

System of Employee Representation in Enterprises in France

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1. Building the employee representation system in companies in France

Trade unionism emerged in France in the 19th century. In 1884 a fundamental law for trade unions was passed making it legal to form trade unions. Since then, trade unions have been free to organise themselves and to negotiate. However for a long time, if workers were free to join or not to join a union, trade unions remained outside companies and collective bargaining was mainly at industry level. The company was not a place for bargaining, and there was no mandatory representation. However, there were some practices of employee representation. Miners' delegates were established in mines and were responsible for health and safety; workplace delegates were also created in the public sector during the First World War. In 1936, in the wake of labour demonstrations and strikes, for the first time, a national intersectorial collective agreement, the Matignon agreement, was concluded. It established the 40-hour work week, annual paid leave and the extension procedure, under which the Minister of Labour may make a collective agreement binding on all employers in a given industry, regardless of their membership of employers' associations. The Matignon agreement, that became law later that year, also provides for staff delegates. For, R. Tchobanian, '*acceptance of the institution of personnel delegates was an employer concession made in a crisis to keep unions themselves out of the workplace*'.¹ However, the war made the elections of staff delegates in companies impossible.

It was after the end of the World War II, in a period of social consensus that employee representation in companies was finally set up. Works councils were established by the ordinance of 22 February 1945 with the aim of associating the workers more closely with the functioning of the company while maintaining management authority. They were to be the locus of peaceful interaction between management and its workers, conflict with the unions being at the level of industry. One year later, staff delegates were also established by the law of 16 April 1946. Even if trade unions still remained outside companies, an institutional link was recognised between elected representatives and trade unions as they obtained a monopoly over candidacies in works councils and staff delegates in the first round of the elections. The ordinance of 22 February 1945 has subsequently been repeatedly modified and amended by various acts, which have reinforced the rights and functions of workers' representatives.

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¹ 'From conflict to Social Dialogue', in J. Rogers and W. Streeck (eds), *Consultation, Representation and Cooperation in Industrial Relations*, University of Chicago Press, 1995, p. 115-152.

An important step in the building of the French system of employee representation at company level was the passing of a major Law of December 27, 1968, after widespread social conflict. The law ensured the unions a formal footing in the workplace for the first time. Since then, any representative unions can create a trade union section and designate a trade union delegate within a company. In the context of the French trade union pluralism, it means that it is possible to have several trade unions delegates representing different representative unions in a company.

In May 1981, the first socialist president of the post-1945 era, François Mitterand, was elected. One immediate consequence was the adoption of the 1982 Auroux laws (the name of the Minister of Labour at the time). The Auroux reforms of 1982 aimed to strengthen employee representation and collective bargaining but they kept the same structure of employee representation. Works councils were given more rights (the right to be assisted by an expert on certain issues, the right to an economic training course, better information, etc.). New structures of representation such as the group committee and the health and safety committee were established. The Auroux laws also introduced the obligation for employers to hold negotiations on particular issues, every year, where trade unions are present in a company. These mandatory obligations relate to current wages, actual hours and organisation of work. Other obligations to negotiate were also created at industry level.

Until 1996, representative trade unions had a monopoly of negotiating collective agreements. One of the most notable changes in the French system was that of giving companies the option of entering into collective bargaining agreements with representatives other than trade unions. This possibility was necessary to allow companies without trade unions to negotiate agreements, particularly on working times issues. Since 1996, various statute laws have concerned this issue. The last one is the law reforming social democracy on August 20, 2008. This law introduces major changes in the French industrial relations systems.² The aim of the reform is to strengthen the legitimacy of the role of trade unions and collective agreements, to reduce the number of trade unions, and to create an environment in which unions have to either work cooperatively to strengthen their position or merge. The law reforms the notion of representativeness, which is central to the French system. In legal terms, trade unions do not all benefit from the same treatment. Certain rights and prerogatives are reserved for trade unions regarded as representative. Before the 2008 law, for historical reasons, five major trade unions in France were automatically considered as representative, at all levels in collective bargaining and designating trade unions delegates. All other trade unions had to prove their representativeness within the company. Since 2008, all the trade unions (both at the company, industry and national levels) have to demonstrate their representativeness by complying with new criteria. These new criteria are: respect of republican values, independence, financial transparency, a minimum of two years seniority, an influence which is mainly characterised by activity and experience, importance of the membership and of the contributions received, and lastly, a minimum percentage of votes in the last professional elections (10% at company level, 8% at the industry and national level). The

² G. Borenfreund, 'Le nouveau visage de la représentativité syndicale', *Revue de droit du travail*, 2008, p. 712. F. Favennec-Héry, 'La représentativité syndicale', *Droit Social*, 2009, p. 630. M. Grévy, E. Peskine, S. Nadal, 'Regards sur la position commune du 9 avril 2008. A propos de l'avenir (incertain) des syndicats dans l'entreprise', *Revue de droit du travail*, 2008, p. 431. *Droit Social*, Rénovation de la démocratie sociale : deux ans d'application de la loi du 20 août 2008, janvier 2011.

representativeness will now be based on the results of the elections of the works councils and it will be questioned at every new election. Thus representativeness will no longer be determined top-down but bottom-up, depending on a union's electoral scores. This is a radical transformation in French labour history and culture: the system of election-based representation had been rejected since the early 20th century as unions represented not only their members, but the entire profession.³

The new legislation on representation will only come fully into effect at national and industry level in August 2013. However, at company level it starts taking effect as soon as elections under the new rules take place. For example, the works council elections in the French railway company SNCF in March 2009, resulted in the FO, CFE-CGC and CFTC losing their rights as representative unions at company level, as they gained fewer than 10% of the votes.

