Downgrade: Le Shrug*, WALL ST. J. (Nov. 8, 2013), <http://blogs.wsj.com/moneybeat/2013/11/08/le-downgrade-le-shrug/>.

⁵⁰ *Id.*

⁵¹ Nicholas Vinocur, *S&P Lowers France Rating on Reform Doubts, Market Unfazed*, REUTERS (Nov. 8, 2013), <http://uk.reuters.com/article/2013/11/08/uk-france-rating-idUKBRE9A706F20131108>.

⁵² Martin, *supra* note 49.

⁵³ DONNA J. KELLEY, NIELS BOSMA & JOSE ERNESTO AMOROS, THE GLOBAL ENTREPRENEURSHIP MONITOR 2010 GLOBAL REPORT 23 (2010), available at <http://entreprenorskapsforum.se/wp-content/uploads/2011/02/GEM-2010-Global-Report.pdf> ("Total Early-Stage Entrepreneurial Activity (TEA) includes individuals in the process of starting a business, and those running new businesses less than 3 ½ years old.").

characterized as early-stage entrepreneurs.⁵⁴ Additionally, according to commentators, France is “strikingly short” of small- to mid-sized companies—another sign of low rates of entrepreneurship.⁵⁵ In Germany, mid-sized companies referred to as *Mittelstand* firms form the backbone of the economy.⁵⁶ In France, however, there are just over 4,000 medium-sized enterprises, which proportionately amounts to half as many as Germany and Britain.⁵⁷ Furthermore, whereas the average German company has 41 employees, the average French company is much smaller with just around 14 employees.⁵⁸

France’s low levels of entrepreneurship can be explained, at least in part, by the presence of onerous administrative regulations that increase the costs and complexity of running a business.⁵⁹ In the WEF’s Global Competitiveness Report for 2012–2013, France ranked 126th under a category representing the “burden of government regulation.”⁶⁰ The ranking indicates that compliance with government regulatory requirements is less burdensome in 125 other countries out of a total of 144 countries surveyed.⁶¹ This wide variety of regulatory requirements in France fosters an unfriendly business environment for entrepreneurial investment.⁶² In 2012, France ranked 32nd out of a total of 185 economies in the World Bank’s annual “Ease of Doing Business” scorecard.⁶³ France also placed 23rd under a subcategory representing the “Ease of Starting a Business.”⁶⁴ Furthermore, France’s position in the rankings has continued to deteriorate since 2012. In 2013, France dropped two spots on the “Ease of Doing Business” scorecard to 34th place⁶⁵ and was additionally downgraded four

⁵⁴ *Id.*

⁵⁵ *Special Report on France: So Much to Do, So Little Time*, ECONOMIST, Nov. 17, 2012, at 8 [hereinafter *Special Report*].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ GLOBAL COMPETITIVENESS REPORT 2012–2013, *supra* note 31, at 396. Additionally, when presented with 16 different factors impacting business, 20.6% of the respondents in the WEF’s Executive Survey ranked “restrictive labor regulations” as the most problematic obstacle to conducting business in France. *Id.* at 168.

⁶⁰ *Id.* at 169.

⁶¹ *Id.*

⁶² *Id.* According to *The Economist*, pervasive regulatory restrictions present an easy explanation for the dearth of successful French entrepreneurs: “Everything from the labour market to pharmacies to taxis is heavily regulated: no wonder would-be entrepreneurs feel discouraged. No entirely new company has entered the CAC-40 stockmarket index since it started in 1987; redundancies can lead to endless court proceedings; and trade unions and protesters tend to take to the streets at the first hint of reform. It adds up to a deeply anti-business culture.” *Special Report, supra* note 55.

⁶³ World Bank, *Ease of Doing Business in France*, DOING BUSINESS, <http://www.doingbusiness.org/data/exploreconomies/france/> (last visited Feb. 19, 2013).

⁶⁴ *Id.*

⁶⁵ At 34th place, France received a worse “doing business score” than the following European economies: the United Kingdom at 7th place, Germany at 20th, Switzerland at 28th, and Belgium at

spots to 27th place for “Ease of Starting a Business.”⁶⁶

Out of a variety of regulatory practices burdening new businesses, this Note focuses on France’s restrictive employment laws, which play an integral role in limiting entrepreneurial growth.⁶⁷ For instance, when presented with sixteen different factors impacting business, 20.6% of the respondents in the WEF’s executive survey on global competitiveness ranked “restrictive labor regulations” as the most problematic obstacle to conducting business in France.⁶⁸ In order to better illustrate how employment laws impact entrepreneurs, the following section examines the concept of entrepreneurship in greater detail, exploring the relationship between the law and entrepreneurial activity in particular.

III. ENTREPRENEURSHIP AS A SOURCE OF ECONOMIC GROWTH

By helping bring new ideas and more efficient business models to the market, entrepreneurship is a tremendous source of growth that can either be fostered or deterred by a nation’s law-making institutions. After first defining entrepreneurship and examining the ways in which it contributes to economic growth, this part pays particular attention to the role of the law in driving entrepreneurial activity. While regulations imposed by employment protection laws discourage entrepreneurs, deregulation measures may have the potential to stimulate entrepreneurial activity.

A. Defining Entrepreneurship

Although there are a variety of ways of defining what it means to be an entrepreneur, entrepreneurship has two essential features: (1) the identification and creation of new economic opportunities, and (2) the introduction of an idea into the market in the face of uncertainty.⁶⁹

33th. WORLD BANK & INT’L FIN. CORP., *DOING BUSINESS 2013: SMARTER REGULATIONS FOR SMALL AND MEDIUM-SIZED ENTERPRISES 3* (10th ed. 2013) [hereinafter *ECONOMY PROFILE: FRANCE*], available at [http://www.doingbusiness.org/~media/GIAWB/Doing% 20Business/Documents/Annual-Reports/English/DB13-full-report.pdf](http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf).

⁶⁶ *Id.* at 164.

⁶⁷ GLOBAL COMPETITIVENESS REPORT 2012–2013, *supra* note 31, at 169.

⁶⁸ *Id.*

⁶⁹ Sander Wennekers & A. Roy Thurik, *Linking Entrepreneurship and Economic Growth*, 13 *SMALL BUS. ECON.* 27, 31 (1999); see also Magnus Henrekson, *Entrepreneurship and Institutions*, 28 *COMP. LAB. L. & POL’Y J.* 717, 720 (2007) (“[A] person can be said to engage in an entrepreneurial venture if she either on her own or in teams, and either inside or outside existing organizations: (1) perceives and creates new economic opportunities (new products, new production methods, new organizational schemes and new product market combinations); and, (2) introduces her or his idea in the market, in the face of uncertainty and other obstacles by making decisions on location, form, and the use of resources and institutions.”).

First, most scholarly literature on the subject of entrepreneurship focuses on the ability of entrepreneurs to innovate and generate new economic opportunities. Joseph A. Schumpeter articulated the most widely recognized description of the entrepreneur to date as an individual who “disrupt[s] existing market balances by introducing new products, new methods of production, devising new business models, or opening new markets.”⁷⁰ According to Schumpeter, by innovating and carrying out “new combinations” in the marketplace, the entrepreneur functions as an agent of “Creative Destruction”—a key contributor to economic vitality and development.⁷¹ In an overview of recent scholarship on entrepreneurship, Magnus Henrekson, President of the Research Institute of Industrial Economics in Stockholm, concludes that entrepreneurship is “about individuals and organizations—be they new, old, large, or small—that actively contribute to renewal and change in the economy.”⁷² An economist defining entrepreneurship in more practical terms writes the following: “[A]n entrepreneur is . . . someone who responds affirmatively to the question ‘I am among those who initially established the business.’”⁷³ Across a wide body of scholarship, this consistent emphasis on the entrepreneur’s ability to create new economic opportunities has led law professors Gordon Smith and Darian Ibrahim to observe that “the most influential definitions of entrepreneurship revolve around the concept of opportunities.”⁷⁴

Second, the ability to assume risk and brave uncertainty is another key feature of entrepreneurship. In order to introduce new ideas into the marketplace or be among the first to establish a business, entrepreneurs need “the daring to embrace risks in the face of” uncertain economic outcomes.⁷⁵ Laying the foundation for the observations advanced by Schumpeter, Frank Knight examined the relationship between entrepreneurs and uncertainty in his 1921 book “Risk, Uncertainty, and Profit.”⁷⁶ Under the analytical framework developed by Knight,

⁷⁰ Viktor Mayer-Schönberger, *The Law as Stimulus: The Role of Law in Fostering Innovative Entrepreneurship*, 6 ISJLP 153, 155 (2010); see JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (5th ed. 1976).

⁷¹ D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1541–42 (2013); Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do About It*, 28 COMP. LAB. L. & POL’Y J. 817, 822 (2007) (“The entrepreneur in the Schumpeterian scheme provides the driving force in the mechanism of change.”).

⁷² Henrekson, *supra* note 69, at 719.

⁷³ Edward P. Lazear, *Entrepreneurship*, 23 J. LAB. ECON. 649, 650–51 (2005).

⁷⁴ Smith & Ibrahim, *supra* note 71, at 1540; see also Jeremy C. Short et al., *The Concept of “Opportunity” in Entrepreneurship Research: Past Accomplishments and Future Challenges*, 36 J. MGMT. 40, 41 (2010).

⁷⁵ Henrekson, *supra* note 69, at 719–20.

⁷⁶ Licht, *supra* note 71, at 823; see also Frank H. Knight, *Risk, Uncertainty, and Profit*, LIBRARY OF ECON. & LIBERTY, available at <http://www.econlib.org/LIBRARY/Knight/knRUP1.html>.

“[e]ntrepreneurs’ unique role in the economy (and in society more broadly) consists of their willingness to bear uncertainties.”⁷⁷ According to law professor Amir Licht, the Schumpeterian theory of entrepreneurship involves a central premise that entrepreneurs are specially equipped to deal with uncertainty.⁷⁸ Consequently, Licht himself writes that “the entrepreneur’s main function is to overcome the difficulties engendered by uncertainty.”⁷⁹ Ultimately, the entrepreneur’s ability to capitalize on new economic opportunities requires the willingness to shoulder economic uncertainty.

