Collective Relations in France: A Multi-layered System in Mutation

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As is the case all over the World, and to cope with the changes stemming from the global economy, collective industrial relations in France have been changing. If employees are traditionally represented by trade unions, (I) they are not the only ones, and, (II) the different adaptations of collective relations seem to lie in the balance between the roles, missions and attributions given to the different representatives, mainly unions and elected representatives, and the norms they produce.

Recently, a law passed on May 4, 2004[1], created a synthesis of all previous experimentations in this field and, therefore, can be considered as a landmark in the move towards decentralization of industrial collective relations (III).

I. A Brief Overview of Unions and Unionization in France

Unions were the first representatives of employees, and remain linked to the story of industrialization. This representativeness of the unions was first recognized outside companies, after having been banned (A). Their acceptance inside the company came later (B). In France, we are facing, as are many other countries, what could be interpreted as a crisis of unionization (C).

A. Historical landmarks

It is impossible to detail the story of the trade union movement in France in so few pages. We will merely give some important dates and events.

A legacy from the French Revolution, the *loi Le Chapelier* (*Le Chapelier* law) prohibited the creation of organizations and, indeed, unions of workers. Unions were then prohibited, even if, secretly, they started organizing the emerging working class. Lawfulness came from the law called *Waldeck-Rousseau*, enacted on March 21, 1884, even if, before this law and following the era of prohibition, a time of relative acceptance emerged during the reign of Napoleon III. The law of 1884 had a broad vision of the role of unions and did not reserve the benefit of unions for workers only. Moreover, the law did not make many requirements for the creation of a union: just registration of the statutes and the name of leaders[2]. Unionization then spread. Provisions of this law have been integrated into the Labor Code. Later, sectional unions appeared (executives, civil servants, in addition to those for independent workers, such as craftsman, shopkeepers, *etc.*).

The structure of the union movement in France resulted from a move between 1884 and

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[1] Also known under the name "*Loi Fillon*", after the name of the Minister of labor of the time, or law for renewing the social dialogue.

[2] These are still the only requirements today, art L. 411-3 of the French Labor Code.

the First World War towards organizing unions on a local (*unions locales et départementales*), then professional (*fédérations*) and national (*confédérations*) basis. This is still the structure of the trade union movement in France.

In 1919, unions were allowed to sign collective industrial agreements. In 1936, in a time of unity for the trade union movement, the government of the time, very favorable to social rights and workers, gave these collective agreements a real and appropriate statute. In contrast, the 1960s saw new divisions appearing in the trade unions. Still, at that time, the unions were not recognized inside companies. This would happen at the end of the 1960s in the aftermath of the demonstrations and riots of *Mai* 68.

B. Their presence in companies

The role of trade unions in the social protests of May 1968 was a key factor. Negotiations between the authorities, employers associations and the union confederations led to accords (*Accords de Grenelle*) providing many improvements for workers: a rise in the minimum wage and wages in general, employment security, *etc*., and recognition of the role of unions in companies. This latter topic will lead to the law of December 27, 1968, the first law arising from the *Accords de Grenelle*. This law fully recognized the role of unions within companies. Any representative union can decide to set up a union group (*section syndicale*) in a company, whatever the number of persons employed by the company. Moreover, providing they are representative in the company, unions are granted new means for their action in the company, in order to fully fulfill the right to unionization recognized in every company[3]. With this law, unions were allowed to organize not only outside the companies, but also within. The organization of employees will, practically speaking, lead to the setting up of union groups[4]. These are not company unions; these are gatherings of members of a union working in the company. The union group can display posters in the company, at appropriate places[5], and distribute union literature to workers even within the company[6]. Moreover, union groups were entitled to a room in companies employing more than 200 people (art. L 412-9). Union groups were also given a *crédit global d'heures* (hours allocation)[7] for preparing and negotiating company-level agreements.

This law of 1968 was a great victory for the unions: now they were organized within the companies themselves. This glorious period lasted for a while, but recent history is less glorious, and it is commonly said that the union movement is in crisis.

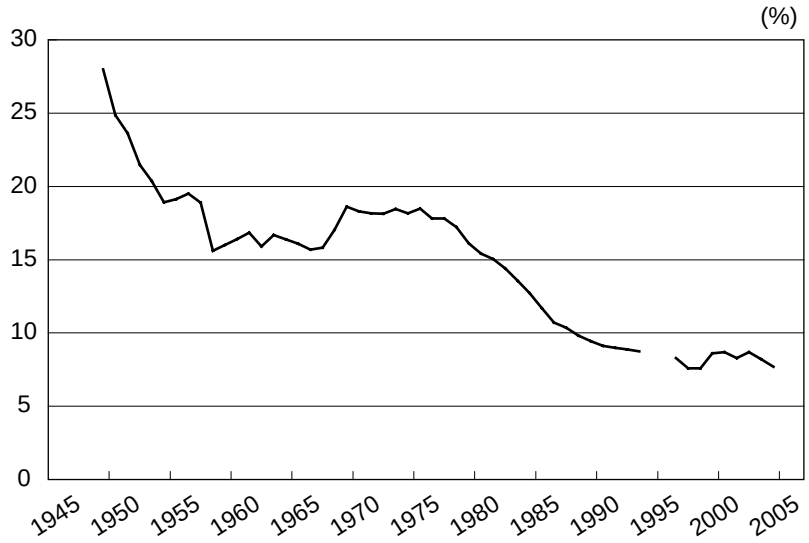
C. Recently: a crisis of unionization?