The 2008 law also recognizes a new employee representative in the company: the delegate of the trade union section (*'représentant de la section syndicale'*). He/she may be appointed by a trade union which is not representative. He/she has a much more limited role than the trade union delegate. Like the union delegate, he or she can distribute material and collect union subscriptions but negotiation is only possible in very unusual circumstances, where there is no union delegate and where no other employee representatives have the right to negotiate. Any agreement signed by the representative of the union section must be also approved by a majority of the workforce (this is not the case for agreements negotiated by the union delegate). Indeed, the main function of the trade union section delegate will be succeeding in obtaining representativeness at the next professional election.

Finally, the 2008 law authorises firstly the works council and secondly staff delegates to negotiate and to sign collective agreements on certain matters in the absence of a trade union delegate.

It is too early to appreciate the impact of the law, which will only have its full effect in 2013.⁴ However it is obvious that it creates a new complexity in adding another employees' representative and that it will have consequences on the traditional dual channel of representation as it reinforces the institutional links between elected representation and trade union representation.

The French system of employee representation can thus be described as a dual channel of workers' representation.⁵ This dual channel can be explained by historical reasons. The French system has been built up gradually and the present system is the result of an accumulation of representative bodies that appeared at various stages in the history of the French industrial relations system. It is thus a complex system and if there is an apparently clear distribution of roles between trade union representatives and elected representatives, the practice is different and there are various institutional and informal links between the two channels of employee representation. I will first present an overview

³ A. Bevort, A. Jobert, *Sociologie du travail: les relations professionnelles*, Armand Colin, 2008. A. Bevort, 'De la position commune sur la représentativité au projet de loi : renouveau et continuité du modèle social français', *Droit Social*, 2008, p. 823.

⁴ A report published in February 2011 examines the impact of the reform of representativeness on industrial relations in 12 French companies. The study demonstrates that the reform's aim to simplify the trade union landscape within companies has not been achieved because there are very few instances where the number of worker representatives has fallen or industrial relations within companies have become more straightforward. See, S. Bérout, K. Yon, '*La loi du 20 août 2008 et ses implications sur les pratiques syndicales en entreprise: sociologie des appropriations pratiques d'un nouveau dispositif juridique*', février 2011, rapport DARES.

⁵ C. Vigneau, 'France', in *Employee representatives in an enlarged Europe*, European Commission, 2008, p. 197.

of this complex system. Secondly, I will concentrate on the constitution and on the functioning of the works council. Thirdly, I will analyse the relationship between works councils and trade unions before concluding with an evaluation of the French system and of its possible evolution in the future.

2. A complex dual channel of workers' representation in the workplace

The French legal framework of employee representation system has a constitutional basis. The Preamble to the 1946 Constitution, which is part of the present Constitution, proclaims the right of *'all workers to take part, through their representatives, in the collective determination of working conditions and in company management'*. It has to be noted that Statute law plays an essential part in French labour law and the employee representation system is mainly defined by laws which are part of the Labour code.⁶

The French system is characterised by a dual channel of workers representation in the workplace. Works councils (*'comité d'entreprise'*) and staff delegates (*'délégué du personnel'*) are elected by the company employees: trade union delegates (*'délégués syndicaux'*) are designated by representative unions. The complexity of the workplace representation system required by law varies with the company size. In a company with at least 11 employees, staff delegates, elected by all employees, are required by law. Their main function is to present the employer with all individual and collective grievances concerning the application of legal rules and collective agreements. In companies with at least 50 employees, there are also works councils whose members are elected in the same way and at the same time, every 4 years (a collective agreement concluded with representative trade unions can reduce the mandate to 2 years). Their prime function is to manage the funds provided by the employer for social and cultural activities for the employees and their families and, secondly, to be informed and consulted on the company's organisation, management and general functioning. In any company employing 50 persons or more, the employer must also create a health and safety committee (*'comité d'hygiène, de sécurité et des conditions de travail'*), which is appointed by the elected members of the works council and by the staff delegates. The purpose of this committee is to contribute to the protection of the employees' health and security and to the improvement of working conditions. The committee must be consulted in all cases of major changes regarding hygiene, safety and working conditions within the company. In a company, employing at least 50 employees, where there are no works council or health and safety committee, the staff delegates perform their duties. In a company, employing fewer than 200 employees, the employer may choose to set up a sole body of employee representatives (*'délégation unique du personnel'*) whose duties and rights are those of the staff delegates on the one hand and on those of the works council on the other hand.

Beside these elected representation, the presence of trade unions in companies is also recognised. Each trade union may set up a trade union section (*'section syndicale'*), which is a de facto grouping with no legal identity. In a company with at least 50 employees, each representative trade union can designate a trade union delegate. As there is trade union pluralism in France, several trade unions in a company can be representative and can designate trade union delegates. Trade union delegates represent the trade union in the

⁶ J. Pélessier, G. Auzero, E. Dockès, *Droit du travail*, Précis Dalloz, 2012.

company. Legally they are in charge of ‘defending the material and moral interests’ of the workers, and in the French model, trade unions represent all the workers and not only their members. The main function of trade union delegates is to negotiate. Trade union delegates can bargain with the management and sign company or plant agreements.

It should be noted that all the rights granted to employees’ representatives are reinforced by repressive labour law since the employer who failed to respect these rights (for example, if he/she refused to organize elections, did not give information, did not consult the works council, did not bargain with trade unions, etc.) would be guilty of interference in the functions of employees’ representatives (*délit d’entrave*). Civil sanctions are also possible and tribunals can oblige employers to respect these rights.