B. The Role of Entrepreneurship in Generating Growth

The two central features at play in the definition of entrepreneurship also link entrepreneurs to economic growth. In order to thrive and remain competitive, countries need businesses with the ability to innovate and identify new opportunities for developing products and services.⁸⁰ They also require businesses that can capitalize on cutting-edge knowledge by establishing new and efficient models to bring their ideas to the market in spite of economic uncertainty.⁸¹ By driving innovation and change in the national market, entrepreneurs are a key source of growth and entrepreneurship has attracted increasing attention as a means of resuscitating depressed economies.⁸² According to one mainstream economist, “[T]he entrepreneur is the single most important player in a modern economy.”⁸³ Various studies and empirical data lend support to this claim, illustrating a strong correlation between high levels of entrepreneurship and economic growth. Entrepreneurship also presents an especially important source of growth and competitiveness for advanced economies like France.

Entrepreneurship helps stimulate economic growth because larger and

⁷⁷ Licht, *supra* note 71, at 823.

⁷⁸ *Id.* at 822.

⁷⁹ *Id.*

⁸⁰ EUROPE’S COMPETITIVENESS, *supra* note 5, at 14.

⁸¹ *Id.*

⁸² See, e.g., HOMBERT ET AL., SHOULD THE GOVERNMENT MAKE IT SAFE TO START A BUSINESS? EVIDENCE FROM A FRENCH REFORM 2 (2013) (“Over the last decade, policy makers and academics alike have embraced entrepreneurship as a panacea for many economic challenges.”); Henrekson, *supra* note 69, at 718 (“Since the days of Adam Smith, Joseph Schumpeter, and Friedrich Hayek, most economists have acknowledged the crucial importance of entrepreneurs for growth and for the organization of economic activity.”); Licht, *supra* note 71, at 817 (“Fostering entrepreneurship has become a central policy goal for economic institutions around the world, ranging from regional to national to international bodies. Underlying this trend is the belief that entrepreneurship is key for a number of desirable social outcomes, including economic growth, lower unemployment, and technological modernization.”).

⁸³ Edward P. Lazear, *Entrepreneurship* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 9109, 2002), available at <http://www.nber.org/papers/w9109.pdf>.

older companies are not as capable at innovating and capitalizing on new ideas as smaller-sized start-up firms.⁸⁴ For instance, the *2013 Index of Economic Freedom* cites to a variety of research findings that new firms are generally more likely to license new technology and smaller-sized firms are about twice as likely to file “high-impact” patents as larger firms.⁸⁵ Researchers have also shown that business turnover is closely linked to higher wages, increased worker productivity, and overall economic growth.⁸⁶ In comparison to incumbent firms whose employment levels had recently fallen, a study of unemployment reform in France found that wages and worker productivity levels were higher in newly created firms.⁸⁷ Within a period of two years after their creation, the value added per worker was 7,000 euros per year higher for newly created firms than that of incumbent firms.⁸⁸ The employees of newly created firms also made annual wages that were approximately 5,200 euros greater than the salaries of workers employed by the incumbent firms.⁸⁹ Based on these findings, the study concluded that the “labor reallocation process from incumbents to start-ups can have a positive impact on aggregate productivity, since newly created firms in the data are on average more productive.”⁹⁰ Comparing the top firms of 44 different countries in 1975 with their 1996 counterparts, another study found that countries with higher rates of firm turnover experience faster per capita economic growth, greater productivity, and faster capital growth.⁹¹

By enhancing economic vitality and innovation, entrepreneurship could offer France a valuable solution to the difficulties of remaining competitive and generating growth. The WEF identifies three stages of economic development at which countries are faced with different challenges related to international competitiveness.⁹² France falls under the third and final stage, where economic development is “innovation-driven” and entrepreneurial growth is critical to the country’s continued financial well-being.⁹³ At the innovation-driven stage, countries can only sustain their high wages and associated standards of living by fostering businesses that can compete with “new and/or unique products, services, models, and

⁸⁴ HERITAGE FOUND., 2013 INDEX OF ECONOMIC FREEDOM 63 (2013), available at <http://www.heritage.org/index/pdf/2013/countries/france.pdf> (“[B]ig firms, encumbered by larger internal bureaucracies, are virtually incapable of capitalizing on radical ideas.”).

⁸⁵ *Id.*

⁸⁶ Kathy Fogel, Randall Morck & Bernard Yeung, *Big Business Stability and Economic Growth: Is What’s Good for General Motors Good for America?*, 89 J. OF FIN. ECON. 83 (2008).

⁸⁷ HOMBERT ET AL., *supra* note 82, at 5.

⁸⁸ *Id.*

⁸⁹ *Id.* at 27.

⁹⁰ *Id.* at 5.

⁹¹ HERITAGE FOUND., *supra* note 84.

⁹² GLOBAL COMPETITIVENESS REPORT 2012–2013, *supra* note 31, at 8–9.

⁹³ *Id.* at 9.

processes.”⁹⁴ In order to successfully produce new goods and services, these businesses need to be capable of deploying “new technologies . . . and/or the most sophisticated production processes or business models.”⁹⁵

In order to capitalize on a country’s innovative potential and generate economic growth, government institutions need to develop a regulatory framework and infrastructure that encourages higher rates of entrepreneurial activity.⁹⁶ The following section therefore examines the role of institutional factors in shaping entrepreneurial activity by balancing the inherent uncertainty of creating a business with reductions in the costs of entrepreneurial risk.

C. Law-Making Institutions and Entrepreneurial Activity

Although cultural and social factors, as well as individual characteristics, influence entrepreneurship,⁹⁷ government institutions and the legal frameworks that they establish can also play a critical role in shaping entrepreneurial activity.⁹⁸

In an overview of recent scholarship on entrepreneurship, one commentator remarked that “[t]he role of institutions has in recent years re-emerged as a dominant explanation of long-term economic performance.”⁹⁹ Contributing to this view, recent studies have shown that very few differences in self-employment rates actually attribute to observable worker characteristics, which suggests that institutions can play an important role in shaping entrepreneurial activity.¹⁰⁰

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ EUROPE’S COMPETITIVENESS, *supra* note 5, at 14; Thomas S. Ulen, *Why Do Entrepreneurs Appear and Flourish?*, 28 COMP. LAB. L. & POL’Y J. 775, 776 (2007) (observing that “there is widespread belief that growth necessitates creating an environment in which entrepreneurs can prosper”).

⁹⁷ Some scholars challenge the argument that legal regulations impose barriers to entrepreneurial development by contending that a purely legal approach fails to account for “national cultural attitudes toward business and the state.” Providing Italy as an example, one scholar asserts that culture plays a pivotal role in determining whether laws are taken seriously or actually enforced. In countries like Italy, where citizens show little concern with observing “minor” administrative and bureaucratic regulations, laws would only present insignificant obstacles to entrepreneurial development. Richard P. Taub, *Research on Entrepreneurship, Culture, and Law*, 28 COMP. LAB. L. & POL’Y J. 893, 895 (2007).

⁹⁸ See, e.g., Mayer-Schönberger, *supra* note 70, at 154 (“[T]he legal system may provide an additional, yet ill-understood and hence underutilized mechanism to stimulate domestic entrepreneurship, one of the central pillars in revitalizing economic growth.”).

⁹⁹ Henrekson, *supra* note 69, at 721; see also Curtis J. Milhaupt, *Beyond Legal Origin: Rethinking Law’s Relationship to the Economy—Implications for Policy*, 57 AM. J. COMP. L. 831, 831 (2009) (noting that the idea that “law is essential to economic development has a long and venerable history”).

¹⁰⁰ Raquel Fonseca et al., *Entrepreneurship, Wealth, Liquidity Constraints, and Start-Up Costs*, 28 COMP. LAB. L. & POL’Y J. 637 (2007). But see Marc Cowling & William D. Bygrave, *Entrepreneurship, Welfare Provision, and Unemployment: Relationships Between Unemployment, Welfare Provision, and Entrepreneurship in Thirty-Seven Nations Participating in the Global Entrepreneurship Monitor (Gem) 2002*, 28 COMP. LAB. L. & POL’Y J. 617, 635 (2007) (questioning the

According to scholars, the law offers two central mechanisms for driving entrepreneurship.¹⁰¹ First, the law creates entrepreneurial opportunities through property rights, which ensure that entrepreneurs retain the benefits of their success.¹⁰² Second, measures that reduce entry costs can also foster favorable conditions for entrepreneurship by minimizing the regulatory and administrative burdens required of entrepreneurs.¹⁰³ Although France already has a well-established and progressive body of property law, the law imposes a wide variety of regulatory requirements on entrepreneurs that raise entry costs. Consequently, the remainder of this Note will focus on France's potential to raise rates of entrepreneurial activity through measures that reduce the entry costs associated with creating a business.

1. Regulatory Barriers Discourage Entrepreneurial Growth

In order to understand how law-making institutions can help stimulate entrepreneurship by reducing entry costs, one needs to first consider the specific ways in which regulations create barriers for entrepreneurial ventures.¹⁰⁴ Rather than serving as a positive source of economic growth, many legal scholars argue that regulations exert a negative impact on entrepreneurial activity by raising the costs of starting a new business.¹⁰⁵ According to a 2007 study by Vesa Kanninen and Panu Poutvaara, entry costs "operate like a tax on entrepreneurship" and excessive government

ability of reforms that remove institutional barriers to promote entrepreneurship, "given that cultural aspects appear to play such an important role in defining peoples pre-disposition toward entrepreneurial activity").

¹⁰¹ In 1956, Willard Hurst advanced the theory that the legal system could be harnessed to promote "the release of individual creative energy" through two important mechanisms for facilitating the creation of entrepreneurial opportunities: (1) "ensuring that entrepreneurs retain the benefits of their success"; and (2) "reducing the costs of action and even failure." Smith & Ibrahim, *supra* note 71, at 1551-52.

¹⁰² *Id.* at 1553-54.

¹⁰³ *Id.* at 1562.

¹⁰⁴ Vesa Kanninen & Panu Poutvaara, *Imperfect Transmission of Tacit Knowledge and Other Barriers to Entrepreneurship*, 28 COMP. LAB. L. & POL'Y J. 675 (2007) ("To develop policies toward entrepreneurship, it is important to identify the barriers in the market for entrepreneurship to alleviate the effects of those distortions.").