In France, as in many other developed countries, the unionization rate is decreasing constantly, especially since the 1980s (Table 1). Nowadays, less than 10% of workers (8.2% in 2003), including civil servants, are unionized. The consequence of this weak unionization rate is that unions in France are poor. One of the main reasons for this phenomenon can be seen in a characteristic of the French industrial collective relation system, namely that it is not necessary to belong to the union that signed the agreement to benefit from the provisions contained in this agreement. All the employees of the company or professional branch will benefit from the provisions of the agreement, even if they are not unionized, or if they belong to another union that did not sign the agreement. This characteristic is obviously not an

[3] Art. L. 412-1.
[4] Art. L. 412-6.
[5] Art. L. 412-8.
[6] Cass. Crim. January 30th 1973. *Bull. Crim*., n° 54.
[7] 10 hours in a year for companies employing at least 500 people , 15 hours for the ones with 1000 employees or more.

incentive for joining a union. And it leads to a paradox: While the unionization rate is around 8%, 90% of workers are covered by an industrial collective agreement (a national, professional or company-level agreement). Moreover, when asked which way they think is the more efficient for defending their interests, employees tend to prefer direct discussion with the management (45%) than asking unions (26%)[8]. Unions are not the preferred agents of employees for defending their interests.

Table 1: Unionization rate from 1949 to 2005



Dares, Ministère de l'emploi, de la cohésion sociale et du logement.

But it dose not mean that social disputes disappeared. However, recently, it may appear that there was a split between unions and the general public about the use of strikes. The action taken by the unions in November 2005 in the area of public transportation (trains) appeared to be in vain and not endorsed by a broad part of the population – and even the employees of the railway services themselves, as only 22% of the employees concerned stopped working. Moreover, it seemed in this case and others occurring at the same time that management did not give in to the demands of the unions[9].

Another characteristic of French industrial relations must be pointed out. According to the rule of *représentativité présumée* (presumed representativeness), any union belonging to one of the five big national union confederations[10] is said to be representative of the employees, even if, in fact, only a minority of employees at a company or plant belong to one of these unions[11]. Being representative, they can sign a collective agreement with the management of the company and this agreement, as we have noted already, will be applied to any employee in the company, unionized or not, belonging to this union or another one. This would not be such a problem if the government had not set up another rule at the same time (1982). From this date on, the law allowed representative unions to sign dispensatory

[8] These figures are quoted from a recent opinion poll : "Les syndicats sont-ils mortels? Résultats du sondage TNS-SOFRES, Colloques, dialogues", TNS-SOFRES, January 16th 2006.
[9] See *Le Monde*, "Le spleen des "perdeurs de grèves" " January 4th 2006, p.3
[10] CGT, CGT-FO, CFTC, CFDT, CGC-CFE .
[11] Of course, beside this presumed representativeness, a union can be representative even if it doesn't belong to one of the five national confedederations .But in case its representativeness is questioned, this union will then have to prove that it is representative.

agreements (*accords dérogatoires*) with employers that could contain provisions less favorable than the law[12]. This meant that a union effectively representing a minority of the employees could sign an agreement with the employer, applied to all the employees, that was less favorable for them than the law. This led to heated debates and questions about this notion of representativeness.

In order to deal with this problem, a law passed on May 4, 2004, changed the situation[13]. In order to be valid, an agreement at the branch level must be signed by one or several unions representing a majority of the employees of the branch or company. The value of this new "proven" representativeness can be appreciated at times of negotiations or during the election of works council or staff representatives. For agreements at the company level, only the results from the election of employees' representatives are taken into account. This can be considered as a revolution in the French collective relations system.

Nevertheless, this weakness of unions is also a problem on the management side. Many employers need a counterpart in order to sign collective agreements at the company level. Some employers decided to encourage the presence of unions in their companies, giving unions new financial means – the "union check," for example, which is given to an employee by the employer in order to finance, if the employee wants it, the union he/she wants[14]. At the same time, it seems, when analyzing the evolution of unionization (see Table 1), that the rate of unionization has been more or less stable in the past few years. In addition, the fact that representative unions have a very important role in the administration of some bodies, such as public companies or the social insurance system, must also be underlined. Nevertheless, this aspect is sometimes seen as a reason for the decline of the unions, which became institutionalized and lost their original mission, *i.e.,* making claims on management in order to improve the working conditions of the workers.

Another reason for this phenomenon might seem to be the fact that unions are no longer the only representatives of workers at the workplace or at the professional level: after World War II, various laws set up different types of representatives (II). But among them, one is directly linked to the unions: the union representative (A). For the others (B), the unions still play an important role.

II. Workers Representation in Companies in France

Besides the union groups inside companies, described above, there is also a union representative within the company, designated by a representative union (A). But there are also other representatives, who are chosen, directly or indirectly, by the employees (B).

A. Designated representatives : le délégué syndical (union representative)

The *délégué syndical (d.s.)* represents his or her union in the company in order to make suggestions, complaints, etc. He or she is also an intermediary between the union and the employees in the company, and also takes part in social bargaining.

A *délégué syndical* must be set in companies or workplaces with 50 employees or more for 12 months or more (continuously or not) during the past 3 years. But they are not elected: representative unions in the company or at the workplace designate union representatives. Only unions that are representative in the company can designate union representatives, and it

[12] *Cf. infra.*
[13] For a detailed analysis of this question, see J.-E. Ray, *"Les curieux accords dits "majoritaires" ", Droit Social* 2004, p. 590.
[14] See G. Adam, "Des syndicats sous perfusion", *Droit Social* 1990, p. 833.

is not necessary to prove the existence of a union section in the company at the time of the designation, as it used to be[15]. The number of union representatives varies depending on the workforce, from 1 to 5 (Table 2). In small companies employing less than 50 people, a union can designate a *délégué du personnel* (staff representative) as union representative on the condition that this person was not elected in the name of another union. No length for the union representative's mission is specified: this depends entirely on the union that designated the union representative. Unions must choose an employee who is 18 years or older and who has worked in the company for at least 1 year (6 months for temporary work agencies or 4 months in case of newly established companies). A union representative can be at the same time a staff representative, a member of the works council or of the *CHSCT*[16] .

a. Missions

First of all, the union representative is a link:

- between his union and the employer – to that extent, the representative transmits complaints, claims or propositions;
- between his union and the employees of the company.

