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

Kelly Hamren
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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.

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2 Id.


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.” In the wake of the financial crisis of 2008, economic activity in Europe suffered a sharp decline, European governments had to bail out banks, Iceland went bankrupt, and a sovereign debt crisis in the “Eurozone” triggered widespread concern over the potential breakup of the euro.

The Eurozone debt crisis erupted in late 2009 in reaction to Greece’s disclosure that the country had previously misreported national deficit levels. The disclosure severely damaged investor confidence, causing Greek bond spreads to rise to unsustainable levels while also galvanizing
international concern regarding the debt levels of other Eurozone countries. 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. 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.” As a result of extensive structural adjustments, the countries that suffered the most during the Eurozone crisis have reduced labor costs, increased labor market flexibility, boosted their export ratios, and made significant progress at correcting fiscal imbalances by reigning in their deficits.

Whereas other Eurozone countries have already engaged in extensive structural reforms to boost economic performance, France has struggled to keep pace. Galvanizing considerable international publicity and provoking the ire of French officials, 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. As the Eurozone’s

11 Id.
12 Id. at 7.
13 Id. at 6, at 12–13.
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/SB10001424052702303309504579184984164551794 (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”).
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, 11% of the French population is currently unemployed.24 France is also “suffering from a widening prosperity gap” in terms of per capita GDP.25 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.”26 The government was forced to raise its estimated 2013 budget deficit from 3.7% to 4.1% of France’s GDP,27 and real GDP growth was projected at a mere 0.1% for 2013.28 Analysts also anticipated that fixed capital investment would contract by 2.5% in 2013.29

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.”30 By driving the rates of return that can be obtained for investments in a particular country’s economy, productivity serves as a

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23 Hugh Carnegy, 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. 
25 Id.
29 Id.
31 Id. at 6.
central component of competitiveness and economic growth that “sets the level of prosperity that can be earned by an economy.” 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. 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. 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.”

While France has long been considered one of the Eurozone’s economic leaders along with Germany, 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. 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. On the one hand, the WEF notes that many features of the French economy help to enhance the

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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.
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).  

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.  

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. As of November 2012, the French state consumed 57% of the GDP, and its public debt had risen to over 90% of the GDP. French workers also pay the highest aggregate tax rate in the EU at 46% of France’s GDP. 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. 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.”

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. Then, in a surprise...
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{49} On the day of the announcement, the CAC-40 stock index decreased by 0.8%\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{53} In contrast, 7.6\% of the population in the United States, 14.4\% in China, and 17.5\% in Brazil were

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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.” \textit{Moody’s Downgrades France’s Government Bond Rating to Aa1 from Aaa, Maintains Negative Outlook, MOODY’S INV$.
SERV.} (Nov. 19, 2012) [hereinafter \textit{Moody’s Downgrades}], \url{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.” \textit{Id.}

\textsuperscript{47} Inman, \textit{supra} note 43.
\textsuperscript{48} Id.
\textsuperscript{50} Id.
\textsuperscript{52} Martin, \textit{supra} note 49.
\textsuperscript{53} DONNA J. KELLEY, NIELS BOSMA & JOSE ERNESTO AMOROS, \textit{THE GLOBAL ENTREPRENEURSHIP MONITOR 2010 GLOBAL REPORT} 23 (2010), \textit{available at} \url{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 1/2 years old.”).
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characterized as early-stage entrepreneurs. Additionally, according to commentators, France is “strikingly short” of small- to mid-sized companies—another sign of low rates of entrepreneurship. In Germany, mid-sized companies referred to as Mittelstand firms form the backbone of the economy. In France, however, there are just over 4,000 medium-sized enterprises, which proportionately amounts to half as many as Germany and Britain. Furthermore, whereas the average German company has 41 employees, the average French company is much smaller with just around 14 employees.

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. In the WEF’s Global Competitiveness Report for 2012–2013, France ranked 126th under a category representing the “burden of government regulation.” The ranking indicates that compliance with government regulatory requirements is less burdensome in 125 other countries out of a total of 144 countries surveyed. This wide variety of regulatory requirements in France fosters an unfriendly business environment for entrepreneurial investment. In 2012, France ranked 32nd out of a total of 185 economies in the World Bank’s annual “Ease of Doing Business” scorecard. France also placed 23rd under a subcategory representing the “Ease of Starting a Business.” 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 place and was additionally downgraded four

54 Id.
55 Id.
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.
64 Id.
65 Id. 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.”

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. 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. 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.


66 Id. at 164.


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.” 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. 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.” 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.’” 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.”

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. 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.”


72 Henrekson, supra note 69, at 719.


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.”).
older companies are not as capable at innovating and capitalizing on new ideas as smaller-sized start-up firms. 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. Researchers have also shown that business turnover is closely linked to higher wages, increased worker productivity, and overall economic growth. 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. 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. 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. 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.” 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.