¹⁰⁵ Simon C. Parker, *Law and The Economics of Entrepreneurship*, 28 COMP. LAB. L. & POL'Y J. 695, 706 (2007) ("Overall, despite ongoing disagreement among researchers, both the theory and evidence point to somewhat stronger negative impacts on entrepreneurship and growth from regulation than positive or neutral effects."); *see also* HERITAGE FOUND., *supra* note 84, at 88; Henrekson, *supra* note 69, at 720; Jolanda Hessels, André van Stel, Peter Brouwer & Sander Wennekers, *Social Security Arrangements and Early-Stage Entrepreneurial Activity*, 28 COMP. LAB. L. & POL'Y J. 743 (2007); André van Stel, David J. Storey & A. Roy Thurik, *The Effect of Business Regulations on Nascent and Young Business Entrepreneurship*, 28 SMALL BUS. ECON. 171 (2007); Martin T. Robson, *Does Stricter Employment Protection Legislation Promote Self-employment?*, 21 SMALL BUS. ECON. 309, 310 (2003).

regulation “results in reduced enterprise formation.”¹⁰⁶ Extensive and complex regulatory requirements impose entry barriers and limit the ability of entrepreneurial ventures to grow by (1) restricting operational flexibility; and (2) raising transaction costs that disproportionately impact small businesses.

Employment protection legislation (EPL), for instance, can exercise a significant impact on levels of entrepreneurship and serve as an instructive example of how too much regulation can impede economic growth. According to the Organization for Economic Co-operation and Development (OECD), employment protection encompasses regulations regarding job creation and termination.¹⁰⁷ Regulations over job creation can encompass rules favoring particular disadvantaged groups, conditions for using temporary or fixed-term contracts, and employee training requirements.¹⁰⁸ Regulations governing termination establish redundancy procedures, mandate notification periods and severance payments, and institute special requirements for collective dismissals.¹⁰⁹ In assessing the ease of conducting business in various countries, the World Bank asserts that the rigidity of a nation’s employment laws over hiring and firing “sheds light on how easy or difficult it is for a local entrepreneur to open and run a small to medium-size business.”¹¹⁰

First, rigid labor laws that limit operational flexibility prevent growth by restricting new businesses from adapting workforce personnel to their evolving business needs.¹¹¹ In an open economy with changing market conditions, businesses require the flexibility to rapidly readjust the size of their workforce based on shifts in performance and rates of return.¹¹² The efficiency and flexibility of the labor market is also critical for ensuring that workers are allocated to their most effective use in the economy and provided with sufficient incentives to work to the best of their ability.¹¹³ Therefore, labor markets as well as entrepreneurs benefit from the ability to rapidly shift workers from one economic activity to another at low cost.¹¹⁴

Second, overly restrictive employment laws deter entrepreneurial ventures by raising the transaction costs of running a new business.¹¹⁵ Because small- and medium-sized firms cannot afford the hiring and firing

¹⁰⁶ Kannianen & Poutvaara, *supra* note 104, at 680.

¹⁰⁷ Parker, *supra* note 105, at 704.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ ECONOMY PROFILE: FRANCE, *supra* note 65, at 4.

¹¹¹ EUROPE’S COMPETITIVENESS, *supra* note 5, at 17.

¹¹² *Id.* at 18.

¹¹³ GLOBAL COMPETITIVENESS REPORT 2012–2013, *supra* note 31, at 6.

¹¹⁴ *Id.*

¹¹⁵ Juan Pablo Couyoumdjian, *Who Walks out? Entrepreneurship in a Global Economy*, 32 INT’L REV. L. & ECON. 158, 161 (2012) (observing that “as agents find it less profitable to engage in entrepreneurial activities we will observe a lower overall level of entrepreneurship and, thus, lower economic growth”).

costs imposed by employment protection legislation, “[i]t is commonly argued that EPL retards entrepreneurship by disproportionately imposing burdens on the smallest firms.”¹¹⁶

By imposing burdens on small- and medium-sized businesses, overly restrictive employment laws can create barriers to entrepreneurial success and discourage the type of risk taking required to launch a new business. EPL illustrates how an extensive regulatory framework can ultimately harm a country’s growth prospects by preventing entrepreneurship. Accordingly, scholars have expressed dismay that governments continue to tighten regulations while also proclaiming the values of entrepreneurship.¹¹⁷ Instead, lawmakers should actively promote growth by reducing the costs of entrepreneurial risk through deregulation measures.

2. *Regulatory Relaxation Encourages Entrepreneurial Activity*

Rather than raising transaction costs and restricting entrepreneurial flexibility, reforms that reduce the costs of entrepreneurial risk-taking can stimulate heightened levels of entrepreneurship. Policies of deregulation and institutional measures to protect entrepreneurs if their endeavors fail are therefore two potentially influential mechanisms for raising rates of entrepreneurship.

First, one critical way to encourage entrepreneurship is by implementing policies of deregulation. Influenced by a system of “crony capitalism,” politicians have a tendency to represent the interests of established businesses to the detriment of new economic entrants.¹¹⁸ Politicians can therefore deploy taxes, fees, and regulations, which all serve as barriers to entry, to help entrench incumbent firms and block entrepreneurial action.¹¹⁹ According to the Legal Origins Theory, however, the law matters because it has the potential to facilitate transactions and drive economic development by eliminating barriers to entry.¹²⁰ Under this

¹¹⁶ Parker, *supra* note 105, at 704; *see also* Henrekson, *supra* note 69, at 738 (“[A]ny costs imposed by labor security regulation are likely to fall more heavily on younger, smaller, and less capital-intensive employers. To the extent that entrepreneurial firms are overrepresented in these categories, labor security regulation disproportionately burdens entrepreneurial firms.”).

¹¹⁷ Parker, *supra* note 105, at 706.

¹¹⁸ Smith & Ibrahim, *supra* note 71, at 1565; *see also* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 899–900 (1987) (Analyzing empirical evidence regarding United States legislative politics, Farber and Frickey observe that the greater economic interests of their constituencies do not influence legislators’ votes. Instead, they theorize “(1) that reelection is an important motive of legislators; (2) that constituent and contributor interests thus influence legislators; and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership.”). *Id.*

¹¹⁹ Smith & Ibrahim, *supra* note 71, at 1565.

¹²⁰ *See, e.g., id.* at 1563–64; Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 306–309 (2008); Milhaupt, *supra* note 99.

line of reasoning, governments can and should actively promote growth and competitiveness by implementing policies of deregulation: “[I]f governments can overcome entrenched interests and institute policies of deregulation that do not harm their other social objectives, they may be able to seize a precious opportunity to stimulate entrepreneurship and greater competitiveness by easing the burden of regulation on small businesses.”¹²¹

Second, government policies that shield entrepreneurs from economic failure can also stimulate entrepreneurship.¹²² For example, one study examining the impact of French labor reforms targeted at the unemployed found that government subsidies that provide economic insurance to entrepreneurs in the case of failure increased rates of entrepreneurial activity.¹²³ According to the study, the reform’s implementation was followed by a 25% increase in monthly business creation rates across industries.¹²⁴

Furthermore, reform measures that facilitate entrepreneurial entry do not appear to decrease the quality of entrepreneurs or contribute to the creation of a greater number of unsuccessful business endeavors. According to the study conducted on French employment reform, the reform did not alter the educational background of business founders, which were not “significantly different” from the background of business founders prior to the reform.¹²⁵ The reform also led to the creation of more “ambitious” firms that were more likely to hire.¹²⁶ In comparison to control groups, entrepreneurs operating in industries impacted by the reform were 3.8% more likely to have plans to hire in the next twelve months.¹²⁷ As a result of these findings, researchers concluded that “[t]he reduction in the cost of entry triggered by the reform then allows for a larger pool of equally talented people to enter self-employment.”¹²⁸

Countries that implement policies to balance the uncertainty of bringing new ideas to the market with reductions in the costs of entrepreneurial risk can thus actively promote growth. However, extensive legal regulations that restrict entrepreneurial flexibility and thus raise transaction costs deter would-be entrepreneurs from bringing new ideas to the market. At the moment, French employment laws discourage

¹²¹ Parker, *supra* note 105, at 707–08; *see also* Smith & Ibrahim, *supra* note 71 at 1565 (“Any legal system that wishes to promote entrepreneurial action must employ mechanisms that constrain the inevitable pressure to favor incumbent firms.”).

¹²² Smith & Ibrahim, *supra* note 71, at 1562 (“[I]f we want entrepreneurs to exploit entrepreneurial opportunities, we must also reduce the costs of their failure.”).

¹²³ HOMBERT ET AL., *supra* note 82, at 6.

¹²⁴ *Id.* at 4.

¹²⁵ *Id.* at 22–23.

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 23.

¹²⁸ *Id.* at 19.

entrepreneurial activity by imposing excessive regulations on business start-ups. The following section therefore examines specific French laws that inhibit entrepreneurship through the over regulation of the labor market.

IV. FRENCH EMPLOYMENT PROTECTION LAWS INHIBIT ENTREPRENEURIAL ACTIVITY AND STIFLE GROWTH

By focusing on worker-protective norms, and eschewing a liberal view of the role of law, French employment law contributes to an anti-business environment that impedes entrepreneurial growth. After providing a brief legal framework for French employment law, this part will highlight specific regulatory measures that are harmful to business start-ups, first looking at rigid hiring and firing procedures that raise the cost of entrepreneurial risk taking and encourage workplace inefficiency. Next, this part will demonstrate how complex statutory regulations that are triggered by expansions in workforce personnel restrict business growth and lead to inefficient allocations of French labor resources after the employment relationship is created. Finally, this part will conclude by discussing how large social security payments impose prohibitive costs on small- to medium-sized businesses and remove incentives to engage in entrepreneurial activity.

A. Legal Framework for French Employment Law

In the French system, employment law, or *droit du travail*, encompasses both “labor law” and “employment law.”¹²⁹ While French labor law involves such issues as industrial relations, unionization, and collective bargaining, employment law covers issues like individual labor contracts, redundancy, and anti-discrimination regulation.¹³⁰ In France, both labor and employment law implement norms that derive from several sources: constitutional law, statutory law, case law, collective agreements, and individual contracts.¹³¹ This Note will predominantly focus on aspects of French employment law governed by statutes codified in the French Labor Code or *Code du travail*, specifically looking at labor contracts within the context of hiring and firing laws, legal regulations associated with workplace size, and social security laws. Generally, legal scholars characterize French statutes, including the *Code du travail*, as much more detailed and rigid than those of their European counterparts.¹³² Whereas

¹²⁹ François Gaudu, *Labour Law*, in INTRODUCTION TO FRENCH LAW 395, 395 (George A. Bermann & Etienne Picard eds., 2008).