This complex system is based on an apparently clear distribution of roles between trade union representatives and elected representatives. Works councils provide *‘collective expression of employees’ views, allowing their interests to be constantly taken into account in decisions relating to the company’s management and economic and financial development, work organisation, vocational training and production techniques’* (art. L 2323-1 of the Labour code). Their role is mainly consultative in the field of economic development and work organisation. Trade union delegates represent their unions and defend the interests of their members and of all the workers in the company. Their main function is to negotiate with employers. Until 1996, unions had a monopoly of collective bargaining. Labour legislation explicitly stipulates that trade unions are to be the exclusive bargaining agent in the workplace, at sectorial or national level. Thus works councils are legally excluded from the possibility of negotiating collective agreements even if recently the law has allowed for the fact that when there is no trade union representative and under certain conditions, they can negotiate.

3. The representation of employees through work councils

It is compulsory for all companies with at least 50 employees to set up a works council. The works council is a joint body. Works councils are made up of the company manager, who takes the chair and elected staff representatives. The number of seats available for elected employees depends upon the total number of employees employed by the company (from 3 to 15). Each representative trade union may also designate an employee to be its representative to the works councils. In companies employing fewer than 300 employees, the union representative is the trade union delegate. These trade union representatives have only consultative rights and they do not participate in voting.

3.1 How representatives are elected?

Any company employing at least 50 employees is required to organize works council elections. This threshold must have been reached during any 12 out of the last 36 months. Part-time employees are calculated by dividing the total amount of their contractual working hours by the legal duration of working hours in the company. Fixed term workers or temporary agency workers (in the company concerned) are calculated in proportion to the duration of their presence in the company during the 12 preceding months. As soon as this threshold is reached, the employer is bound by law to take the initiative to organize works council elections. Works councils are elected for a four-year term. However, the term can be reduced by company collective agreement to a two-year term.

It is up to the employer to initiate the organization of the works council elections by inviting all representative trade unions to present a list of candidates. If the employer does not take this initiative, any employee or a trade union can ask the employer to organize the election (the employee is protected against a dismissal), and the employer must start to organize elections within one month. The procedure for the election is defined by the law. Until 2008, the law gave representative trade unions in the company a monopoly of presenting candidates in the first round of such elections. As the results of these elections are now taken into account in evaluating the representativeness of trade unions, this condition is no longer required. However, trade unions (but not representative trade unions) still have a monopoly of candidature for the first ballot of the elections. There are certain criteria that unions must meet to be able to put forward candidates, such as being independent and having existed for at least two years, but they are less restrictive than was the case before the legislation introduced in 2008. In the event, there are no trade union candidates, or if fewer than 50% of the electors vote, a second ballot must be organised no more than 15 days later. For this second ballot the candidatures are free, which means that any employee (not only trade union candidates) fulfilling the eligibility conditions can be a candidate. In practice, votes for non-union candidates account for around a fifth to a quarter of all votes cast. Depending on size, the whole workforce votes together or in two or more separate groups, known as 'colleges', representing different grades of workers.

The elections are organized during working time and on the company's premises. The employer must provide ballot boxes and polling booths in order to ensure the secrecy of the votes. The vote is based on a system of proportional representation.

Voters must be at least 16 years old (16 years is the age at which children can legally work) and must have been employed by the company for at least three months. Fixed-term workers can vote if they fulfil this condition. A company's representatives, or close relatives, in principle have no voting rights, even if they are employed by the company.

To be eligible as a works council's candidate, a worker must be a voter. He/she must be at least 18 years old and must have been employed by the company for at least one year. Here again, a fixed term worker can be a candidate if he/she fulfils this condition, which is obviously difficult. Part-time workers can vote and they can be eligible.

It is to be noted that the exercise of the functions of a member of works council is compatible with the other workers' representative functions. The same individual may simultaneously occupy the position of staff delegate, trade union delegate, member of the works council and member of the health and safety committee. In practice, this situation is not unusual.

Regarding temporary agency workers, their employer is the agency, and the law organises their collective rights in the agency and not in the user company. Thus for the purposes of calculating company size thresholds in the agency in connection with worker representation, temporary workers are included on condition that they have been employed for more than 3 months in a reference period of 12 months.⁷ Temporary workers can vote in the elections of worker representatives if they have had an assignment for at least 3 months or have worked a minimum of 507 hours over a period of 3 months within the 12 months preceding the elections. In order to stand as a candidate they must have had an assignment of at least 6 months or have been on assignment for a minimum of 1014 hours over a period of 3 months within the 18 months preceding the election.

⁷ They shall also count for the purposes of calculating the threshold in the user undertaking in proportion of the duration of their presence in the company during the 12 preceding months.

3.2 Representation unit

The definition of the representation unit is an important point in the French system and the law attempts to adapt the structure of works council to that of the company. The structure of the works council follows, when possible, the structure of the company and of the corporate company. Thus each level of decision corresponds to a specific structure of representation: the establishment works council, the central works council, the group council and now the European works council.

Previous to the election of the members of the works council, the employer and the representative trade unions must negotiate a specific agreement, the pre-electoral agreement, in order to determine the modalities of the elections. If a company has several establishments, the agreement will define the various units of representation. In the absence of trade unions, the employer must organise the elections in compliance with the law. If no agreement can be reached, the departmental director of Labour and Employment takes the decision.

When a company has several separate establishments reaching the 50 employees threshold, each separate establishment elects an establishment works council. A separate establishment is defined by case law. Thus not all separate units of a company automatically constitute establishments. For the Supreme administrative Court, to qualify as a separate establishment, the unit must have a certain degree of managerial autonomy in order for the role that the law establishes for the works council to be fulfilled.⁸ The idea is that the works council can be properly informed and consulted by a manager who is not totally dependent on central management.⁹ These establishment works councils are made up of and operate in exactly the same way as ordinary works councils. They have the same prerogatives as ordinary councils. The establishment works councils are then headed by a central works council composed of representatives of the establishment works councils. The prerogatives of central and establishment works council depend on the issues that are subject to their information and consultation. For example, decisions of the central management are subject to the central works council's information and consultation whereas local management decisions are subject to the relevant establishment's local works council, and if a central management decision requires local implementation, information and consultation will need to be carried out at both levels.