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. 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. 

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85 Id.
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.
93 Id. at 9.
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.”

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. 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, government institutions and the legal frameworks that they establish can also play a critical role in shaping entrepreneurial activity.

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.” 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.
According to scholars, the law offers two central mechanisms for driving entrepreneurship.\(^1\) First, the law creates entrepreneurial opportunities through property rights, which ensure that entrepreneurs retain the benefits of their success.\(^2\) Second, measures that reduce entry costs can also foster favorable conditions for entrepreneurship by minimizing the regulatory and administrative burdens required of entrepreneurs.\(^3\) 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.\(^4\) 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.\(^5\) According to a 2007 study by Vesa Kanniainen 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”).

\(^1\) 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.

\(^2\) Id. at 1553–54.

\(^3\) Id. at 1562.

\(^4\) Vesa Kanniainen & 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.”).

regulation “results in reduced enterprise formation.” 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. Regulations over job creation can encompass rules favoring particular disadvantaged groups, conditions for using temporary or fixed-term contracts, and employee training requirements. Regulations governing termination establish redundancy procedures, mandate notification periods and severance payments, and institute special requirements for collective dismissals. 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.”

First, rigid labor laws that limit operational flexibility prevent growth by restricting new businesses from adapting workforce personnel to their evolving business needs. 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. 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. Therefore, labor markets as well as entrepreneurs benefit from the ability to rapidly shift workers from one economic activity to another at low cost.

Second, overly restrictive employment laws deter entrepreneurial ventures by raising the transaction costs of running a new business. Because small- and medium-sized firms cannot afford the hiring and firing costs associated with labor market rigidity, they may choose to remain small and avoid entering new markets. As a result, the overall level of entrepreneurship and economic growth may be lowered.

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106 Kanniainen & 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.
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 706.
117 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.
118 Smith & Ibrahim, supra note 71, at 1565.
119 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: “If 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.”

Second, government policies that shield entrepreneurs from economic failure can also stimulate entrepreneurship. 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. According to the study, the reform’s implementation was followed by a 25% increase in monthly business creation rates across industries.

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. The reform also led to the creation of more “ambitious” firms that were more likely to hire. 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. 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.”

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

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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

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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.”

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. 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. Because workers are subordinated to their employers under the employment contract, this second approach stresses the need for a certain degree of state protection. 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.” Employers lose around 75% of the cases brought to French labor courts, 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.”

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.

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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.
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,

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141 Gaudu, supra note 129, at 397.
142 Id.
144 Gaudu, supra note 129, at 401.
145 Id.
146 Vranceanu, supra note 44.
147 Id.
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.


\(^{154}\) 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. 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. 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.

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. 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. 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. 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.

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

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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.
163 Id.
164 Id.
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.” 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.

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.

First, economic reasons for dismissal encompass financial difficulties, technological change, or any business reorganizations necessary to maintain competitiveness. However, when the dismissal is adjudicated, French judges apply a proportionality principle in determining whether the economic motive is sufficiently serious. The judicial proportionality test entails weighing the advantages an employer derives from dismissal against the detriment suffered by the dismissed employee. 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.

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


166 Vranceanu, *supra* note 44.


169 *Id.*

170 *Id.* at 401–02.

171 *Id.*

172 *Id.*
whether the employer is implementing an individual or collective dismissal.\footnote{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, \textit{supra} note 129, at 403.} 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.\footnote{Gaudu, \textit{supra} note 129, at 403.}

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 \textit{plan social} or \textit{plan de sauvegarde d’emploi}.\footnote{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.”).} The employment maintenance plan provides an overview of how the employer handled the economic redundancy as well as their justifications for dismissal.\footnote{CODE DU TRAVAIL [C. TRAV.] art. L1233-62 (Fr.); Freedland, \textit{supra} note 134, at 495–96.} 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.”\footnote{Gaudu, \textit{supra} note 129, at 403.}

Employers must both consult with a \textit{Comité d’entreprise}, referred to in English as a “Works Council,” regarding the maintenance plan and then submit the plan to the \textit{Directeur départemental du travail} for administrative approval.\footnote{Employment Protection, \textit{supra} note 173; Gaudu, \textit{supra} note 129, at 403.} 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.\footnote{Gaudu, \textit{supra} note 129, at 403.}

\section*{2. Non-Economic Dismissals}

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

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.” 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. 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. 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.” 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. 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.

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.
192 Id.
193 Id.
number of companies with forty-nine employees, whereas this is not the case in American firms. 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. According to the commission’s report, the cost of these regulations amounts to 4 percent of a firm’s total payroll.

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. 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. 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.