¹³⁰ *Id.*

¹³¹ *Id.* at 397.

¹³² *Id.* at 398.

other European countries, like Germany, leave many of the details of implementation to collective bargaining, very detailed French regulations place greater constraints on employer flexibility and “make law difficult to understand for ordinary people.”¹³³

In addition to the legal complexity of the French statutory law codified in the *Code du travail*, two different characterizations of the appropriate role for the state in shaping the national labor market have an impact on employers. On the one hand, a liberal, free-market approach asserts that sources of employment law should merely provide a legal framework to validate private employment agreements and provide for their enforcement.¹³⁴ On the other hand, an alternative approach emphasizes the importance of maintaining “social public order,” or *l’ordre public social*, by establishing a protective framework for worker’s rights.¹³⁵ Because workers are subordinated to their employers under the employment contract, this second approach stresses the need for a certain degree of state protection.¹³⁶ Adopting a worker-protective approach, French judges often resolve employment disputes based on the principle that “the norm that is most advantageous for employees shall prevail.”¹³⁷ Employers lose around 75% of the cases brought to French labor courts,¹³⁸ and roughly one out of every four French employees brings a case to these courts, which have been described as “the least business-friendly in Europe.”¹³⁹

Ultimately, the complexity of French employment law and the French legal system’s emphasis on worker protection is reflected by the country’s hiring and firing procedures, the laws governing business expansion, and the social security regime, all of which limit employer flexibility, encourage workplace inefficiency and raise transaction costs.

B. Restrictions on Hiring Flexibility

In France, the act of entering into an employment contract activates a variety of mandatory statutory rules and collective labor agreements.¹⁴⁰

¹³³ Gaudu, *supra* note 129, at 398–99.

¹³⁴ Mark Freedland, *Beyond the Public Law/Private Law Dichotomy: Employment Law*, in PRINCIPLES OF FRENCH LAW 483, 487 (2d ed. 2008).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Gaudu, *supra* note 129, at 399.

¹³⁸ ORG. FOR ECON. CO-OPERATION & DEV., OECD EMPLOYMENT OUTLOOK 68 (2004) [hereinafter OECD EMPLOYMENT OUTLOOK], available at http://stats.oecd.org/Index.aspx?DataSetCode=EO68_MAIN.

¹³⁹ Matthew Melchiorre, *France’s Disappointing Labor Reforms*, CHRISTIAN SCI. MONITOR (Feb. 5, 2013), <http://www.csmonitor.com/layout/set/print/Commentary/Opinion/2013/0205/France-s-disappointing-labor-reforms>.

¹⁴⁰ Gaudu, *supra* note 129, at 397. One well-known example of this is the infamous 35-hour workweek, which was implemented by law no. 2000-37 of 19 January 2000 and is more popularly known as the *Loi Aubry*. *Loi Aubry* reduced the basic working week from 39 hours to 35 hours. When

Consequently, employers are automatically bound by a variety of obligations that they cannot contract away.¹⁴¹ Furthermore, regardless of how two parties characterize their relationship, they are deemed to have entered into an employment contract whenever a worker accepts a relationship of “subordination” to an employer by performing services for the employer in consideration for wages.¹⁴² Several different forms of employment contracts exist in France, including: open-ended or fixed-term contracts, full-time or part-time contracts, and contracts based on direct recruitment or indirect recruitment through a temporary employment agency.¹⁴³

Despite what appears to be a variety of options, however, employers often lack the flexibility to select the employment relationship that best suits their business needs. Although the French legal system technically recognizes several types of employment contracts, the predominant type is an open-ended, full-time contract with an unspecified duration.¹⁴⁴ This type of contract is called the *contrat de travail à durée indéterminée* (the CDI) and is presumptively favored by French courts.¹⁴⁵ As a result, French employment law has been described as creating a dual employment structure, pitting the CDI as the most common contractual arrangement against all the other less common forms of temporary and fixed-term contracts.¹⁴⁶ The CDI represents around 90% of total employment.¹⁴⁷

The prominence of the CDI is the product of a number of French statutory measures that limit an employer’s ability to freely fashion the type of employment relationship that best suits his or her business needs. Whereas no conditions need to be satisfied in order to form a CDI, every other employment contract must conform to strict statutory conditions.¹⁴⁸ For example, French law prohibits employers from relying on fixed-term or temporary employment contracts for most jobs considered to fulfill the durable and long-term needs of an employer’s business.¹⁴⁹ In France,

employees enter into an employment contract, there is an entire legal regime just concerning working time, night work, rest periods, and holidays, which is structured on “the basic pillars of the 35-hour week.” According to scholarly commentators, “[t]he resulting provisions . . . form an immensely complex regime for the control of working time, in which legislation and collective bargaining (or *réglementation*) are very elaborately intertwined.” Freedland, *supra* note 134, at 501.

¹⁴¹ Gaudu, *supra* note 129, at 397.

¹⁴² *Id.*

¹⁴³ M. JEAN-CLAUDE JAVILLIER, *MANUEL DE DROIT DU TRAVAIL* [EMPLOYMENT LAW] 186–87 (4th ed. 1992).

¹⁴⁴ Gaudu, *supra* note 129, at 401.

¹⁴⁵ *Id.*

¹⁴⁶ Vranceanu, *supra* note 44.

¹⁴⁷ *Id.*

¹⁴⁸ CODE DU TRAVAIL [C. TRAV.] art. L1242-1 (Fr.); JAVILLIER, *supra* note 143, at 187.

¹⁴⁹ Gaudu, *supra* note 129, at 401. The French *Code du travail* prohibits the use of fixed-term contracts for permanent tasks and limits the maximum length of fixed-term contracts to eighteen months, subject to some minor exceptions. ECONOMY PROFILE: FRANCE, *supra* note 65, at 106.

fixed-term contracts are created by the *contrat de travail à durée déterminée* (CDD)¹⁵⁰ and temporary work contracts are formed by the *contrat de travail à temporaire* (CTT).¹⁵¹ French courts interpret the statutory language governing the CDD as expressly prohibiting employers from offering fixed-term contracts for positions that are not of a “temporary nature.”¹⁵² Courts have also blocked efforts on the part of employers to circumvent the open-ended, full-time CDI by engaging the same workers under multiple successive contracts that only last for a limited duration.¹⁵³ According to a decision by the *Cour de cassation*, which is France’s highest court for judicial matters, employer reliance on multiple CDDs “requires verification that the recourse to successive CDDs is justified.”¹⁵⁴ In order to make this justification, employers need to present “concrete elements establishing the temporary nature of the position in question.”¹⁵⁵

Furthermore, employment relationships created by the CDDs and CTTs, or any other contractual arrangements other than the CDI, trigger other additional statutory requirements that restrict employer flexibility with respect to scheduling and assigning work hours. For example, employers are often required to set a predetermined work schedule for part-time employees and the law limits the employer’s ability to assign additional hours or depart from the pre-determined schedule.¹⁵⁶ All of these restrictions reinforce a “very strong insistence” within French employment law on the use of CDIs, reflecting the legal system’s preference for full-time, open-ended employment relationships.¹⁵⁷

By focusing disproportionately on worker protection and understating the interests of private employers, rigid hiring practices limit the type of workforce flexibility required by entrepreneurs. In particular, the treatment of the CDI as France’s default employment contract is significant because

¹⁵⁰ CODE DU TRAVAIL [C. TRAV.] art. L1242-1 (Fr.) (“Un contrat de travail à durée déterminée, quel que soit son motif, ne peut avoir ni pour objet ni pour effet de pourvoir durablement un emploi lié à l’activité normale et permanente de l’entreprise.”); Freedland, *supra* note 134, at 497.

¹⁵¹ CODE DU TRAVAIL [C. TRAV.] art. L1251-1 (Fr.); Freedland, *supra* note 134, at 497.

¹⁵² See *Cour de cassation* [Cass.] [supreme court for judicial matters] soc., Dec. 12, 2012, Bull. civ. V, No. 22302 (Fr.); *Cour de cassation* [Cass.] [supreme court for judicial matters] soc., Sept. 26, 2012, Bull. civ. V, No. 26019 (Fr.).

¹⁵³ See *Cour de cassation* [Cass.] [supreme court for judicial matters] soc., June 22, 2011, Bull. civ. V, No. 6944 (Fr.) (finding that employer mislabeled worker as a CDD employee where the employer had engaged the employee for multiple successive limited-term contracts); *Cour de cassation* [Cass.] [supreme court for judicial matters] soc., Mar. 24, 2010, Bull. civ. V, No. 42186 (Fr.) (reclassifying employee engaged by employer under 23 CDDs as having CDI status).

¹⁵⁴ *Cour de cassation* [Cass.] [supreme court for judicial matters] soc., June 22, 2011, Bull. civ. V, No. 6944 (Fr.) (“[L]’utilisation de contrats à durée déterminée successifs, impose de vérifier que le recours à l’utilisation de contrats successifs est justifié par des raisons objectives qui s’entendent de l’existence d’éléments concrets établissant le caractère par nature temporaire de l’emploi.”).

¹⁵⁵ *Id.*

¹⁵⁶ Gaudu, *supra* note 129, at 401.

¹⁵⁷ Freedland, *supra* note 134, at 497–98.

it severely restricts the ability of employers to adapt workforce personnel to the evolving needs of their businesses.¹⁵⁸ For new business ventures, every job is important and hiring entails both a great deal of risk as well as a significant expense in terms of screening, interviewing, and training.¹⁵⁹ Entrepreneurs need the flexibility to adapt their business model and the size of their workforce to an evolving and unpredictable market. By effectively forcing employers to create full-time, long-term contracts, and thus preventing employers from freely creating the employment relationship that best suits their needs, French employment law elevates the costs of entrepreneurial risk taking. Employment protection legislation that restricts hiring flexibility by limiting the way employers characterize the employment relationship, therefore, places entrepreneurs at a disadvantage from the earliest stages of business development.¹⁶⁰

C. Restrictions on Firing Flexibility

Rigid firing procedures are an additional and closely associated obstacle to entrepreneurial growth that limit the employer's flexibility and increase the risks of starting a business. In France, employee dismissals, regardless of the cause, are costly and entail a great deal of legal complexity. Employers are almost always required to give notice and provide for a dismissal allowance, the level of which depends on the dismissed employee's seniority.¹⁶¹ The World Bank calculates a "redundancy cost indicator" measuring the overall cost of "advance notice payments, severance payments and penalties due when terminating a redundant worker" as expressed in weeks of the terminated worker's salary.¹⁶² In France, for a worker with ten years of tenure, employers pay the equivalent of 8.7 weeks of the terminated worker's salary in severance costs.¹⁶³ Averaging dismissal costs for workers with one, five, and ten years of tenure, employers pay the equivalent of 4.6 weeks of a dismissed worker's salary in severance payments and other costs.¹⁶⁴

In addition to the expense of dismissing an employee, employers can only terminate their employees for reasons recognized under the French *Code du travail* and often need to satisfy a variety of other termination requirements, which are determined based on the employer's rationale for

¹⁵⁸ JAVILLIER, *supra* note 143, at 222–23.