But the most important and specific mission of the *délégue syndical* is social bargaining. As the Labor Code stipulates that social agreements are negotiated between the employers and representative union within the company, being the link between the unions and the employer, it is normal that the union representative is in charge of negotiating collective agreements.

Social bargaining starts each time the employer wants to conclude an agreement, but there are also mandatory annual negotiations on some topics, like wages or work time. If the employer has not taken the initiative for this mandatory collective bargaining for more than 12 months since the previous one, collective bargaining starts when a representative union asks for it, within the following 15 days. Other mandatory annual negotiation topics include disabled workers and equality between women and men. The list of these mandatory negotiation subjects is continuously widening, both at the company and branch level[17], which, of course, encourages collective bargaining, at both levels.

b . Documents that must be made available to the union representative

In order to negotiate, various documents must be made available to the union representative:

- the collective agreement and other agreements applicable in the company,
- the annual report concerning equality between women and men drawn up for the work council,
- the report drawn up by the employer about the mandatory hiring quota of disabled workers,
- the annual statement on the utilization of part-time work,
- the *Bilan Social*, which outlines the social situation in the company[18],
- documentation for the works council on the elaboration of training plans,
- documentation for the works council concerning interns in the company.

[15] Cass. Soc. May 27th 1997, *Dalloz* 1997, P. 416 : the existence of the union section is established by the designation of the union representative.
[16] *Cf. infra.*
[17] On this question, see A. Supiot, "un faux dilemme: la loi ou le contrat?", Droit Social 2003, pp. 70-71.
[18] *Cf. infra*, works council (comité d'entreprise).

Table 2: Number of union representatives depending on the workforce of the company

Workforce of the company	Number of representatives
50 to 999 employees	1 representative
1,000 to 1,999 employees	2 representatives
2,000 to 3,999 employees	3 representatives
4,000 to 9,999 employees	4 representatives
10,000 employees and more	5 representatives

B. Elected representatives

1. *Le délégué du personnel* (staff representative)

This institution traces its origins back to the law of April 16, 1946, but workers' representatives (*délégués ouvriers*) were already instituted in 1936 for plants employing more than 10 workers. The *délégué du personnel's (d.p.)* mission is essentially to communicate to management the complaints of the staff. Since 1982[19], there has been no distinction between complaints and claims: the staff representatives bring both to the employer. To that extent, they meet the head of the company at least once a month[20].

A délégué du personnel must be set in companies or workplaces with 11 or more employees for 12 months or more (continuously or not) in the past 3 years by elections at the workplace every 2 years, organized by the company. The number of staff representatives varies depending on the workforce of the company (Table 3).

The representative unions in the company or the plant play a very important role in these direct elections. They negotiate and sign with the employer a pre-electoral accord that governs the elections (on topics such as the number and composition of the electoral colleges, representation of the workforce in the colleges, *etc.*) and they have a monopoly on the presentation of candidates in the first round of the elections.

Any employee who has been working for the company for one year or more and who is 18 years or older can be elected, but he or she can not be the spouse, ancestral descendant, brother, sister or relative by marriage in the first degree to the head of the Company. Any employee who has worked for the company for three months or more and who is 16 years or older can vote.

a) Missions

The main mission of the *délégué du personnel* is to represent the employees and transmit to the employer any individual or collective complaints concerning wages and the application of labor regulations in the company (*Code du Travail* [Labor Code], collective agreements, work time, safety regulations, *etc.*)[21]. It is not only regular employees who can bring a complaint to the staff representative[22] but also workers who do not belong to the company or

[19] Before the *Loi Auroux* (*Auroux* Law, named after the Minister of Labour or the time) of October 28th 1982, the *Cour de Cassation* (the Higher Court in France) used to draw a line between the *réclamations* (complaints, concerning the application of the rules at the workplace) and *revendications* (claims, aiming at the transformation of the rules). The seconds ones, because unions have the monopoly of claiming at the workplace, could only be formulated by the union representative(s) if there were one or several of them at the workplace, *cf.* Cass. Crim, May 24th 1973, *Dalloz* 1973, p. 599. With the law of 1982, the unions lost this monopoly.
[20] Art. L.424-4 of the *Code du Travail*.
[21] Art. L.422-1.
[22] Art. L. 422-1.

Table 3: The number of staff representatives depending on the workforce of the company

Workforce of the company	Number of representatives
11 to 25 employees	1 representative + 1 substitute representative
26 to 74 employees	2 representatives + 2 substitute representatives
75 to 99 employees	3 representatives + 3 substitute representatives
100 to 124 employees	4 representatives + 4 substitute representatives
125 to 174 employees	5 representatives + 5 substitute representatives
174 to 249 employees	6 representatives + 6 substitute representatives
250 to 499 employees	7 representatives + 7 substitute representatives
500 to 749 employees	8 representatives + 8 substitute representatives
750 to 999 employees	9 representatives + 9 substitute representatives
1,000 employees and more	1 more representative + 1 more substitute representative for every 250 employees

temporary workers. These complaints and claims are usually submitted to the employer during the mandatory monthly meeting. The requests from the staff representatives must be submitted to the employer at least two days before the meeting. Moreover, these requests must be written. Answers from the employer must also be made in writing within six days of the meeting. Notwithstanding this mandatory monthly meeting, the staff representatives can ask the employer for a meeting individually, or by category, section, *etc.*[23]

The presence of staff representatives does not prevent the employee from introducing his complaints personally to the employer or the employer's representative.

In the event that the staff representative notices a breach of personal rights, either physical or mental, he informs the employer, who will start an investigation. In the event of deficiency on the part of the employer or if there is disagreement on the reality of the breach in question, the employee or the staff representative (if the employee has given a written consent stipulating he does not oppose the action by them) can complain to the *Conseil des prud'hommes* (the industrial tribunal). The staff representative can also submit a case to the administration (*inspecteur du travail*, factory inspector) concerning any problem related to the application of labor law. Actually, the staff representatives are the real link between the workers and the work inspection, and are allowed to leave the workplace to visit the office of the factory inspector without asking for permission from the employer.