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. However, France’s national social security...
system, the Sécurité sociale more commonly referred to as Sécu, imposes burdensome costs on employers.\textsuperscript{201} Sécu is a compulsory insurance that provides for healthcare, pensions, family allowances, and unemployment benefits to employees.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{205}

Sécu imposes higher labor costs on French employers than the social security regimes of most other European countries.\textsuperscript{206} According to a recent study, German companies pay 17 percent of workers’ gross salaries in social charges, whereas French companies pay 38 percent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. \textit{Libr. of Cong.–Fed. Res. Div., Country Profile: France (2007), available at} http://lcweb2.loc.gov/frd/cs/profiles/France.pdf.

\textsuperscript{201} Id.
\textsuperscript{202} Gaudu, \textit{supra} note 129, at 406.
\textsuperscript{203} Id.
\textsuperscript{204} \textit{Libr. of Cong.–Fed. Res. Div., supra} note 200.
\textsuperscript{205} Gaudu, \textit{supra} note 129, at 404.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
V. ENCOURAGING ENTREPRENEURSHIP THROUGH FUTURE EMPLOYMENT REFORM

On June 14, 2013, France enacted labor market reform through the *Loi relative à 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.


\(^{213}\) MORGAN LEWIS, supra note 212.


\(^{215}\) Melchiorre, supra note 139.
termination procedures, and mandatory employer services as firms increase in size originate from a desire to protect employees, 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. 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. 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. Due to France’s burdensome labor regulations and expensive social charges, however, both small and large businesses are reluctant to create new jobs.

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. 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. 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

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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.
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{226} Because entrepreneurs face many “external risks” that are both unpredictable and beyond the entrepreneur’s control,\textsuperscript{227} the law should serve as a tool to minimize those risks that can be controlled.\textsuperscript{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.

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\textsuperscript{223} Garicano, Lelarge & Reenen, supra note 194.

\textsuperscript{224} Henrekson, supra note 69.

\textsuperscript{225} Mayer-Schönberger, supra note 70, at 154.

\textsuperscript{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.”).

\textsuperscript{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.

\textsuperscript{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. 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.\(^\text{229}\)

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.\(^\text{231}\) 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.”\(^\text{232}\) 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.\(^\text{233}\)

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.\(^\text{234}\) 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.\(^\text{235}\) 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.


\(^{233}\) Id. at 14.

\(^{234}\) Id.

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. 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. 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. 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. 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 layoffs. 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

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236 France Introduces Radical Labour Market Reforms, SQUIRE SANDERS (May 2013) [hereinafter SQUIRE SANDERS], http://www.squiresanders.com/files/Publication/5fde-90a3-e1d2-4c6a-b71d-ab4fc7429426/Presentation/PublicationAttachment/0fbece787-35fb-4e05-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.”

Moreover, reform measures intended to improve employer flexibility must also be weighed against other measures to prevent the creation of nonpermanent jobs. 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, subject to limited exceptions. 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. 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. 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.” 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.”

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. In order to provide employers with greater firing flexibility, Loi 2013-506 creates two different procedural tracks that simplify the

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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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{252} or unilaterally implement a maintenance plan, which the Work’s Council must still review but can no longer veto.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{258}

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

\textsuperscript{250} SQUIRE SANDERS, supra note 236; PROSKAUER, supra note 235; MORGAN LEWIS, supra note 212.
\textsuperscript{251} SQUIRE SANDERS, supra note 236; PROSKAUER, supra note 235; MORGAN LEWIS, supra note 212.
\textsuperscript{252} Employment Protection, supra note 173; SQUIRE SANDERS, supra note 236.
\textsuperscript{253} SQUIRE SANDERS, supra note 236; PROSKAUER, supra note 235; MORGAN LEWIS, supra note 212.
\textsuperscript{254} SQUIRE SANDERS, supra note 236; PROSKAUER, supra note 235; MORGAN LEWIS, supra note 212.
\textsuperscript{255} SQUIRE SANDERS, supra note 236; see also Employment Protection, supra note 173.
\textsuperscript{256} SANDERS, supra note 236; PROSKAUER, supra note 235; MORGAN LEWIS, supra note 212.
\textsuperscript{257} See, e.g., EUROPE’S COMPETITIVENESS, supra note 5, at 18–20; LABAYE ET AL., supra note 26, at 33.
\textsuperscript{258} Erlanger & Jolly, supra note 219.
reform undertaken by other “flexicurity” countries. 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. 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.

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. 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.” 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.

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. Although improved security measures, such as enhanced unemployment benefits, job search assistance, and professional development training are a critical feature of the “flexicurity” model, 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

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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.”\textsuperscript{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.”\textsuperscript{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.

\textsuperscript{267} Id. at 11.
\textsuperscript{268} HERITAGE FOUND, supra note 84, at 88.