¹⁵⁹ See Parker, *supra* note 105, at 704.

¹⁶⁰ *Id.*

¹⁶¹ Gaudu, *supra* note 129, at 401.

¹⁶² WORLD BANK & INT'L FIN. CORP., DOING BUSINESS 2014, ECONOMY PROFILE: FRANCE 102 (11th ed. 2014), available at <http://www.doingbusiness.org/data/exploreconomies/~/media/giawb/doing%20business/documents/profiles/country/FRA.pdf?ver=2>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

dismissal.¹⁶⁵ Although it might seem as though an employer should be free to terminate an employee under an open-ended CDI with no-fixed term, in practice, these contracts cannot be terminated “unless very stringent conditions are filled.”¹⁶⁶ There are two separate justifications that can provide French employers with grounds for terminating an employment relationship: (1) economic dismissals, which are connected to the economic situation of the employer; and (2) non-economic dismissals, which are connected to the behavior or performance of the terminated worker.¹⁶⁷ Although economic dismissals and non-economic dismissals entail different procedural requirements, both forms of dismissal interfere with the employer’s ability to manage his or her own workforce.

1. Economic Dismissals

French employers must satisfy a variety of highly specific, complex, and costly requirements to terminate economically redundant employees. In order to justify economic dismissals, employers need to meet three basic conditions: they must (1) show that they have an economic reason for the dismissal that is both “real and serious” (*une cause réelle et sérieuse*); (2) satisfy certain procedural requirements; and (3) undertake an “employment maintenance plan” or “social plan” to try and re-establish dismissed workers, in the case of collective dismissals.¹⁶⁸

First, economic reasons for dismissal encompass financial difficulties, technological change, or any business reorganizations necessary to maintain competitiveness.¹⁶⁹ However, when the dismissal is adjudicated, French judges apply a proportionality principle in determining whether the economic motive is sufficiently serious.¹⁷⁰ The judicial proportionality test entails weighing the advantages an employer derives from dismissal against the detriment suffered by the dismissed employee.¹⁷¹ If a judge concludes that the harm experienced by the employee outweighs the advantages sought by the employer, then the employer is found to lack the real and serious grounds required for dismissal.¹⁷²

Second, employers must notify the appropriate administrative authority of the dismissal, and demonstrate that they complied with the appropriate standard dismissal procedures, which may vary depending on

¹⁶⁵ Amanda K. Caldwell, *Employment Law in France: The Basics*, FISHER & PHILLIPS LLP (Jan. 22, 2013), <http://www.crossborderemployer.com/post/2013/01/22/Employment-Law-in-France-The-Basics.aspx>.

¹⁶⁶ Vranceanu, *supra* note 44.

¹⁶⁷ Freedland, *supra* note 134, at 495.

¹⁶⁸ Gaudu, *supra* note 129, at 402.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 401–02.

¹⁷¹ *Id.*

¹⁷² *Id.*

whether the employer is implementing an individual or collective dismissal.¹⁷³ As part of this process, the administrative authority has the discretion to review such matters as the employer's economic reasons for dismissal, the number of positions eliminated and the category of the workers affected, the criteria used to select which workers to dismiss, and the measures taken to re-establish the terminated workers.¹⁷⁴

Third, employers have a duty to attempt to re-establish employees dismissed based on economic grounds due to collective redundancies. In order to satisfy this duty, employers with fifty or more employees who dismiss more than ten employees over a thirty-day time period must prepare a "social plan," or "employment maintenance plan," referred to in French as a *plan social* or *plan de sauvegarde d'emploi*.¹⁷⁵ The employment maintenance plan provides an overview of how the employer handled the economic redundancy as well as their justifications for dismissal.¹⁷⁶ The purpose of the maintenance plan is to demonstrate that the employer considered all of the available alternatives to dismissal, such as proposals "to transfer workers, to change the terms and conditions of employment, to transfer workers to other companies within a holding group, to order outplacement, and to institute training measures."¹⁷⁷

Employers must both consult with a *Comité d'entreprise*, referred to in English as a "Works Council," regarding the maintenance plan and then submit the plan to the *Directeur départemental du travail* for administrative approval.¹⁷⁸ However, as a substitute to preparing a maintenance plan and meeting all the other statutory requirements for economic dismissals, sometimes employers will simply make arrangements with employees directly, providing them with early retirement or cash bonuses to encourage less burdensome "voluntary" departures as an informal means of working around the law.¹⁷⁹

2. Non-Economic Dismissals

The legal requirements for non-economic dismissals also disfavor employers and leave French judges with broad discretion to apply worker-

¹⁷³ ORG. FOR ECON. CO-OPERATION & DEV., *Detailed Information on Employment Protection: France*, <http://www.oecd.org/els/emp/France.pdf> (last visited Apr. 4, 2014) [hereinafter *Employment Protection*]; Gaudu, *supra* note 129, at 403.

¹⁷⁴ Gaudu, *supra* note 129, at 403.

¹⁷⁵ CODE DU TRAVAIL [C. TRAV.] art. L1233-61 (Fr.) ("Dans les entreprises d'au moins cinquante salariés, lorsque le projet de licenciement concerne au moins dix salariés dans une même période de trente jours, l'employeur établit et met en oeuvre un plan de sauvegarde de l'emploi pour éviter les licenciements ou en limiter le nombre.")

¹⁷⁶ CODE DU TRAVAIL [C. TRAV.] art. L1233-62 (Fr.); Freedland, *supra* note 134, at 495–96.

¹⁷⁷ Gaudu, *supra* note 129, at 403.

¹⁷⁸ *Employment Protection*, *supra* note 173; Gaudu, *supra* note 129, at 403.

¹⁷⁹ Gaudu, *supra* note 129, at 403.

protective norms. Similar to the first requirement for economic dismissals, an employer must establish that they have a “real and serious cause” (*une cause réelle et sérieuse de licenciement*) for the termination of an employee in a non-economic dismissal.¹⁸⁰ In principle, this requirement can be satisfied by a variety of circumstances: disciplinary misconduct, loss of confidence, professional inadequacy, and illness.¹⁸¹ According to scholarly commentators, however, courts have applied this requirement inconsistently, and “a real and serious cause can be found to exist just as easily when a worker has committed some misconduct as it can be found to exist in the absence of misconduct.”¹⁸²

French judges have broad discretion in determining whether an employer has demonstrated a real and serious cause for termination. If a non-economic dismissal results in litigation, Article L1235-1 of the *Code du travail* stipulates that, whenever a doubt exists as to whether the employer has proven that termination is warranted under the real and serious cause requirement, the judge should hold in favor of the employee.¹⁸³ France’s constitutional court, the *Conseil constitutionnel*, has even upheld the constitutionality of this provision, reasoning that, so long as proper civil procedures are observed and the judge has an opportunity to weigh the evidence presented by both sides, “judicial control over the legal conditions for termination [in favor of the employee] is in no way contrary to the principle of equality before the law.”¹⁸⁴ The unpredictability that results from such broad judicial discretion may explain why the majority of employee dismissals are economic in nature.¹⁸⁵

For both economic and non-economic dismissals alike, France’s stringent requirements governing firing procedures prevent firms from terminating poor-performing and redundant employees, which increases the production costs of running a new business and severely limits the efficiency of a firm’s business operations.¹⁸⁶ Rigid French dismissal laws

¹⁸⁰ *Id.* at 402.

¹⁸¹ JAVILLIER, *supra* note 143, at 234–36.

¹⁸² *Id.* at 233 (“Il peut donc exister une cause réelle et sérieuse lorsqu’une faute a été commise par le salarié, comme en absence d’une telle faute.”).

¹⁸³ CODE DU TRAVAIL [C. TRAV.] art. L1235-1 (Fr.) (“En cas de litige, le juge, à qui il appartient d’apprécier la régularité de la procédure suivie et le caractère réel et sérieux des motifs invoqués par l’employeur, forme sa conviction au vu des éléments fournis par les parties après avoir ordonné, au besoin, toutes les mesures d’instruction qu’il estime utiles. *Si un doute subsiste, il profite au salarié.*”) (emphasis added).

¹⁸⁴ Conseil constitutionnel [CC] [Constitutional Court] decision No. 89-257DC, July 25, 1989, Rec. 59 (Fr.) (“[L]e contrôle juridictionnel des conditions légales du licenciement, ne sont en rien contraires au principe d’égalité des citoyens devant la loi.”); JAVILLIER, *supra* note 143, at 232–33.

¹⁸⁵ Gaudu, *supra* note 129, at 402.

¹⁸⁶ HERITAGE FOUND., *supra* note 84, at 90 (“The ability of businesses to contract freely for labor and dismiss redundant workers when they are no longer needed is a vital mechanism for enhancing productivity and sustaining overall economic growth.”).

not only force firms to retain poor performers and redundant employees, but also increase the likelihood of poor employee performance. When employment protection legislation shields workers from the job market, studies indicate that workers are less efficient and exert less effort than they would under more competitive circumstances.¹⁸⁷

Labeling this phenomenon as the “X-inefficiency,” economist Harvey Leigenstein explains: “In situations where competitive pressure is light, many people will trade the disutility of greater effort, or search for the utility of feeling less pressure.”¹⁸⁸ According to Leigenstein, in the absence of competitive market conditions, employees appear less compelled to work effectively and expend less personal effort at performing their jobs well.¹⁸⁹ As a result, operational expenses in an “X-inefficient” firm will be greater than those in a competitive firm where labor regulations do not protect workers from the free market.¹⁹⁰ In this respect, France’s onerous termination procedures disadvantage entrepreneurs by not only raising the costs of risk, but also by contributing to lower rates of productivity and efficiency.