The staff representatives must also be consulted by the employer in certain situations: the placement of an employee who has been the victim of a work accident or some professional disease to the extent that he cannot perform his regular job anymore, the allocation of annual paid leave, and work stoppage due to weather conditions in construction and civil engineering firms. If there is no work council (C.E., *Comité d'entreprise*) in a firm with 50 employees or more, they will also be consulted on dismissals for economic reasons, work time (overtime, individualized work time schemes) and vocational training.

They can also make suggestions on the general organization of the company, in particular to the work council.

2. Le comité d'entreprise (works council)

The *comité d'entreprise (c.e.)* was established by an ordinance on June 18, 1946. The works council deals with economic (the head of the company must ask the *c.e*. its opinion

[23] Art. 424-4 § 2.

prior to important decisions concerning the management of the company, such as the organization of work time, the introduction of new technology, *etc.*), cultural and social aspects (for example: managing the welfare activities of the company). The goal of this council is to "allow a collective expression of the employees" and to take into account their interests on a permanent basis. In 1982, these ideas replaced the previous text of 1945 according to which the aim of the council was to allow "cooperation" with management, an idea broadly rejected by the unions.

As with union representatives, a *comité d'entreprise* must be set in companies or workplaces with 50 employees or more over 12 months or more (continuously or not) during the past 3 years. If the company is composed of several plants with 50 or more employees, one *c.e.* in each of these plants and a *comité central d'entreprise* (central work council) must be set up. Actually the works council exists at the different decision-making levels: plant, company, group and company or groups with a European dimension (plants in different countries of the European Union). This makes some scholars say the different levels of works councils are organized in a "federal" way[24].

Representatives of employees at the *c.e.* are elected at the workplace every four years[25]. The election is organized by the company and is a direct election, as for the staff representatives. The unions play the same important role in these elections as for the staff representatives (pre-electoral draft treaty and presentation of the candidates)[26]. Any employee who has worked for the company for one year or more and who is 18 years or older can be elected, but he or she cannot be the spouse, ancestral, descendant, brother, sister or relative by marriage of the first degree to the head of the company.

Any employee who has worked for the company for three months or more and who is 16 years or older can vote in the election for employee representatives on the works council.

a) Structure of the works council

α. *A tripartite structure*

The *c.e.* comprises:

- The head of the Company, assisted by a maximum of two colleagues, under the laws of December 20, 1993, and May 4, 2004. This means that in small companies, it is possible to have the same number of representatives for both management and workers, which, one assumes, was not the initial idea behind the works council. The employer is the president of the works council. Nevertheless, he can designate an employee of the company, more likely an executive, as his representative, who will sit on the council.
- One or several union representatives designated by the unions. A distinction must be made depending on the size of the company. In companies employing less than 300 persons, these representatives can, at the same time, also be a *délégué syndical* (union representative) in the company[27]. In cases where there are several union representatives of the same union, the union designates one of them to sit on the works council. In contrast, in companies employing 300 persons or more, any union

[24] J.Pélissier, A. Supiot, A. Jeammaud, *Droit du Travail*, 22nd edition, Dalloz, 2004, p.837.
[25] Since 2005 (law of August 2nd 2005) the length of the mandate has been extended to 4 years, whereas it was 2 years initially. This length will be applied for members of the works council elected after August 3rd 2005, the day the new law was published. This extension is clearly a sign of reinforcement of the power of the workers representatives at the works council, as, for example, they will benefit from a longer protection, *cf. infra.*
[26] *Cf. supra.*
[27] Art. L. 412-17.

considered as representative in the company can designate one representative[28] to the council, different from the union representative in the company.

- A delegation of employees, who are elected. The number of representatives varies with the size of the firm (Table 4). These figures can be increased by agreement.

β. Commissions

There are two types of commissions within the works council. Some are mandatory and take into account the number of people working in the company – the commission for vocational training and employment and the commission for professional equality (more than 200 employees), the commission for housing (more than 300), and an economic commission (1,000 employees or more). The works council, for dealing with various specific matters, can create other commissions[29]. In these latter ones, various experts are allowed in.

Table 4: Number of elected worker representatives at the works council according to the workforce

Workforce of the company	Number of representatives
50 to 74 employees	3 representatives + 3 substitute representatives
75 to 99 employees	4 representatives + 4 substitute representatives
100 to 399 employees	5 representatives + 5 substitute representatives
400 to 749 employees	6 representatives + 6 substitute representatives
750 to 999 employees	7 representatives + 7 substitute representatives
1,000 to 1,999 employees	8 representatives + 8 substitute representatives
2,000 to 2,999 employees	9 representatives + 9 substitute representatives
3,000 to 3,999 employees	10 representatives + 10 substitute representatives
4,000 to 4,999 employees	11 representatives + 11 substitute representatives
5,000 to 7,499 employees	12 representatives + 12 substitute representatives
7,500 to 9,999 employees	13 representatives + 13 substitute representatives
10,000 employees and more	15 representatives + 15 substitute representatives

b) Social attributions

Since an ordinance of February 2, 1945, all company benefit schemes were transferred to works councils. This was reasserted in 1982: "The works council manages and controls the administration of all company benefit schemes set up in the companies to benefit the employees or their families"[30]. According to jurisprudence, these benefit schemes "must not be mandatory by law", "mainly to the advantage of the employees of the company" and the aim must be "to improve the collective employment, working and living conditions of the employees within the company"[31]. The benefit of such schemes must ensue from being an employee of the company[32].

The role of the works council depends on the nature of the schemes:

- They directly manage benefit schemes that are not legal entities.
- They take part in the management of legal entities with designated representatives on the board.