Another representation unit of works councils is the social and economic unit. The notion of social and economic unit was first recognised by case law¹⁰ and then by the law (see Art. L 2322-4 of the Labour code). Social and economic units have been developed by case law in response to the issue of employers who have separate legal entities that each have fewer than 50 workers, but together exceed this threshold. When several companies which are technically separate legal entities, have strong operational, human resources,

⁸ Conseil d'Etat, 25 juin 2003, 252280.

⁹ What makes the system complex is that the definition of the establishment is not the same for the other workers representatives because they fulfil a different role. The function of staff delegates is to submit individual and collective claims relating to social protection and health and safety and collective bargaining agreements applicable in the company to the employer. Thus the representation unit of staff delegates could be more decentralised (also because they may be elected in companies employing at least 11 employees and not 50). For the Supreme Court, concerning staff delegates, it is not necessary for the manager of the establishment to have specific competences and to be able to directly answer the workers' claims. As a consequence, the definition of establishments may differ in the same company for different categories of workers' representatives (Cass. Soc. 29 janv. 2003, Bull. V n° 30; Cass. Soc. 18 mai 2011, n°10-60383).

¹⁰ Cass. Crim. 23 avril 1970, Ets Herriau, D. 1970.444.

economic and financial ties, they can be deemed to be a social and economic unit. Works council elections occur within this broader framework.

Another level of representation exists. Established by the 1982 Auroux laws, group councils are set up within groups consisting of a controlling company and controlled companies. A group council must be created within each group composed of a parent company having its registered office in France, its subsidiaries, and all affiliated entities (Article L. 2331-1 of the Labour Code). However, this is subject to the condition that the parent company directly or indirectly controls the subsidiary/affiliates. The group council is not a substitute for the works council. Its purpose is to provide the representatives of each company with more comprehensive information concerning the activity of the group as a whole. The group council meets at least once a year and must be informed on matters such as the group's businesses, its financial situation, the employment evolution and employment forecasts on an annual or several years' basis, possible prevention actions, and the economic prospects of the group for the year to come. The group council does not have a consultative function. A group council consists, on one side, of the controlling company manager, on the other side of representatives of staff in the group. Staff representatives are appointed by the representative trade unions among the members of the various works councils of all of the group companies and on the basis of the results of the latest elections.

Directive 94/45 of 22 September 1994 was transposed into French law and European works councils must be set up on the conditions defined by the Directive.

3.3 Role and power of the works council

The general function of works councils is to ensure the collective expression of the employees and to protect their interests professionally, economically, socially and culturally. Works councils are a legal body and may accordingly act in the courts to defend their interests in any jurisdictions. The interests defended must however be direct, current and personal. Unlike trade unions, works councils are not entitled to act in the collective interest of a profession or to act on behalf of the employees.

Works councils have two types of functions: social and cultural duties and economic duties. Their duties are very different in each of these areas. Although they exercise real managerial power in their social and cultural activities, they have only a consultative role in economic and occupational matters.

3.3.1 The Social and cultural duties

The granting of the management of the social and cultural duties in 1945 made it possible to withdraw social benefits from the former company paternalism and entrust them to the personnel representatives. According to Article L. 2323-83 of the Labour code, the works council shall perform or monitor the management of all social and cultural activities organised in the company especially for the benefit of employees and their families. The employer must provide the works council with funding for social and cultural activities. But the law sets no minimum amount and the funding can differ greatly from one company to another. However the employer's contribution cannot be less than that given during the last three years.

These social and cultural activities are the activities which the employer is not obligated to provide but which have been put in place for the benefit of the employees,

their families and retirees of the company. In this area are found activities such as canteens, organising trips, Christmas parties for employees' children, theatre outings, reduced-rate cinema tickets, etc. These social activities are important for the workers and they are sometimes the most visible activities of works councils. However, they do not imply any control by the works council over company operation.

3.3.2 Economic duties

The most important prerogatives of the works councils are their economic and occupational duties. According to article L. 2323-1 of the Labour code, the works council's purpose is '*to provide a collective expression of employees' views, allowing their interests to be constantly taken into account in decisions relating to the company's management and economic and financial development, work organisation, vocational training and production techniques*'. On all these matters, French law gives works councils extensive rights to be informed and consulted. Regulation on these matters is very detailed. The Labour code specifies the documents that companies must provide to works councils and at what moment the information must be provided (annually, every quarter, monthly). The information concerns the economic, financial, social and employment situation of the company. The information is needed in order for the works council to be consulted.

Information rights

First, French law requires employers to notify newly elected works councils of a range of information, to be supplied within a month of their election (art. L 2323-7 of the Labour code). The details in question are the company's legal status and organisation; its foreseeable business prospects; its position within its group, if applicable, in view of the information available to the company manager; the distribution of capital among shareholders owning more than 10% of its shares, and its position in the sector of activity to which it belongs.