D. Legal Constraints on Expansion

One of the key factors contributing to the declining competitiveness of France, as well as Europe, is the failure to generate “new businesses destined for growth.”¹⁹¹ Prior to the market crash in 2008, Europe already trailed behind the U.S. in producing new businesses. Only twelve new companies from Europe broke into the top 500 public companies from 1950 to 2007, whereas America contributed fifty-two new companies.¹⁹² Additionally, in the 1990s, one study found that while 19 percent of mid-sized American firms could be characterized as “fast-growers,” the same characterization was true of only 4 percent of the companies in six European countries, including France.¹⁹³

French employment protection legislation penalizes growing businesses by requiring firms to satisfy costly and complex legal requirements as they increase in size, thus discouraging the type of growth the country needs. Looking at the relationship between employment regulations that significantly raise labor costs once French firms reach 50 employees and French firm size, a study conducted by researchers at the London School of Economics found that France has a surprisingly large

¹⁸⁷ *Id.* at 61.

¹⁸⁸ Harvey Leibenstein, *Allocative Efficiency vs. 'X-Efficiency,'* 56 AM. ECON. REV. 392, 413 (1966).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *European Entrepreneurs: Les Misérables*, ECONOMIST, July 28, 2012, at 30.

¹⁹² *Id.*

¹⁹³ *Id.*

number of companies with forty-nine employees, whereas this is not the case in American firms.¹⁹⁴ In 2008, a French commission charged with writing a report on growth found that once an enterprise employs fifty workers, no fewer than thirty-four laws and regulations start to apply.¹⁹⁵ According to the commission's report, the cost of these regulations amounts to 4 percent of a firm's total payroll.¹⁹⁶

Thus, the empirical data indicates that, when determining firm size, many small business owners are influenced by considerations weighing the benefits of expansion against the costs of increased labor regulation.¹⁹⁷ Based on their findings that far fewer French firms expand on the same scale as productive U.S. firms, researchers at the London School of Economics concluded that French employment regulations offer an "attractive" explanation for the country's productivity gap.¹⁹⁸ In order to avoid costly labor regulations, many highly productive firms fail to reach their optimal size, which contributes to a misallocation of French labor resources and harms entrepreneurial growth.¹⁹⁹

E. Social Security Costs

Due to its robust public welfare system, France is one of the most successful countries in the world at minimizing income disparities between the wealthy and the poor.²⁰⁰ However, France's national social security

¹⁹⁴ Luis Garicano, Claire Lelarge & John Van Reenen, *Firm Size Distortions and the Productivity Distribution: Evidence from France 2*, 15 (London Sch. of Econ., Ctr. for Econ. Performance, Working Paper, 2012), available at <http://cep.lse.ac.uk/pubs/download/dp1128.pdf> (Out of the total number of French firms researched, "[t]here are just over 400 firms with exactly 49 employees and then only about 130 with 50 employees.").

¹⁹⁵ JACQUES ATTALI, RAPPORT DE LA COMMISSION POUR LA LIBÉRATION DE CROISSANCE FRANÇAISE [COMMISSION REPORT ON THE DEREGULATION OF FRENCH ECONOMIC GROWTH] 48 (2008), available at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000041/0000.pdf>; *Special Report*, *supra* note 55.

¹⁹⁶ *Id.* ("Les seuils sociaux constituent aujourd'hui un frein à la croissance et à la création d'emploi. À titre d'exemple, le passage de 49 à 50 salariés entraîne actuellement l'application de 34 législations et réglementations supplémentaires dont le coût représente 4% de la masse salariale.").

¹⁹⁷ *Special Report*, *supra* note 55.

¹⁹⁸ Garicano, Lelarge & Reenen, *supra* note 194, at 15.

¹⁹⁹ *Id.* at 21 ("Intuitively, firms will optimally choose to remain small to avoid the regulation, so the size distribution becomes distorted with 'too many' firms just below the size threshold and 'too few' firms just above it. Furthermore, the distribution of productivity is also distorted: some of those firms just below the cut-off are 'too productive' as they have been prevented from growing to their optimal size by the regulation. We show how the regulation creates welfare losses by (i) allocating too little employment to more productive firms who choose to be just below the regulatory threshold, (ii) allocating too little employment to more productive firms because they bear the implicit labor tax (whereas small firms do not) and (iii) through reducing equilibrium wages (due to some tax incidence falling on workers) this encourages too many individuals to become small entrepreneurs rather than working as employees for more productive entrepreneurs.").

²⁰⁰ Using the Gini coefficient as a rough measure of inequality, which ranges from 0 (representing

system, the *Sécurité sociale* more commonly referred to as *Sécu*, imposes burdensome costs on employers.²⁰¹ *Sécu* is a compulsory insurance that provides for healthcare, pensions, family allowances, and unemployment benefits to employees.²⁰² Healthcare, pension, and unemployment benefits are allowances that depend, at least in part, on the level of an employee's wages, while family allowances are granted regardless of income.²⁰³ *Sécu* is funded by a tax on jobs that is unevenly shared by workers and employers, with most of the burden falling on employers.²⁰⁴ In 2007, in order to fund employer *Sécu* contributions both large and small, French companies were found to pay the equivalent of a 42.3% tax on top of each employee's salary in comparison to the equivalent of a 10.5% tax paid by UK employers for social security costs.²⁰⁵

Sécu imposes higher labor costs on French employers than the social security regimes of most other European countries.²⁰⁶ According to a recent study, German companies pay 17 percent of workers' gross salaries in social charges, whereas French companies pay 38 percent.²⁰⁷ With employer social-security contributions coming in at almost 30 percent of labor costs in 2011, France eclipses Italy, Sweden, Spain, Germany, and Britain in social charges.²⁰⁸ Furthermore, even in Italy, which has the highest social charges after France, social-security contributions amount to less than 25 percent of labor costs.²⁰⁹ As a result, the chief executive of Valeo, one of the world's biggest car-parts companies, has been quoted saying that unaffordable employer social security contributions present one of the biggest problems for companies in France.²¹⁰

Having now examined some major deficiencies in French employment law that discourage entrepreneurial activity and hinder job creation, the following part will continue the analysis by suggesting some key areas where deregulation measures might help to stimulate growth.

perfect equality) to 1 (representing perfect inequality), as of 2004, France reduced inequality to 0.248 over the past quarter century. In contrast, the United States has seen significant increases in the Gini coefficient over the same period and has a score of 0.450. LIBR. OF CONG.—FED. RES. DIV., COUNTRY PROFILE: FRANCE (2007), available at <http://lcweb2.loc.gov/frd/cs/profiles/France.pdf>.

²⁰¹ *Id.*

²⁰² Gaudu, *supra* note 129, at 406.

²⁰³ *Id.*

²⁰⁴ LIBR. OF CONG.—FED. RES. DIV., *supra* note 200.

²⁰⁵ Gaudu, *supra* note 129, at 404.

²⁰⁶ LIBR. OF CONG.—FED. RES. DIV., *supra* note 200.

²⁰⁷ *France's Economy: The Performance Gap*, ECONOMIST, Sept. 22, 2012 at 27.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

V. ENCOURAGING ENTREPRENEURSHIP THROUGH FUTURE EMPLOYMENT REFORM

On June 14, 2013, France enacted labor market reform through the *Loi relative a la sécurisation de l'emploi*, which is referred to in English as the “Law for the Security of Employment.”²¹¹ This law implemented a combination of reforms that were intended to enhance employer flexibility in the management of workforce personnel on the one hand, and to provide greater job security for employees and greater access to information regarding an employer’s business decisions on the other.²¹² However, a number of commentators have criticized the French reform as being too modest to bring about any substantive change in the country’s rigid labor market,²¹³ and an article in the *Christian Science Monitor* reported that “France’s entrepreneur exodus and continued economic malaise signal the need for a labor overhaul, not a minor adjustment.”²¹⁴

Although the labor market and employment reforms enacted in June 2013 were intended to address French problems with unemployment and declining competitiveness, the reforms fell short of implementing the kind of change that will be needed to significantly lower France’s high rate of unemployment, raise its levels of entrepreneurship, and revitalize the French economy.²¹⁵ After first addressing the ways in which French employment law contributes to unemployment by harming employers and job seekers alike, this part offers some general insights and recommendations for the future. Finally, by examining the 2013 reforms and focusing on specific areas where the Loi 2013-504 fell short, this part concludes with a prescriptive analysis for how the reforms could be improved upon to further enhance employer flexibility and reduce the cost of entrepreneurial risk taking.

A. Achieving the Goals of Employment Protection Legislation

Although French regulations favoring open-ended contracts, rigid

²¹¹ *Special Report*, *supra* note 55.

²¹² The *Loi relative à la sécurisation de l'emploi* or the “Law for the Security of Employment” will hereinafter be referred to within the text of this Note as the Loi 2013-504. Loi 2013-504 du 14 juin 2013 relative à la sécurisation de l'emploi [Law 2013-504 of June 14, 2013 Relating to the Security of Employment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 16, 2013; *France Enacts the Labor Law Reform Act*, MORGAN LEWIS (July 3, 2013) [hereinafter MORGAN LEWIS], http://www.morganlewis.com/pubs/LEPG_LF_FranceEnactmentOfLaborLawReformAct_02july13.pdf.

²¹³ MORGAN LEWIS, *supra* note 212.

²¹⁴ See, e.g., *Hollande’s Modest Labor Reform: France Needs a Reagan Revolution*, WALL ST. J. (Jan. 16, 2013) [hereinafter *Hollande’s Modest Labor Reform*], <http://online.wsj.com/news/articles/SB10001424127887324235104578241292636563234>; Melchiorre, *supra* note 139; Vranceanu, *supra* note 44.