[28] Can be designated only on representative by union, unless a more favorable agreement exists, Cass. Soc. July 2nd 1981, *Bull. civ*. V, n°644.
[29] Art. L. 434-7.
[30] Art. L. 432-8.
[31] Cass. Soc. November 13th 1975, *Bull. Civ*. V, n° 533.
[32] Cass. Soc. January 13th 1981, *Bull. Civ*. V, n° 25.

- They simply check the management of some benefit schemes (for example, concerning the construction of housing for employees).

There are some limits. The works council cannot allocate funds for political activities or activities linked to unions, but this restriction does not apply to cultural activities (lecture, exhibitions, journeys, *etc.*). The works council can also invite people from outside the company for informational meetings in the works council room[33].

In order to fulfill its social attributions, the works council receives a specific contribution from the employer that is different from the general contribution to the works council[34].

c) Economic attributions

Basically, the employer must consult with the works council prior to certain decisions regarding the company and must also forward certain information and documents.

α. Meetings and consultations

There are two kinds of meetings. On the one hand, are the regular meetings, which can take place every year for some topics (flexible work hours, paid leave, equality between men and women, vocational training, R&D, *etc.*), every month (in companies with 150 employees or more) or every two months (for companies employing less than 150 persons). Then there are extraordinary meetings, sometimes occurring between regular meetings, should the majority of the members of the council ask for such[35]. The program of the meeting (*l'ordre du jour*) and notice to attend must be given three days in advance.

The works council must be informed of any decision regarding the organization, management and general operation of the company[36] and, among others, of measures that could affect the size or the structure of the workforce, working time, the working and employment conditions and the vocational training of the employees[37]. The most important criterion to take into account in this text is that of "importance," whatever the nature (strictly economic, social, direct consequences on the workforce, *etc.*) of the measure. As for the organization of the company, the measure can concern itself with the internal (new methods in work organization, introduction of new technology, *etc.*) or external (merger, transfer, *etc.*) organization. This consultation was extended by the law of October 28, 1982, to cases where the company acquires an interest (between 10 and 50% of the capital) in another company, or when another company acquires an interest in the company in question[38].

β. Communication of documents and information

The employer must communicate to the work council various documents.

- One month after the council has been elected, the employer must forward to the new council financial documents detailing the nature of the company and its organization, including the economic prospects of the company[39].
- Every three months, the employer must appraise the work council with a general outline of orders made with the company and its financial situation and production plans (art. L. 432-4, last paragraph). Every three months in companies employing 300

[33] Art. L. 431-7.
[34] *Cf. supra*.
[35] Art. L. 434-3.
[36] Art. L.432-1.
[37] For a more complete detailing of the case in which the employer must consult the works council, see J.Pélissier, A. Supiot, A. Jeammaud, *op. cit.* , p.836
[38] L.432-1, § 8.
[39] Art. L. 432-4 § 1.

persons or more and every six months in others, the employer must inform the council of planned measures for improving, renewing or transforming equipment or production methods and their influence on working conditions and employment, and the change in the workforce and other matters[40]. Concerning this last point, the information given by the employer must describe the utilization of employees under fixed-term contracts, temporary workers, part-timers and employees of other companies working at the company. On this specific matter, the attributions of the work council go further: The council can alert the administration in case it thinks there might have been abuses in the utilization of workers with fixed-term contracts and temporary workers or when there is a sharp increase in the utilization of such contracts.

- Each year, the employer must forward various documents to the council. First, the council must receive a report concerning the activity of the company, turnover, profit, investment, economic prospects for the coming year, *etc.* (art. L. 432-4 §2). In addition to this, the council will also be communicated the *Bilan Social*, which draws up a statement of the social situation in the company (in companies employing at least 300 persons)[41]. The council must also receive copies of the accounts drawn up by the company.

Nevertheless, the power of the *c.e.* never goes as far as the *Betriebsrat* in Germany; there is clearly no co-administration in France. The works council only needs to be consulted, except in some (rare) situations in which it can veto a measure (such as the introduction of an individual working hours system). Moreover, in principle, as long as there is a union representative in the company, the works council has no power to conclude a collective agreement[42]; this is the role of the representative unions and their representatives.

In companies with less than 200 employees, there can be a unique representation (*la délégation unique*) instead of a *comité d'entreprise* and *délégués du personnel*, which is given the attributions of both.

3. Le Comité d'Hygiène, Sécurité et des Conditions de Travail (*CHSCT*, committee for hygiene, safety and working conditions)

The *CHSCT* contributes to the protection of the health and safety of employees and to the improvement of their working conditions[43]. In concrete terms, this committee's aim is first to advise the employer when the latter is planning a measure that will have a strong impact on hygiene, safety or working conditions in the company[44]. The employer must also consult the committee when work rules are altered and for certain measures concerning specific categories of workers (disabled, victims of work accidents, *etc.*). It must be set up in companies with 50 employees or more. The *CHSCT* comprises a president, namely the employer or his representative, and a worker delegation comprising employees of the company elected by indirect elections. Workers representatives on the *CHST* are designated for two years (renewable) by a college comprising staff representatives and the elected members of the works council.

[40] Art. L. 432-4 and L. 432-4-1.
[41] Art. R. 438-1 gives the precise content of this document.
[42] Nevertheless, there are 2 exceptions: it is possible to negotiate an agreement on interest and participation within the works council (art. L441-1 and L. 442-10) and a company or plant agreement in case there is no union representative (art L. 136-26 of the Labor Code, resulting from the law of May 4th 2004, *cf. infra*).
[43] In companies classified at dangerous, it is also in charge or threats the company may represents for the environment, art. L. 236-2 of the Labor Code.
[44] Art. L. 236-2 § 7).

At least once a year, the employer must give the committee a report analyzing the situation regarding hygiene, safety and working conditions in the company.

