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The difficult reform of the social dialogue in France

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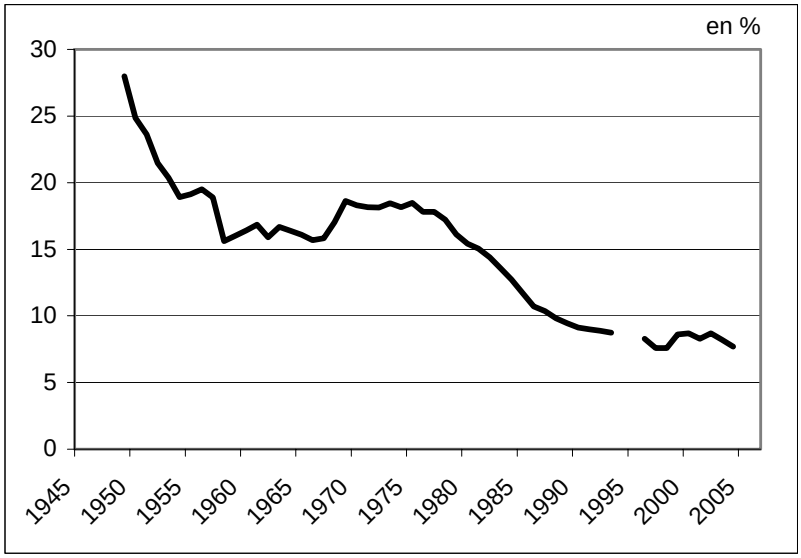
Autumn 2007 will be a very busy period for social dialogue in France. Starting September 7, a 3 month long negotiations round at the national level between labor and employers representatives will have to deal with a vast topic: the modernization of the labor market. If on December 31 parties can't come up with an agreement on the different matters, this modernization goal will be implemented through a law. So was announced by the still freshly elected President of the Republic, Nicolas Sarkozy. One interesting fact of this discussions and negotiations round is that it will have to follow the rules set by the law of January 31 of this year. It is then worthy of interest to get back to what this law prescribes, and what was the context leading to its genesis. Doing so, we will discover that, if this law is surely a step towards the good direction, there are still issues let unsolved on the way to a real reform, of the social dialogue in France.

I Characteristics of the social dialogue in France: some hints.

One important question is the representativeness of the parties. More specifically, the trade unions. First at all, the representativeness can be questioned when the unionization rate is low. In France, this rate has been decreasing dramatically for the past 50 years though it's been stable for a few years now(see table 1). It is now about 8% as a whole, but only around 5% in the private sector. The question, then raises: how can unions representing only that few employees can be considered as representative? This problem is especially accentuated in France by the powers traditionally given to the trade unions considered as representative by the law. Thus, any union belonging to one of the five big national union confederations 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. Being representative, they can sign a collective agreement with the management of the company and this agreement will be applied to any employee in the company, unionized or not, belonging to this union or another one.

Table 1: Unionization rate from 1949 to 2005.



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

Another question is the articulation of the different levels of social bargaining and, implied by that, the articulations between the norms steaming from these different levels. The questions was ruled by the law of May 4, 2004. With this law, the article L. 132-23 of the Labor Code, as it resulted from the law of 1982, the previous law concerning this matter, was not deleted or rewritten. Nevertheless, two new paragraphs added to the original article changed 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[1]. 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, in which the most favorable provision, whatever the level where the agreement was signed, is applied only if the upper-level agreement clearly says the company agreement can't do so. Still, the system remains, if simpler than before, a little confusing, as exceptions have been set. Article L. 132-23 of the Labor Code gives these exceptions where the company or plant agreement can't 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

[1] Art. L. 132-23 § 4.

funds collected for vocational training, collective guarantees concerning contingency, etc. Second, the professional classification or minimum wages – here too, the company agreement can't 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).

However, this reform marked the first step towards a renewal of the social dialogue, dealing with the agreements steaming for the social dialogue process. After that, needed to be taken care of the two other components of the social dialogue: actors themselves and the method of the dialogue. That was the mission of two reports issued in 2006: the Habas-Lebel report and the Chertier report[2].

Before detailing the content of these reports, we will explain briefly an episode particularly revealing of the lack of, or misuse of social dialogue in France: the crisis of the *CPE*.

II The crisis of the *CPE* (First Hiring Contract)

First at all: what was the law about? This law introduced a new system for urging companies to hire more young employees. Basically, under this contract, an employer could hire a person less than 25 years old with a probation period of 2 years. During this probation time, the employer was able to dismiss the employee without giving any reason. The idea behind this was to relax the regulation in order to incite employers to hire, and to create more employment opportunities for the youth, a population largely victim of unemployment. That was the content and the purpose of the law.