²¹⁵ Melchiorre, *supra* note 139.

termination procedures, and mandatory employer services as firms increase in size originate from a desire to protect employees,²¹⁶ none of these measures have proven successful at combating rising unemployment or economic stagnation within France. In fact, the country's worker-protective approach to employment law is harmful to both employers and employees alike by discouraging entrepreneurial activity and preventing job creation.²¹⁷ With a general unemployment rate of nearly 11 percent of the French population, and youth unemployment at more than 26 percent, more than 3 million people are jobless in France.²¹⁸ France's unemployment rate has consistently exceeded 8 percent for the last twenty years and has hovered near the 10 percent threshold for more than a third of the time.²¹⁹ Due to France's burdensome labor regulations and expensive social charges, however, both small and large businesses are reluctant to create new jobs.²²⁰

Rather than actively contributing to job creation, the legal system actually encourages employers to engage in inefficient and informal employment practices geared toward avoiding restrictive labor laws. For example, France has witnessed a significant rise in "atypical precarious forms of employment," under which young professionals are being engaged for increasingly long trial periods in the hopes of eventually receiving an employment offer.²²¹ The adverse effect of employment protection legislation is further illustrated by indications that French businesses are curtailing growth in order to avoid the heightened employment regulations that result when a firm employs more than fifty workers.²²² French employment practices and the current growth crisis thus reflects scholarly research findings that, "[i]f institutions are such that it is beneficial for the individual to spend entrepreneurial effort on circumventing them, the individual will do so rather than benefiting from

²¹⁶ *Id.* (remarking that "[i]nstead of introducing needed flexibility into France's rigid labor market, the [reform] merely tinkers around the edges").

²¹⁷ Mark Freedland, *Beyond the Public Law/Private Law Dichotomy: Employment Law*, in PRINCIPLES OF FRENCH LAW 483, 487 (2d ed. 2008).

²¹⁸ According to the 2013 *Index of Economic Freedom*, "Onerous labor laws penalize businesses and workers alike. Rigid labor regulations prevent employers and employees from freely negotiating changes in terms and conditions of work, resulting often in a chronic mismatch of labor supply and demand." HERITAGE FOUND., *supra* note 84, at 91.

²¹⁹ Steven Erlanger & David Jolly, *French Lawmakers Loosen Labor Rules in a Victory for the President*, N.Y. TIMES, May 14, 2013, at A8, available at http://www.nytimes.com/2013/05/15/world/europe/french-lawmakers-loosen-labor-rules.html?_r=0; *Special Report*, *supra* note 55.

²²⁰ LIBR. OF CONG.—FED. RES. DIV., *supra* note 200, at 18.

²²¹ Melchiorre, *supra* note 139 ("Businesses don't want to take the risk of hiring an employee they can't dismiss later."); *see also id.* ("The unemployment and underemployment problem is often blamed on France's robust labor regulation and high minimum wages, which are said to inhibit job creation and to price low-paid workers out of jobs."); *Special Report*, *supra* note 55, at 6.

²²² Gaudu, *supra* note 129, at 404.

given institutions to reduce uncertainty and enhance contract and product quality.”²²³

Ultimately, France’s employment protection legislation not only deters entrepreneurial activity, but also harms the very workers that it was intended to protect by hindering job creation and blocking economic vitality. Although the French legal system has operated in ways that discourage entrepreneurial activity, the law can also play an important role in fostering entrepreneurship and stimulating economic growth. In fact, according to one scholar, in the context of the current global recession, “the legal system may provide an additional, yet ill-understood and hence underutilized mechanism to stimulate domestic entrepreneurship, one of the central pillars in revitalizing economic growth.”²²⁴

B. Enhancing Employer Flexibility and Reducing the Costs of Entrepreneurial Risk

By restricting employer flexibility and increasing the cost of entrepreneurial risk, the rigidity of French employment law presents significant obstacles to entrepreneurial growth. In order to undertake more successful reform measures, French policy makers and legislators need to recognize that entrepreneurs are self-serving agents who will only overcome the inherent risks of investment if the legal system increases their chances of making a return.²²⁵ Therefore, in order to make the law more responsive to the needs of emerging businesses, Viktor Mayer-Schönberger proposes that the law should play a dual role in encouraging entrepreneurship by reducing the costs of entrepreneurial risk taking and increasing the predictability of legal outcomes.²²⁶ Because entrepreneurs face many “external risks” that are both unpredictable and beyond the entrepreneur’s control,²²⁷ the law should serve as a tool to minimize those risks that can be controlled.²²⁸ For example, although entrepreneurs lack the means to singlehandedly control the economy, the law can help entrepreneurs minimize the cost of uncontrollable “external” risks like market fluctuations by providing them with the means to control how they manage their workforce in response to changing economic circumstances.

²²³ Garicano, Lelarge & Reenen, *supra* note 194.

²²⁴ Henrekson, *supra* note 69.

²²⁵ Mayer-Schönberger, *supra* note 70, at 154.

²²⁶ See Henrekson, *supra* note 69 (“Individuals carrying out the entrepreneurial function are self-serving agents, so that we can reasonably assume that entrepreneurs venture into the type of entrepreneurship that they expect will lead to the highest private return.”).

²²⁷ Mayer-Schönberger writes that the law ultimately has “two fundamental, reactive roles associated with lowering risks for entrepreneurs: directly lowering the cost for entrepreneurial activity . . . and increasing predictability.” Mayer-Schönberger, *supra* note 70, at 183.

²²⁸ *Id.* at 175 (“For entrepreneurs, ‘external’ risks are what they can assess, but not control. Each of these risks consists of a cost or benefit and the probability that it will be incurred.”).

Consequently, the French legal system should relax rigid hiring and firing procedures as well as other constraints on operational flexibility in order to provide employers with the freedom to adjust their business models as different needs and challenges arise. Transforming France's heavily regulated labor market, which currently privileges workers over employers, into a market that promotes a voluntary exchange of services between employers and employees could help accomplish this goal, fostering a more favorable environment for entrepreneurial investment.²²⁹ Based on the principle of voluntary exchange, French reform should implement measures to improve labor market flexibility by eliminating complicated dismissal requirements and empowering workers and employers to contract freely.²³⁰

Reforms that introduce greater flexibility in the market should also reduce the transaction costs associated with entrepreneurial risk taking. In an article examining the impact of increased legal intervention in the field of corporate governance, a group of scholars concluded that legal rigidity raised transaction costs and impeded growth.²³¹ The article observed that “[s]tricter rules and less flexibility arguably result in higher compliance costs and more box-ticking,” which “can have a negative spill-over effect on the performance and development of firms.”²³² As an alternative, the authors proposed a more “flexible principle-based framework,” rather than a detailed “one-size-fits-all” approach to regulating corporate governance.²³³

C. Transforming Employment Reform into an Entrepreneurial Future

After lengthy negotiations between French trade unions and employer trade associations, a national agreement was reached to reform French labor and employment law on January 11, 2013.²³⁴ This agreement, referred to as the *Accord National Interprofessionnel* (or the ANI), was signed by three out of five major French trade unions and set forth the terms for the French statutory reforms enacted in 2013 as the “Law for the Security of Employment,” or Loi 2013-504.²³⁵ Although Loi 2013-504

²²⁹ *Id.* at 174–76.

²³⁰ HERITAGE FOUND., *supra* note 84, at 91 (“[T]he ability of businesses to contract freely for labor and dismiss redundant workers when they are no longer needed is a vital mechanism for enhancing productivity and sustaining overall economic growth. The core principle of any market is free, voluntary exchange. That is as true in the labor market as it is in the market for goods.”).

²³¹ *Id.*

²³² Jose Miguel Mendoza, Christoph Van der Elst & Erik P. M. Vermeulen, *Entrepreneurship and Innovation: The Hidden Costs of Corporate Governance in Europe*, 7 S.C. J. INT'L L. & BUS. 1, 11 (2010).

²³³ *Id.* at 14.

²³⁴ *Id.*

²³⁵ *New Labor and Employment Legislation in France—Is French Labor Law Becoming More Flexible?*, PROSKAUER ROSE LLP (Apr. 2, 2013) [hereinafter PROSKAUER], <http://www.proskauer.com/>

implemented a number of changes to provide French employers with more flexibility in hiring and firing practices, the reform's effectiveness at reshaping the French economy will be somewhat limited due to the narrow scope of the flexibility reforms weighed against other measures to enhance employee security.

1. Reforms Impacting Hiring Practices

The 2013 legislation provides French firms with increased flexibility to alter their contractual relationships with employees during periods of economic difficulty thanks to measures that facilitate employee mobility and temporarily permit employers to cut wages and work hours.²³⁶ First, as a result of the reform, the *Code du travail* now permits employers who are not engaged in downsizing to negotiate with unions over the geographic and occupational mobility of employees within the same company.²³⁷ Additionally, external mobility provisions that apply to firms with a minimum of three hundred employees permit employers and employees to temporarily suspend their employment relationship while the employee searches for a new position in a different company.²³⁸ However, the arrangements for external mobility may offer less flexibility to the employer than the mobility they grant to employees. Given that the employee can independently elect to either return to their prior position or leave at a pre-determined date, the advantages of increased employer flexibility are somewhat diminished by the unpredictability of the outcome at the end of the arrangement.²³⁹ Second, under Article L5125-1 of the *Code du travail*, companies that face “serious economic difficulties of a cyclical nature,” referred to in French as *graves difficultés conjoncturelles*, can negotiate agreements with the trade unions to modify collective work arrangements to reduce employee wages and work hours for a period of up to two years in an effort to prevent massive lay offs.²⁴⁰ According to an article in the *Christian Science Monitor*, the critical problem with both of these reforms is that they “only increase flexibility during economic downturns, and they do nothing to change the employer’s fundamental and

publications/client-alert/new-labor-and-employment-legislation-in-france/.

²³⁶ *France Introduces Radical Labour Market Reforms*, SQUIRE SANDERS (May 2013) [hereinafter SQUIRE SANDERS], <http://www.squiresanders.com/files/Publication/5fd90a3-c1d2-4c6a-b71d-ab4fc7429426/Presentation/PublicationAttachment/0fbce787-35f0-4c05-becd-b2a7e4620235/France-Introduces-Radical-Labour-Market-Reforms-Newsletter.pdf>; MORGAN LEWIS, *supra* note 212.

²³⁷ Sarah Dilorenzo, *France Approves Major Labor Reform Package*, YAHOO NEWS (May 14, 2013).

²³⁸ CODE DU TRAVAIL [C. TRAV.] art. L242-21 (Fr.).

²³⁹ CODE DU TRAVAIL [C. TRAV.] art. L1222-12 (Fr.).