Besides its consultation aspects, the committee also controls the situation of hygiene, safety and working conditions, analyzing the professional risks in the company. To that extent, the *CHSCT* will conduct inspections in the company at least four times a year (art. L. 236-2 § 3 and R. 236-10). The aim of these inspections is to check if the legal provisions are being respected. It also conducts investigation on professional diseases and work accidents.

C. Means and protections

In order to fulfill their mission, and considering their specific role in the company, which could lead them into conflict with the employer, the workers' representatives are given specific means and protection.

1. Means

They have different means to fulfill their mission. The *délégués du personnel*[45] and *délégués syndicaux*[46] have a certain number of hours (*crédit d'heures*), depending on the size of the company (from 10 to 20 hours), in order to fulfill their missions. The actual time can exceed the time allowance in case of exceptional circumstances (an industrial dispute, for example). The time spent in meeting with the employer is not deducted from this time allocation. These hours are considered as work time and, therefore, paid as such.

The *comité d'entreprise* is allocated both time (20 hours per month for each representative, considered as work time) and money (contributed by the employer), and a venue for holding information meetings, etc., for employees.

They also must have free access to certain company documents, as well as the freedom to go anywhere they want at the workplace when on mission, in order, for example, to meet employees within the company, providing this does not make problems for the worker. They can also do so at hours other than their working hours. They are also allowed to quit the workplace during their allocation of hours in order to fulfill their duties (for example, going to the factory inspection office).

2. Special protection

All the representatives have special protection during their mission and even beyond: six months or one year, depending on the case (Table 5). Any employer who would like to dismiss such a representative must ask for authorization from the *inspecteur du travail* (factory inspector), whatever the reason for the dismissal. The works council must be consulted in the event that the employer plans to dismiss one of its members or a staff representative, but this is a simple opinion. The dismissal pronounced without authorization, or contradicting the authorization is null and void.

The scope of protection in cases of dismissal has been extended by law to other situations, such as transfer, retirement or modification of the individual contract[47]. In addition, the law established some specific rules in some cases (terminating a fixed-term contract, for

[45] Each staff representative has 10 hours per month in firms with less than 50 employees, 15 hours in companies employing 50 or more persons.

[46] Each unions representative is allocated 10 hours per month in companies employing between 50 and 150 persons, 15 hours in companies with 151 to 500 employees and 20 hours for companies with more than 500 employees.

[47] P.-Y. Verkindt, "La modification du contrat de travail du salarié protégé", *Mélanges H. Sinay*, 1994, p.281.

Table 5: Length of protection for former representatives and election candidates

Length of protection	Protected employee status
6 months	-Former staff representatives -Former employee representatives to the works council and former union representatives at the works council, who have fulfilled their duties for at least 2 years. -Candidates for staff representative elections, starting from acceptance of the candidacy by the employer. -Non-elected candidates at the latest election for the works council, starting from the sending of the lists of candidates to the employer. -The first employee who asked the employer to organize elections (works council or staff representatives) or accepted to organize elections if his initiative is confirmed by a union.
12 months	Former union representatives having fulfillled their duties for at least one year.

example: application of the same scope as dismissal)[48].

We have just seen there are multiple levels of representation of workers in companies, factories and groups in France. But the elected representatives are not competitors to the traditional unions: it is more of a complementary situation. Moreover, unions retain an important role in the setting up and operation of these representatives. Nevertheless, recently, new tendencies have appeared to alter this balance, giving non-union representatives new attributions in a search for decentralization and flexibility in industrial collective norms.

III. New trends toward the decentralization of collective relations

There has been a clear trend in French labor law recently toward a decentralization of collective industrial relations. This tendency relies mainly on two means: A) a new supremacy given to the company (or plant) level agreement in the hierarchy of collective industrial norms, leading to new relations between the different levels; and B) new opportunities given for collective bargaining at companies where there is no union representation.

A. New relations between the different levels

The Law of May 4, 2004, marked a disruption in relations between the different levels of collective labor relations. Clearly, it gave the company- or plant-level agreement greater emphasis. This law, and the radical shift it made compared with previous practice and legal norms, is the result of a long process during which, in the name of deregulation and flexibility, the old system was criticized and applied less stringently. It was necessary to examine this in order to understand the genesis of the law of 2004.

a. Before the law of 2004: a tendency and pressures for renewing relations between levels

The existence of several levels of collective bargaining (national, professional, company or plant) is a typical characteristic of the French system of collective labor relations. The basic

[48] Art. L. 425-2 and L. 436-2.

principle of this somewhat complicated articulation was that what was acceptable at a lower level should not contradict what was implemented at the upper level, except in cases where it grants the employees with more favorable terms[49]. It meant that the collective agreement concluded at the company level could deviate from the agreement concluded at the branch level only if it granted the employees of companies with terms more favorable than the ones in the branch-level agreement.

The law of November 13, 1982, tried to make this relationship between the company level and branch level clearer[50]. In the event that the company-level agreement is signed after the branch-level agreement, its aim should be the improvement of the branch-level agreement, with more favorable clauses, clauses on topics not dealt with in the upper-level agreement, and adaptations of the branch-level agreement to the particularities of the company. In contrast, if a branch-level agreement becomes applicable in a company where an agreement has already been concluded at the level of the company, the provisions of the company agreement must be adapted. This text seemed to establish a hierarchy between the levels in favor of the branch agreement: in case the conflict between the two cannot be resolved using the principle of the most favorable provision for the employees, the branch agreement prevails.[51]

Nevertheless, even after that time, some signs contradicting these principles surfaced. First of all, some dispensatory agreements (*accords dérogatoires*) were authorized, under certain conditions, to set different provisions, sometimes less favorable than the law, as we have explained[52]. Under the law of October 13, these agreement were limited to the question of salaries (with some limits)[53] and working time (adjustment)[54]. In these cases, the law allowed the company-level agreement to contain some different provisions, including less favorable ones, from the branch-level agreement and, eventually, the law itself.