But what was shocking about this law was not only the content, but also the method. In the law of May 4, 2004, concerning social dialogue and vocational training, the government committed itself to favor social dialogue before any reform affecting labor relations. The Law on the *CPE* was the total opposite example.

This obvious negation of its past promises by the State leaded to a massive reaction, basically from the first persons it was aimed at, or the potential victims one could say: the youth. The result was 530,000 to 1.5 millions demonstrators in the streets in March 18, 2006;

[2] *Cf. infra.*

between 1 and 3 millions in March 28. It if important to say here that the trade unions are not at the origins of the protest movement, but the students associations. The trade unions confederations then joined a movement that took them by surprise and overcame them in a way. Moreover, the unity shown between the big confederations during the *CPE* crisis doesn't mean it brought back unity in the trade unions movement in a whole, and at least, didn't prevent the members of the *CGT* to boo at the leader of the *CFDT* invited at the *CGT* National Conference just after.

Still, there was a strong political will from the State for reforming the social dialogue in France. To that extent, and ever since the *CPE* episode, the Prime Minister of the time ordered 2 reports, at the beginning of 2006 in order to look for solutions for reforming the system of social dialogue in France. We are going to have a closer look at these reports now.

III The Habas-Lebel Report.

Called *For an efficient and legitimate social dialogue: representativeness and financing of professional organizations and trade unions*, this report comprises 2 parts. The first part draws an inventory of the present situation in France and gives some elements of international comparison. The second part is of course more interesting as it gives some possible measure to make the situation better. One interesting feature of this report is that it proposes two types of remedies. One possibility is to adapt the current system, with a few tweaks; the other way is to change the system more radically. In both parts, 4 topics are dealt with: representativeness of trade unions and professional organizations, collective bargaining and validity of collective agreements, collectives bargaining in SMEs, and financing of trade unions. According to the topic of this present paper, we will only detail the first part, dealing with the representativeness question.

1. Present situation.

Basically, the report recalls the 2 types of trade unions organizations.

First comes the ones enjoying what is called the irrefragable presumption of representativeness. The list of these organizations dates back to an administrative orders of March 31 1966. Several privileges are attached to this quality. At the national level, the confederations on the list will take part to the national interprofessional social dialogue and

bargaining, will belong to various consultative bodies and will take part in the administration of unemployment insurance, social security, complementary pension scheme, bodies collecting funds for vocational training and distribution of some monetary assistance from the State or local governments. At the sector, or branch, level, they have the power to negotiate and sign the collective agreements. At the company or plant level, they also can do social bargaining, and have a monopoly on the presentation of candidates for the elections of employees representatives.

On the other side, the other unions, federations or confederations not on the list can prove that they are representative, if they satisfy some criteria set by the Labor Code[3] and the jurisprudence[4]. Once they can prove that they are representative, organizations get the same right and privileges as the ones in the first category, but only at the company or plant level or branch level, as at the national level, only the list of 1966 prevails.

2. Solutions.

The author starts attracting the attention on the fact that the criteria, and the list of the confederations with irrefragable presumption of representativeness didn't change whereas, at the same time, social reality has changed. That said, and as we have already explained, the report provides 2 types of propositions.

a) Adaptation

The author of the report, in this pattern, proposed to keep the irrefragable presumption of representativeness, but to add new rules to it. First, the list would be revised, for example every 4 or 5 years, after the election to labor arbitration courts (Prud'hommes) or after the elections of employees representative bodies. The report then recommends to update the criteria for representativeness, articulating them between the capacity to influence, measured essentially by the scores at the professional elections, and the independence and experience, plus the respect of the values of the Republic. Lastly, the author called for a clarification of the prerogatives attached to the quality of being representative.

b) Transformation.

In this pattern, the goal is to shift to a system in which representativeness will be established by vote. The author proposes several alternatives for measuring this. That could

[3] Article L. 133-2: number of members, independence, subscription, experience and ancientness and patriotic attitude during German occupation.
[4] Essentially activity, measured by the dynamism of their action and reception among labour (measured essentially by the scores at the professional elections).

be made at the time of the labor arbitration courts elections, or at the time of the elections of the workers representatives, or by specific elections for representativeness at the branch level.

This transformation pattern would of course have several consequences. First, the irrefragable presumption would only remain for the national, interprofessional level. A simple presumption would exist at the branch and company level. Second, the monopoly of presentation of candidates by the trade unions at the professional elections could be questioned, which would lead to shift to one round only elections, as opposed to the current system, with 2 rounds. Third, this would impose to set a "point of representativeness", from which a trade union would be considered as representative. The author's recommendation in the report is to set this level to 5%, which could be raised to 10% in order to favor a movement of consolidation of trades unions. The authors is actually quoting the Spanish example, where this level of 10% is set in order to determine the representativeness of a trade union during the employees representatives elections.