Regularly, the employer may then provide different information. The information rights can be different depending on the size of the company. For example, in companies with fewer than 300 employees, economic and social information may be conveyed in a single annual report regarding the company's activity and financial situation, the developments in employment, qualifications and training.¹¹

The most important information includes:

- An annual general report relating to the company's activity and financial situation;¹²

¹¹ The law defines precisely the information content. For example, regarding information on developments in employment, qualifications and training, the employer may give: statistical data about the month-by-month changes in the company workforce, the distribution of the workforce by sex and qualification, the number of employees with open-ended employment contracts, the number of employees with fixed term contracts, the number of employees with temporary contracts, the number of workers belonging to external companies, the number of working days worked over the past 12 months by workers with fixed-term and temporary employment contracts, the number of alternative integration and training contracts open to young people aged under 26, the number of return to work contracts, the name, sex and qualification of part-time employees, the hours of part-time work done in the company, the reasons for fixed-term contracts, temporary contracts, part-time contracts and workers belonging to external companies, the comparative situation of men and women (analysis of statistical data by occupational category on the respective situations of men and women as regards recruitment, training, promotion, qualification, classification, working conditions and current pay, measures taken over the past year with a view to ensuring occupational equality, objectives and actions for the coming year, an account of actions planned but not performed).

¹² Turnover, profits or losses recorded, overall production results in value and volume, major capital transfers between the parent company and its subsidiaries, the subcontracting situation, distribution of profits made, European grants and financial grants or benefits, especially regarding employment, investments, trends in the company wage structure and total wage bill, trends in productivity and production, capacity utilisation.

- An annual report on the evolution of salaries;
- Information on improvements, changes, or transformation of the equipment;
- Analysis of the employment situation;¹³
- An annual social report containing information on employment, pay, working, health and safety conditions, training, occupational relations and employee living conditions;
- Information on vocational training;¹⁴
- Information on daily working conditions (all matters relating to changes in working hours, new technologies, changes in working conditions, competencies, qualifications, methods of remuneration and changes in career paths).

In trading companies, the company manager must also provide the works council with all the documents that must necessarily be furnished to the general shareholders' meeting, before their transmission, along with the annual accounts report.¹⁵

Information may also be given about any events that occur and may affect the company. According to Article L. 2323-6 of the Labour code, '*the works council must be informed and consulted on matters affecting the organisation, management and general development of the company, and in particular on measures liable to affect the volume or structure of the workforce or the company staff's working hours or employment, working and vocational training conditions*'. The information given must be in written and precise. The information is given to allow works councils to fulfil their consultative functions.

Consultation

French law gives wide scope to works council consultations (see Article L. 2323-6 of the Labour code below). The idea is that prior to making any important social or economic decisions, an employer must consult the works council. The Labour code also expressly indicates certain situations in which the works council must be informed and consulted, such as staff and dismissals, changes in working time organisation, technological developments and evolutions, etc. Pursuant to case law, a works council must also be consulted before a plant-level agreement is to be concluded.¹⁶

The notion of consultation is also defined by the Labour code as the exchange of views with the works council resulting in the works council formulating its opinion on a contemplated management decision. Consultation, in order to be respectful of works council prerogatives, requires that (i) sufficient information be provided to the works council to allow the works council to form its opinion, and (ii) the works council's opinion be requested before management is due to take the relevant decision and more precisely at a time where the works council's opinion could still arguably influence the management's

¹³ The employer must provide the works council with a whole set of information on employment in the company. In a company with more than 300 employees, this information is quarterly; otherwise it is given every six months. For example the employer must inform the works council of the general employment situation with in particular a month-by-month description of the workforce and employee qualifications by gender. The information includes the number of employees with open-ended and fixed term contracts, the number of part-time employees, the number of temporary workers and the number of workers belonging to external companies. The employer must explain the reasons for any outsourcing.

¹⁴ Every year the works Council has to be consulted about the coming year's training plan. It also gives its opinion about how the previous year's training plan worked out.

¹⁵ To analyse the information, the works council may be assisted by an accountant of its choice up to twice in the financial year.

¹⁶ Cass. Soc. 5 mai 1998, Bull. V, n° 219.

decision (whether or not this is actually the case). In practice, timing can be a major issue in any decision-making process that requires a prior works council opinion, because legislation does not prescribe any maximum time limit for the works council consultation procedure. Works council consultation procedures should therefore be started sufficiently in advance when considering a tentative timeline of business decisions to be taken. It is usually considered that it would be ‘too early’ to start a consultation procedure at a time when the project concerned is insufficiently advanced, i.e. where the parameters of the project are insufficiently determined or determinable. No meaningful information can be given at this stage to the works council, management will be unable to answer precise questions and consequently, the works council will be unable to render a well-informed and meaningful opinion. On the other hand, it is considered that it is too late to conduct a consultation procedure when the project is so advanced that it has reached an irreversible state, in particular if the company has already made legally binding commitments or decisions.

Consultation does not however mean a veto right nor a co-determination or decision-making right. The works council’s opinion is indeed “only” consultative, and not binding on management.

Except in one or two circumstances, works councils in France do not have any codetermination rights. An exception regards the setting of individualised working hours. In this situation, the Labour code foresees that such a measure may be implemented only if the employees’ representatives do not oppose it. Collective bargaining on profit sharing plans is also explicitly open to works councils and, in 2009, 95% of the agreements on this issue were concluded by elected representatives.¹⁷

Other rights

Linked to their economic duties, works councils have also an ‘alert right’ (art. L2323-78 of the Labour code). When the works council is concerned, with justification, over the economic situation of the company, it may ask the employer for explanations. If the answer is insufficient or confirms its concerns, the work council may draft a report, which is then transmitted to the statutory auditor. In the works council’s report confirms its concern, the works council may communicate this report to the board of directors who will then have to give a substantial answer within one month.