On October 31, 1995, trade unions and employer associations concluded an *accord national interprofessionnel* (inter-professional national agreement) in which this system of linking the three levels (nation, branch, company) was highly criticized, calling for the re-consideration of the role to be given to each level[55]. To that extent, this agreement proposed a new role for the branch-level agreement. According to the 1995 national agreement, the branch-level agreement should allow more freedom for company-level social bargaining. But this new approach was highly criticized[56] for denying the principles of articles L 132-2 and L. 132-23 of the Labor Code, *i.e*., the application of the most favorable provision and the place of the branch level agreement, as a standard. This may explain why this new linking of the norms was not taken up again in the law of November 12th 1996.

Of course, the Laws *Aubry I* on June 13, 1998, and *Aubry II* in January 2000 have encouraged social bargaining, especially at the level of the companies, inviting the employers to conclude agreements on the 35-hour workweek.

At last, in 2001, the Medef (the employers association) and four union confederations

[49] *Ordre public social, principe de faveur, or dérogation in melius* ,whatever the name, these describes this principle, art. L 132-4 of The Labor Code. This rule has been applied by the jurisprudence many times: for an example, Soc. June 8th 1999, *Droit Social* 1999, p.852.
[50] Art. L. 132-23 Labour Code.
[51] M.-A. Rotschild-Souriac, "Les accords collectifs au niveau de l'entreprise", thèse, Paris I, 1986, p.1410.
[52] *Cf. supra.*
[53] Art. L. 132-24.
[54] Art. L. 212-10.
[55] *Liaison Sociales* C1 n°7354, November 9th 1995.
[56] See C. Tissandier, "L'articulation des niveaux de négociation: à la recherche de nouveaux principes", *Droit Social* 1997, p.1045. Some scholars, at the contrary, pretended this part of the agreement wasn't in contradiction with the legal system of the moment, see for example M.-L. Morin, "L'articulation des niveaux de négociation dans l'accord interprofessionnel sur la politique contractuelle du 31 octobre 1995", Droit Social 1995, P. 11.

signed a text, a *position commune*, calling for the authorities to take legislative measures in order to radically change the relations between the different levels of social bargaining. If this text is not legally binding in any way, it could be seen as the last step before the law of 2004: the radical change it promotes can directly lead to this law, which we are going to examine now.

b. The revolution of 2004

All the previous laws were more or less adaptations of the original principle. This is not the case of the law of 2004, which obviously changed the relationship between the collective agreements of different levels.

With the law of May 4, 2004, the article L. 132-23 of the Labor Code, as it resulted from the law of 1982[57], is not deleted or rewritten. Nevertheless, two new paragraphs change the whole system. According to the new text, the company or plant agreement can include provisions superseding all (or part of) those that are applicable to an agreement with a wider territorial or professional field unless this agreement states to the contrary[58]. So, since this law, the principle is that the company or plant agreement can include provisions different to the ones in the branch level (or professional or inter-professional), including less favorable provisions for the employees. The old system will be applied only if the upper-level agreement clearly says the company agreement cannot do so. The old system became an exception. With this text, the emphasis is clearly placed at the company (or plant) level, whereas it used to be at the branch level. Now, in case of conflict between the different levels (company and branch), this is the decentralized text that will be applied, whether it is more or less favorable for the employees[59]. The positive side of the new regulation is that the solution is now far simpler in case of conflict between a branch and company agreement.

Nevertheless: a new principle generally means new exceptions too. Article L. 132-23 of the Labor Code gives these exceptions where the company or plant agreement cannot depart from the provisions contained in a branch or national or inter-professional agreement. And the fact is that the scope of these exceptions is very limited. First, this concerns some mechanisms functioning at a wider area than the company: mutual benefit insurance systems financed by funds collected for vocational training, collective guarantees concerning contingency, etc. Second, the professional classification or minimum wages – here too, the company agreement cannot contain provisions departing from the branch (or professional or inter-professional) agreement. French law shifted from a positive list system (general prohibition with exceptions where deviations were allowed) to a negative list system (generally allowed, except for some specific subjects).

So, obviously, the law of 2004 changed the relationship between collective agreements at different levels. Now, the company (decentralized level) agreement prevails over the branch-level agreement (other than some exceptions). In that sense, this law clearly went in the direction of the decentralization of industrial relations.

B. Social bargaining in the absence of a union representative

We have seen that the most important, and most typical, task of the union representatives in the company has been to negotiate collective agreements[60]. The question arises as to what should be done in companies where agreements are required but where there is no such

[57] *Cf. supra.*
[58] Art. L. 132-23 § 4.
[59] M.-A. Rotschild-Souriac, "L'articulation des niveaux de négociation", *Droit Social* 2004, p.579.
[60] *Cf. supra.*

representation. This kind of situation is clearly topical at a time when the unionization rate is low, especially in small companies. The employers have also claimed the prerogative to conclude collective agreements, seeking greater flexibility. In order to satisfy this need for decentralized regulation, several laws imposed different measures. The law of May 2004 discussed above concerning the link between the different levels, made a synthesis of these previous texts while renewing the ideas of certain points. We are now going to examine all these different laws and norms (1) before detailing the 2004 law on this question (2).

1. The recent multiplication of norms towards the attribution of the power of negotiating to other persons than the union representatives (1995-2003)

As has often been the case on this problem of renewed social dialogue, the initiative came from an *accord national interprofessionnel* (inter-professional national agreement) on October 31, 1995, the same as seen in §A. One of the aims of this accord, signed by employers and unions, was to allow the opening of negotiations with other participants than union representatives in companies where they are not present. There was also a conflict here with the past of industrial relations[61]. But it must be pointed out that this avenue was possible only in companies where there was no union representative: the idea was not to set a "double track" for negotiating collective agreements; this is still the natural role of the labor unions and their representatives[62]. The aim was only to compensate for the absence of a union representative, not to "bypass" the unions.