²⁴⁰ CODE DU TRAVAIL [C. TRAV.] arts. L1222-13–L1222-14 (Fr.) (“A son retour dans l’entreprise d’origine, le salarié retrouve de plein droit son précédent emploi ou un emploi similaire, assorti d’une qualification et d’une rémunération au moins équivalentes ainsi que du maintien à titre personnel de sa classification.”).

burdensome obligations to employees.”²⁴¹

Moreover, reform measures intended to improve employer flexibility must also be weighed against other measures to prevent the creation of nonpermanent jobs.²⁴² As a result of the 2013 reform legislation, the French statutory regime for part-time employment now requires employers to provide part-time employees with a minimum of 24 hours of work per week,²⁴³ subject to limited exceptions.²⁴⁴ Part-time employees will receive increased compensation for any time worked in excess of their contractual hours and the law additionally places limits on how many additional hours they may work.²⁴⁵ The reforms additionally discourage the use of fixed-term contracts by increasing employers’ contribution rates to the unemployment branch of social security based on the length of the contract term: Employer contribution rates, which were previously capped at 4 percent, have been raised to 4.5 percent for contracts terms shorter than three months; 5.5 percent for contract terms that last between one month and three months; and 7 percent for contract terms of one month or less.²⁴⁶ The reform also raises the taxes and fees for hiring workers under temporary contracts, which is likely to “hit [] businesses hard because 8 out of every 10 new hires are on these contracts.”²⁴⁷ Rather than penalizing firms for short- and part-term hiring, the *Wall Street Journal* observes that “a more effective tack would be to strip away more of the costly guarantees and protections that have made employers so wary of long-term contracts.”²⁴⁸

2. Reforms Impacting Firing Practices

The 2013 reform also introduced substantial changes in dismissal procedures for collective redundancies occurring when companies of more than fifty employees dismiss over ten employees during a thirty-day timeframe.²⁴⁹ In order to provide employers with greater firing flexibility, Loi 2013-506 creates two different procedural tracks that simplify the

²⁴¹ CODE DU TRAVAIL [C. TRAV.] art. L5125-1 (Fr.).

²⁴² Melchiorre, *supra* note 139.

²⁴³ See *Hollande’s Modest Labor Reform*, *supra* note 214.

²⁴⁴ CODE DU TRAVAIL [C. TRAV.] art. L3123-14-1 (Fr.). See also CODE DU TRAVAIL [C. TRAV.] art. L3123-14 (Fr.) (listing all terms to be covered under a part-time employment contract).

²⁴⁵ Articles L3123-14-2 through L3123-14-5 provide lists of specific exceptions to the law mandating part-time employees to work a minimum of twenty-four hours per week. CODE DU TRAVAIL [C. TRAV.] arts. L3123-14-2–L3123-14-5 (Fr.).

²⁴⁶ French employees are to receive a 10 percent increase on their regular wages for overtime and the law prohibits any overtime work in excess of one tenth the duration of an employee’s weekly or monthly hours. CODE DU TRAVAIL [C. TRAV.] art. L3123-17 (Fr.).

²⁴⁷ MORGAN LEWIS, *supra* note 212.

²⁴⁸ Melchiorre, *supra* note 139; Vranceanu, *supra* note 44.

²⁴⁹ *Hollande’s Modest Labor Reform*, *supra* note 214.

implementation of collective dismissals.²⁵⁰ Prior to the 2013 reforms, in the case of collective dismissals, employers were typically required to first consult with and receive the approval of a “Works Council” regarding the content of an employment maintenance plan and then notify and submit the plan to the appropriate administrative authorities, all the while adhering to a very complex set of procedures and timetables.²⁵¹

As part of an “overall aim . . . to speed up the collective consultation process,” under the 2013 reforms employers can now either negotiate an agreement with one of the relevant trade unions, circumventing consultations with the Work’s Council altogether,²⁵² or unilaterally implement a maintenance plan, which the Work’s Council must still review but can no longer veto.²⁵³ Furthermore, regardless of which procedure employers adopt, they are relieved from satisfying many other onerous dismissal requirements governing meetings with employee representatives, the timetable for the collective dismissals, and the selection criteria for terminated employees.²⁵⁴ Additionally, under the reform provisions to facilitate employee mobility and safeguard employment during periods of economic downturn, employees who refuse to agree to these arrangements may be terminated.²⁵⁵ Although employers still need to satisfy the typical requirements for an economic dismissal, regardless of how many terminations occur, the employers are not required to set up a maintenance plan.²⁵⁶

3. *Expanding the Scope of the 2013 Employment Reforms*

By combining increases in job market flexibility with improved job security for employees, the French reforms of 2013 took a moderate approach to the “flexicurity” model of reform developed by Denmark, Germany, and the Netherlands.²⁵⁷ Granting French companies greater flexibility to hire and fire, it also provided roughly 3.5 million lower-wage earners with additional employer-financed health benefits and imposed tax penalties on French businesses using part-time and temporary employment contracts.²⁵⁸

The greatest problem with the French reform measures, however, is that they fell short of implementing the same level of substantive structural

²⁵⁰ SQUIRE SANDERS, *supra* note 236; PROSKAUER, *supra* note 235; MORGAN LEWIS, *supra* note 212.

²⁵¹ SQUIRE SANDERS, *supra* note 236; PROSKAUER, *supra* note 235; MORGAN LEWIS, *supra* note 212.

²⁵² *Employment Protection*, *supra* note 173; SQUIRE SANDERS, *supra* note 236.

²⁵³ SQUIRE SANDERS, *supra* note 236; PROSKAUER, *supra* note 235; MORGAN LEWIS, *supra* note 212.

²⁵⁴ SQUIRE SANDERS, *supra* note 236; PROSKAUER, *supra* note 235; MORGAN LEWIS, *supra* note 212.

²⁵⁵ SQUIRE SANDERS, *supra* note 236; *see also Employment Protection*, *supra* note 173.

²⁵⁶ SANDERS, *supra* note 236; PROSKAUER, *supra* note 235; MORGAN LEWIS, *supra* note 212.

²⁵⁷ *See, e.g., EUROPE’S COMPETITIVENESS*, *supra* note 5, at 18–20; LABAYE ET AL., *supra* note 26, at 33.

²⁵⁸ Erlanger & Jolly, *supra* note 219.

reform undertaken by other “flexicurity” countries.²⁵⁹ First, the French measures geared at injecting more flexibility in the labor market continued to reflect an outmoded preference for full-time, open-ended employment contracts, which provide increasingly little utility for both employers and job seekers in today’s economy.²⁶⁰ France needs to engage in deeper structural reforms that relax restrictive hiring practices and stay away from the country’s age-old insistence on the CDI to facilitate the use of temporary and part-time employment contracts. Additionally, although the millennium has witnessed growing trends across OECD member countries in favor of implementing reforms that facilitate the use of fixed-term and temporary employment contracts, France and Italy were two of the main exceptions to these trends toward the liberalization of employment protection legislation.²⁶¹

Second, despite measures to facilitate dismissal procedures, the French reforms failed to remove one of the most significant obstacles to employer flexibility under the *Code du travail*. Onerous termination procedures still require French companies to justify their financial difficulty before they can restructure their workforce and dismiss redundant employees.²⁶² The law only permits firms to use the new streamlined dismissal procedures to help preserve the competitiveness of companies that are already in difficulty, and “firms still cannot lay off workers to improve competitiveness when the business is healthy.”²⁶³ The 2013 reforms, therefore, only go half way at providing the greater firing flexibility France needs in order to incentivize employers and entrepreneurs to resume hiring.²⁶⁴

Overall, the French reforms placed too great an emphasis on security measures in a country that already offers extensive social security benefits, as well as other social services that are experiencing increasing pressure in light of France’s current rates of job creation.²⁶⁵ Although improved security measures, such as enhanced unemployment benefits, job search assistance, and professional development training are a critical feature of the “flexicurity” model,²⁶⁶ France has a more pressing need to increase job market flexibility in order to stimulate job creation and entrepreneurial activity during a period of declining competitiveness. According to a

²⁵⁹ See, e.g., EUROPE’S COMPETITIVENESS, *supra* note 5, at 18–20; LABAYE ET AL., *supra* note 26, at 33.

²⁶⁰ LABAYE ET AL., *supra* note 26, at 33.

²⁶¹ OECD EMPLOYMENT OUTLOOK, *supra* note 138.

²⁶² Vranceanu, *supra* note 44 (describing the legal requirement that an employer provide proof of real and serious cause for an economic dismissal as an “absurd requirement” that “interfere[s] with the firms’ ‘right-to-manage’”).

²⁶³ Melchiorre, *supra* note 139.

²⁶⁴ See *id.*

²⁶⁵ LABAYE ET AL., *supra* note 26, at 11.

²⁶⁶ *Id.* at 33.

report on French employment prepared by McKinsey Global Institute, “France needs to more than double the number of net new jobs it creates each year to meet ambitions for employment and prosperity at a par with the European average.”²⁶⁷ France should look more to countries like Denmark, Germany, and the Netherlands for a successful example to emulate in the future.

VI. CONCLUSION

The absence of a business environment or legal regime that rewards entrepreneurial investment is at the heart of France’s performance gap and declining competitiveness. Along with a detailed discussion of the ways in which French employment law impedes entrepreneurial activity and unintentionally harms employees in the process, this Note confirms the observation that, “[b]y substituting political judgments for those of the marketplace, government diverts entrepreneurial resources and energy from productive activities to rent-seeking The result is lower productivity, economic stagnation, and declining prosperity.”²⁶⁸ This Note therefore concludes that by reforming France’s rigid employment laws through deregulation measures that enhance employer flexibility and reduce the costs of forming new businesses, the French state can remove barriers to entrepreneurial activity and stimulate economic growth.

As the French economy continues to suffer from high rates of unemployment and economic stagnation, there has been increasing international unease regarding the vitality of the country’s economic future. Before France finds itself on the brink of another recession, now is the ideal moment for policymakers to send a positive signal to France’s private business sector and the international community by undertaking key employment reforms that promote entrepreneurship and create jobs. In particular, French employment law can be improved by increasing the hiring and firing flexibility of employers in running their businesses, encouraging the voluntary exchange of services between workers and employers, and adapting the law to the entrepreneur’s needs by decreasing the costs of risk and increasing the predictability of legal outcomes. By reforming employment laws to remove regulations and even create incentives for entrepreneurial activity, significant potential exists for a country like France to revitalize a depressed economy and generate positive growth.

²⁶⁷ *Id.* at 11.

²⁶⁸ HERITAGE FOUND, *supra* note 84, at 88.