There is also a very light mechanism of employee representation on corporate boards through the works council. In trade companies, the works council has the right to nominate two of its members to sit with a consultative voice on the board of directors or on the supervisory board. Works councils representatives on these boards have fewer rights. They take part in proceedings only in a consultative capacity, though they are entitled to express their views. However these rights give them access to the same documents as those sent or handed over to the members of the board of directors or the supervisory board. Through them the works council may submit requests to the board of directors or supervisory board, on which a reasoned opinion must be delivered.

To fulfil its various functions, the Labour code provides for a meeting of the works council at least once a month in companies employing at least 150 workers and at least once every two months in the others. In any event, there may be a further meeting when so requested by a majority of the council members. The council elects a secretary, who in conjunction with the company manager draws up and signs the agenda, which is notified to

¹⁷ DARES, ‘*Les accords collectifs d’entreprise conclus en 2009*’, Avril 2011, n°031.

the other members at least three days before the meeting. Works council resolutions are adopted by a majority of the members present. The council chairman, who is the company manager, does not take part in the vote when consulting the council's elected members in their capacity as staff representatives.

Like all employee representatives (whether they are members of works councils, staff delegates or trade union delegates), elected members of works councils benefit from specific protection against dismissal. The law has provided for a specific procedure and special guarantees for the employees' representatives. The law considers that they run a specific risk of displeasing their employer in the accomplishment of their tasks and therefore must be specially protected against dismissal. Nevertheless, they remain regular employees submitted to the obligations arising from their contract of employment. Thus if the employer must follow a specific procedure before dismissing them, the dismissal can occur for exactly the same reasons as ordinary workers.

Workers' representatives can only be dismissed following an interview with the employer, consultation with the works council and with the permission of the local labour inspector. Regarding the works council, this protection is applicable to employees having initiated the elections (for 6 months), candidates (for six months), elected employees (during their term of office) and former elected employees (for 6 months following their term). The employer may ask for authorisation of the labour inspector who has a minimum of 15 days during which a preliminary inquiry will be held in order to verify compliance with the specific procedure and the absence of discrimination. The labour inspector's decision must be motivated. If the employer dismisses an employee representative without the labour inspector's authorisation, the employee representative has a right to be reinstated in his/her job. Penal sanctions are also possible.

Members of workers councils have also specific rights to fulfil their tasks. They are entitled to 20 hours of paid time a month to carry out their duties. They are entitled to move freely about the company both outside and during their hours spent on representational functions. They may make any contacts required within the performance of their functions, especially with employees. They also have up to five days' paid time for training during their period of office.

The employer bears all costs of a works council, by means of an annual works council budget equal to at least 0.2 per cent of the company's annual total gross payroll. This budget is in addition to any sums provided by the employer for running social and cultural activities in the company. The works council has also the exclusive use of a room together with the equipment and material necessary for it to function effectively – all provided free by the employer. Another important right is the possibility to use financial experts. They can be called in, at the company's expense, to analyse the annual accounts and to look at financial forecasts in companies with 300 or more employees. They also can examine proposals for large-scale redundancies, and to examine issues which the works council thinks are cause for concern. In companies with 300 or more employees the works council can also call in a technology expert, if necessary.

These rights are not always taken up, but the fact that the choice is left to the works council has resulted in the growth of national organisations of experts linked to the main trade union confederations.

3.4 A high compliancy rate

The compliancy rate is relatively high and it is increasing. According to the last report of the DARES (the research unit of Ministry of Labour), 77% of companies with at least 20 workers, and 90% of the companies with at least 50 workers do have some workers' representatives, either staff delegate or works council.¹⁸ In practice, works councils exist in 81% of the companies that should have them according to the same DARES figures. Among companies with 500 employees or more, all the percentages are above 95%.

In 2005, the participation rate of employees in the election of works council was around 63.2% (against 63.8% in 2003). Non trade unions lists obtain 23.5 % (against 23.2% in 2003), and in companies with fewer than 100 employees, around 50%.

4. Relationships with trade unions and collective bargaining

4.1 A concise description of unionization and collective bargaining today

In membership terms the French trade union movement is one of the weakest in Europe with only 8% of employees in unions (and even less in the private sector). It is divided into a number of rival confederations, competing for membership. The main confederations are the CGT, CFDT, FO, CFTC and CFE-CGC. Despite low membership and apparent division French trade unions have strong support in elections for employee representatives and are able to mobilise French workers. It should also be noted, that collective agreements have an *erga omnes* effect. The coverage rate is high and nothing in the French system really favours unionization.

In terms of support in the elections, the main test is the five-yearly election of employee members of the employment tribunals, although this only covers the private sector. Here, in the latest elections in 2008, the CGT is in the lead, with 34.0% of the vote, followed by the CFDT with 21.8%, FO with 15.8%, CFTC with 8.7%, the CFE-CGC with 8.2%, UNSA with 6.3% and Solidaires with 3.8%. At the professional elections, CGT is also in the lead with 22.5% of the vote, followed by the CFDT with 20.6%, FO with 12.5%, CFTC with 6.8% and CFE-CGC with 6.6%.¹⁹

Despite its low rate of unionization, the French industrial relation system has a very high rate of collective bargaining coverage, close to 97 per cent.²⁰ There is one major reason for this: the extension of collective bargaining agreements by the Ministry of Labour.

Collective bargaining can take place at three levels: at national level covering all employees; at industry level which can involve national, regional or local bargaining; and at company or plant level. National level negotiations for the whole economy cover a wide range of issues, including social security and industrial relations. For example, the 2008 Act was based on a common position agreed by the CGT and CFDT together with the employers' associations in April 2008. Industry level and company negotiations cover pay, pay structures, equality between men and women, financial participation, working time

¹⁸ *Les institutions représentatives du personnel : davantage présentes, toujours actives, mais peu sollicitées par les salariés*, DARES 2007. Because of the adoption of the 2008 law, the DARES is waiting until the end of the electoral cycles in 2012 before establishing new statistics.