This idea was accepted by the authorities and set out in the law of November 12, 1996, but only in an experimental way (for a limited period of time). As in the way management and labor concluded it in 1995, the law allowed elected representatives of the company and employees who received a mandate from a union representative in the company to negotiate collective agreements. But there were conditions, and this must have been allowed by a branch-level agreement.

These conditions disappeared in the two laws concerning the 35-hour workweek, encouraging the conclusion of agreement at the company level concerning the reduction of working hours. Attention should be paid to one particular point: Only employees who received a mandate from a representative union could conclude such agreements under the law of June 13, 1998. This comes from the fact that the experimental scheme of the 1996 law was still applicable. So, practically, the two different schemes were available. With the law of January 19, 2000, (the second law), only those with a mandate from the representative unions were allowed to conclude such agreements. In that sense, the law of 2000 reduced the possibilities of negotiation with persons other than union representatives. And it must be repeated here that this was limited to agreements concerning the reduction of working hours.

The reduction of possibilities of alternative negotiations will be more spectacular in 2003; the law of January 2003 (known as the law concerning employees, work time and the development of employment) simply abolished these schemes.

As we can see, the possibilities of negotiating with persons other than union representatives in companies where they were not present were very limited before 2004: it was allowed only for a limited time (as an experiment in 1996) or on a precise subject (the

[61] See V. G. Coin, "L'accord interprofessionnel du 31 octobre 1995 sur la politique contractuelle", *Droit Social* 1996, p. 3.

[62] According to the jurisprudence, law gives a monopoly to unions for representing interests of employees in social bargaining (Cass. Crim, November 18th 1997, *Droit Social* 1998, p.409. Nevertheless, this monopoly has no constitutional value, and, therefore, the law can allow other types of collective representation as long as the aim and the result are not to counter the representation of the unions (Conseil Constitutionel, November 6th 1996, *Droit Social* 1997, p. 31.

reduction of working hours in 1998 and 2000). The law of 2004 did not set such limitations.

2 . The return to "alternative" negotiations with the law of May 4, 2004

This is more or less a return to the system under the 1996 law, with some adjustments inspired by the experiences of the laws that followed. But the law of 2004 also introduced some new ideas. For example, the branch agreement organizing the negotiations does not have to specify the number of employees under which the negotiations are allowed. This could lead to a wider spread of such schemes. Directly inspired by the law of 1996 and the accord of 1995, the new law targets both the elected representatives (a) in the company and the employees with a mandate from a representative union (b).

a) Elected representatives

Is is the branch agreement that fixes the subjects of negotiations carried out by the elected representatives; the law itself does not give the domain of the negotiation anymore. We saw that this was limited to a reduction of working hours in the law of 2000. This is a widening of the scope of this form of negotiation, but this is no more or less than a return to the solutions of 1995 and 1996[63]. In principle, general authorization seems now to have been given to elected representatives to negotiate at the company level, in the absence of a union representative, on any subject.

But the lawmakers also put a limit in 2004, setting up a national branch joint commission (with the same number of representatives for both labor and management) that must approve the agreement concluded by the employee representatives in order for the agreement to be considered as a binding industrial collective agreement. This commission will not only check the validity of such an agreement, as it was set up in the law of 1996, but will give its approval, which means it could also check, for example, if the agreement is appropriate[64].

b) Employees with a mandate from representative unions

On this point, the lawmakers in 2004 seemed to alter the tendency seen in the law of 2000. If this latter law suppressed the possibility of allowing elected representatives to conclude agreements on working hours, therefore putting a strong emphasis on the employees appointed by a union, the law of 2004 seems to give less importance to these new participants in industrial collective relations[65]. Now, the emphasis seems to be on the employees' representatives. Still, the law of 2004 contains some interesting and useful details. First, it is clear that one representative union[66] can give a mandate to only one employee, where the law of 2000 simply stated that "a union" can give a mandate to an employee. Moreover, it is now specified that the agreement will be enforced after being communicated to the administration[67]. Of course – and it was already provided in the text before – the employees receiving a mandate benefit from the same protection as the union representative during their mandate and 12 months after the end of the negotiation.

Whatever the details, the fact is that, after having disappeared in 2003, since 2004 it is possible again for the employer to conclude a collective agreement with persons other than union representatives, *i.e*., employee representatives in the company or an employee of the

[63] *Cf. supra,* 1.
[64] G. Borenfreund, "La négociation collective dans les entreprises dépourvues de délégués syndicaux", *Droit Social* 2004, p.606.
[65] G. Borenfreund, *op.cit*., p. 609.
[66] In 2004 like in 1998 and 2000, only the union representative at the national level can give a mandate to an employee of the company in order to negotiate a collective agreement.
[67] Art. L. 132-10.

company especially appointed by a union on any subject, but still with the limit of the authorization from a branch agreement.

As a conclusion, we could say that it is obvious that, in France, there was, and still is, a move towards the decentralization of industrial relations, but this movement can appear at first sight not to be against a traditional role of trade unions, *i.e.*, the negotiation of collective agreements. Collective bargaining is left to the elected representatives or employee with a mandate from a union only in case there is no union representative in the company. This is not about changing the role of unions; this is just about filling a gap. The only change is that specially appointed representative employees are given a new mission where nothing existed before. On this point, this is not about changing the roles of the participants; this is just about improving the system. Moreover, unions keep broad control over the norms stemming from this new schemes, or on the person in charge of the negotiations. And this move must be praised, as it has brought social bargaining in economic entities where it never occurred before.

The real change comes from the role and hierarchy of the bargaining levels themselves: the decentralized level (the company, the plant) has taken a broader role than the branch level. And this is where the main change appears. Considering that the branch level is still dominated by the unions, minimizing the role of agreements decided at the branch level and giving the priority to provisions instituted by the company or a plant-level agreement, where it is not only unions who are bargaining with the employer, is surely minimizing the role and the influence of unions.