¹⁹ DARES, *Evolution de l'audience des organisations syndicales aux élections aux CE*, 2005. <http://www.travail-emploi-sante.gouv.fr/IMG/pdf/participation2005.pdf>.

²⁰ However, some of the agreements have only limited importance. DARES, *La couverture conventionnelle a fortement progressé entre 1997 et 2004*, DARES, 2006 <http://www.travail-emploi-sante.gouv.fr/IMG/pdf/2006.11-46.2.pdf>.

and a range of other working conditions. Traditionally, industry level bargaining is the most important level for collective bargaining, in terms of numbers employees covered. However, collective bargaining at plant level is becoming more and more important.

Traditionally, the articulation of the levels of collective bargaining was centred around the traditional hierarchy of norms, called the 'favour principle', according to which each level was only supposed to add better conditions. However this principle has been progressively restricted. Since 1982, it has been possible for a collective agreement to depart from the legal provisions even when it is not in favour of the employees. This possibility of 'derogatory agreements' is limited to the areas enumerated by law but these areas have been extended since 1982 and are now quite considerable: flexibility of working hours, procedure for economic dismissals, etc. Derogatory agreements may be concluded either at industry or at the company level. In 2004, another major change in the French system of industrial relations was introduced. The law gave company-level agreements the possibility of departing from industry agreements, except for negotiations over minimum wages, classifications, supplementary social protection and professional training. However, industry agreements may exclude the possibility for company agreements to depart from higher-level agreements if this departure is not more favourable to the employees. Finally, the Act of 20 August 2008 allows the company agreements to fix working hours independently of the industry agreement. From now on, industry agreements are applicable only if there is no company agreement on working hours.

Another major change in the French system has been the modifications to the conditions affecting the validity of collective bargaining agreements as regards the signatory trade unions. Since the 2008 Act, the company or plant agreement must be signed by one or several representative unions with at least 30% of the votes in the 1st ballot of the last elections of the members of the works council. Besides, it cannot be rejected by one or several representative union organization(s) with a majority of votes in the 1st ballot on the same elections. These new conditions for signature equally apply to interprofessional and industry level agreements but will only come into force in 2013.

4.2 Trade Unions and elected representatives

Even if French law clearly separates the role of unions which involves collective bargaining from the role of elected works councils which involves information and consultation on certain decisions taken by managements, there have always been important, institutional links between trade unions and elected representatives. First, trade unions have a monopoly of candidature for the first ballot of the elections. Thus, many members of works councils belong to unions. Secondly, a representative trade union may designate an employee to be its representative on the works councils with a consultative voice. Therefore, representative trade unions know perfectly how the works council works and they receive the same information. The work council may also be informed and consulted on negotiation of collective agreements. Thirdly, French Labour code authorises an employee to fulfil different representative function. Thus the same person can be a member of works council and a trade union delegate. In practice this often happens. The recent 2008 Act has strengthened the relationship between trade unions and elected representatives. Among other criteria, to demonstrate their representativeness at plant level, trade unions must now obtain at least 10% of votes at the last professional elections and in order to be appointed as trade union delegate, the worker must have been a candidate for

either the works council or as an employee delegate (as a member or deputy) and must have received at least 10% of the votes cast in the first round of the elections.

Regarding collective bargaining, only representative trade unions can negotiate and conclude collective agreements. Strictly speaking, works councils do not have a role in the negotiations of collective agreements even if they must be consulted on the negotiation. However, here again the distinction is not always so clear. In practice, it happens that works councils conclude agreements with the employer. They are deprived of the legal force and binding effect attached to collective agreements. However, case law has recognised the validity of these agreements (so called ‘untypical agreements’) and has given them a certain legal force if they are more favourable to the workers. They can create obligations for the employer as a unilateral undertaking.

Moreover, although the right to negotiate is generally reserved for the union delegates, in some cases, where there are no union delegates, other representatives of the employees, in companies with fewer than 200 employees, can negotiate dispensatory agreements. Works councils, and if there are no works councils, staff delegates, can negotiate in the absence of trade unions delegates. The agreements the works councils can negotiate are ‘derogatory’ agreements (agreements which contain provisions that are less favourable than, or at least different from, legal provisions for workers). The agreement the works council signs must be endorsed by a joint employer-union commission for the industry.

Thus in practice, the dividing line between consultation, which is the prerogative of the works council and collective bargaining, which is the prerogative of the representative trade unions is a very fine one. However, the French system always gives priority to representative trade unions to negotiate and it is only when there is no trade union delegate in the company that the works council can negotiate.

5. Function and dysfunction of employee representative system

5.1 Main functions of employees’ representatives

As should be clear from the foregoing, French law separates the role of unions, which involves collective bargaining and entering into collective agreements, and the role of elected works councils, which involves information and consultation on certain decisions taken by the management. Trade unions and works councils fulfil different functions. The function of staff delegates has more to do with establishing better communication between workers and managements in order to avoid conflict. Through collective bargaining at company level, trade unions participate in defining terms and conditions of employment, but also in making statutory regulations more flexible. This is particularly true for example in working time issues. Working time is one of the mandatory objects of the obligation to negotiate. Every year, effective working time and organisation of working time in the company has to be negotiated with the unions. Since 1982, this negotiation has been supported by legal provisions allowing collective agreement to depart from some legal standards. Social partners are permitted to depart from the maximum daily working hours (from 10 to 12), they can also increase the amount of allowed overtime. Above all, they can decide that the reference period over which the average working time is calculated is a year instead of a week. The 1998 and 2000 statutes on 35 hours working time also favoured regulations by the social partners. Finally, the Act of 20 August 2008 allows the company agreements to fix working hours independently of the industry agreement. From now on, industry agreements are applicable only if there is no company agreement on

working hours. Working time has progressively moved from a state centralised regulation to a much more decentralised regulation.

The annual report on collective bargaining, published in June 2011 by the Ministry of Labour,²¹ shows that 33,826 agreements were signed at company level in 2010 (with a rise of 18% compared to 2009). 72% of these agreements were concluded by trade union delegates. Most of the agreements concluded by elected representatives were about profit-sharing plans and employee saving plans, which is an area where works councils can negotiate. 32.8% of the collective agreements concluded are about wages, 24.6 % about working time, 23.5% about employee savings plans, 12.4% about employment, 9.1% about unions rights and 8.7 % on gender equality.²²

Complementary to the negotiation function, the consultative functions of works councils do not mean that the works councils must agree before any planned changes go ahead. There must simply be an opportunity for the works council view to be heard, normally involving written submissions by the employer, and a delay before the decision is taken to allow a dialogue between the two sides. This means that the process of consultation is normally procedurally very precise and formal, but in practice may change nothing. Management is obliged to listen to the views of the employee representatives, but it continues as before.

One exception is the area of collective redundancy and restructuring, where a number of works councils have turned to the courts to block their employers' proposals, arguing that adequate consultation has not taken place. In a number of cases this has led to long delays before the employers have been able to implement their plans. If the works councils can be an important actor in a restructuring plan, it is also because a specific procedure has been defined. When there is a dismissal plan affecting more than 10 employees over a period of 30 days, in companies with at least 50 employees, the employer must convene the works council on two occasions. The two meetings must be separated by no more than 14 days (or more depending on the number of dismissals). Companies must also present 'an employment protection plan' to the works council. Designed to prevent redundancies or to limit their number and to facilitate the relocation of staff when dismissals cannot be avoided, the employment protection plan must be submitted for consultation to the works council. Failure to consult the works council is punishable by a declaration of invalidity of the redundancy procedure. The works council may also apply for assistance from an accountant paid by the employer. If the services of an accountant are engaged, the council may hold a third meeting. The formalization of the procedure of consultation and the obligation imposed on the employer to present the 'employment protection plan' have made the works council the most important negotiating partner for the employer in case of collective redundancies. The role of works councils in the area of collective redundancy and restructuring does not mean that trade unions delegates cannot interfere. Collective agreements on employment can be negotiated during this period. Legislation introduced in January 2005 also allows the possibility of signing so-called 'method agreements' with the union (not the works council) to better define the procedure of information and consultation of the works council and the content of a possible 'employment protection plan'.

²¹ *La négociation collective en 2010*, Bilans et rapports, Ministère du travail, juin 2011.

²² Some of the issues of collective bargaining like employees saving plan or gender equality are supported by the legislator.

5.2 Shortcomings of the current employee representation system

One of the main criticisms which can be made of the French system of representation is its complexity which is certainly reinforced by the 2008 Act. Staff delegates, the works council, health and safety committees, trade unions delegates and now the delegate of the trade union section share the functions of representation in a division of functions which is not so clearly defined. The low level of unionization combined with a highly pluralist system certainly reinforces this complexity. Even if this plurality of representation can lead to some competition, in practice they are more complementary than competitors (even if of course competition is possible among various unions, and the 2008 Act reinforces electoral competition). Where trade unions are present, they will usually play an important coordinating role. When they are no representative trade unions in companies, the possibility given to works councils or to staff delegates to negotiate dispensatory agreements could be discussed. Are these representatives independent and competent enough to negotiate agreements which can be less favourable than the law ?

6. Conclusion

Works councils are a well-established part of the French industrial relations system. Their existence is not a matter of debate on either the trade union's or employer's side. However, this does not imply that employers will support any extension of works council's rights. French employers sometimes call for a reduction in representation bodies' responsibilities, a reduction in the number of hours for which representatives are freed from their work to carry out their duties, and the creation of a single structure to replace current specialized bodies. Employers may, in some cases, wish to extend particular aspects of the role of works councils. For example, in France, many employers are keen to increase the bargaining role of works councils to enable greater company-level flexibility. Trade unions are against the creation of a single structure of representation, and they want to preserve their negotiating function.

The consequences of the 2008 Act are for the moment very uncertain. It is unclear whether the new rules will result in any of the existing nationally representative union confederations losing this status or any new confederation gaining it. At company level, it also remains to be seen whether the new rules on representativeness will lead to a fall in the number of companies with union delegates or reduce the number of union delegates from different unions. There is also a risk of disparities in representation from one workplace to another and even within companies (for example, a trade union can be representative in one establishment and not in another: this is not hypothetical, this situation has already occurred). Representation would also tend to be unstable, varying between electoral cycles: a union may be recognized in one election then disqualified in the next, thereby excluded from union rights while awaiting new elections four years later. It is also obvious that the relationships between representative trade unions and works councils are reinforced by the 2008 Act. Elections of works councils are becoming the test of representativeness of trade unions, trade union delegates must stand for the election to be designated (also as deputies), collective agreements are only valid if they are signed by one or more unions with at least 30% of votes at the last professional elections and works councils can bargain when there are no representative trade unions. Professional elections in companies tend to become essential for trade unions even if paradoxically the main aim of the elections is still to elect a specific representation distinct from the trade unions. This

evolution can support the demand for the creation of a single representation structure,²³ even if trade unions are against this evolution, fearing that it could reduce their position in companies.

²³ F. Petit, 'Faut-il instaurer un canal unique de représentation dans l'entreprise?', *Revue de droit du travail*, février 2010.