Despite all these interesting propositions, and a very comprehensive view on the situation of trade unions in France, this report didn't lead to any law. Probably, after the crisis of the CPE that we briefly explained earlier, the government became very prudent in questioning the unions confederations representativeness presumption and privileges…

However, this representativeness question, and the fact that the report didn't lead to a law incorporating its prescriptions, is not such an issue for the present negotiations at the national level. As we have just seen, the report called for a change, *i.e.* giving up the irrefragable presumption of representativeness, more at the company and branch levels than at the national, interprofesional one. Consequences of this lack of progress must be expected later, not this autumn, but when the decisions taken at the national level will have to be spread through branch and company or plant agreements.

The other report ordered by the Prime minister of the time, the Chertier report, had a more glorious fate, as it led to a law. We will now examine both the report and the law.

IV The Chertier Report.

This report, called *For a modernization of the social dialogue* comprises 3 parts.

1: The present situation in France.

Words used in the report are strong: unproductive monologues, situations of conflict. The report writes the French system of social dialogue is a Babel Tower, emphasizing for example the competitions between different representation systems and levels. On the other side, the report also shows that social dialogues happens and works at several occasions in France, whether it is before the law is passed, like it was for the law on pensions of 2003, where a dialogue took place in order to find a definitions for hardness at work, or during the later phase of implementation of the law, for example concerning working time and vocational training.

But one thing is clear: there is no sharing of competence between the State and labor and management side.

2: Foreign examples

Facing these national problems, the author of the reports studied some foreign examples of social dialogue.

a. European Union.

In the EU, rules for a social dialogue at a European level have been set since 1991.These rules are now at the articles 138 and 139 of the Treaty of the European Union. The Commission, before making proposals in the social policy field, consults the labor and management representatives. Moreover, right is given to these latter to take the initiative in the social field in order to negotiate an agreement likely to be integrated into a directive. The topics where such an initiative of the social partners is possible are detailed in the article 137 of the Treaty.

Nevertheless, even if rules exist, only 6 agreements have been signed, with only 3 leading to a directive. It then looks like rules exist but labor and management don't take the opportunity to use them.

b. Germany

The report stresses the existence of a reserved domain for the negotiation, constitutionally protected. Basically, social security is mainly set by laws, with some rare collective agreements setting better conditions nonetheless. Law also set minimum conditions

regarding working conditions and relations, with, here again, improvements made by agreements between labor and management. On the opposite, individual working conditions and wages are determined by collective agreements.

This didn't prevent laws from setting rules concerning working relations (paid vacations, protection against dismissal, *etc*.) or vocational training for example. But each time, there is the possibility for labor and management to seize the constitutional court for denouncing an interference.

However, some tensions appeared, especially after the failing of the tripartite body "Bundnis für Arbeit", suppressed in 2003.Tension appeared between the government and unions too, in particular concerning the question of the minimum wage.

c. Anglo-Saxons examples.

- U.S.A.

A striking aspect of the system in this country is the low number of dialogue bodies, and the fact that these bodies are temporary. These are the Presidential Commissions. An executive order sets goals and limits, tenure and date of end of the commission, *etc*. . However, work done by these bodies are of first importance and left very deep traces even after the end of the commissions, as it is the case for exemple with the Commission on the status of woman in 1961. The work of these commissions can be of great value and influential.

- Great Britain.

The author recalls that social bargaining almost disappeared since the Thatcher era. Moreover, law has a limited role concerning labor law in England. Social bargaining doesn't exist at the national level either, where the *Trade Union Congress* (TUC) doesn't negotiate agreement with the British Industries Confederation (CBI).

Thus, new dialogue procedures appeared with Tony Blair, with the *better regulation* goal. As an example of this policy, it is provided that any government initiative must set a 12 weeks dialogue period. In fact, labor and management are actors among others in these new procedures.

d. Netherlands

The characteristic stressed out by the report is, in a context of sharing of norms set by law and agreements based on a consensus in the society, the existence of a dominating dialogue body, the *SER* (*Sociaal Economishe Raad*, Social and Economic Council), whom role is to advise the government on important social and economic matters. Moreover, this council is at the origins of the criteria for trade unions representativeness.

3: Propositions for solutions.

These propositions are of 3 types.

a. Build a shared reforms agenda, known by all the actors.

Tasks will be shared between the government, the Parliament, labor and management and civil society representatives. This program will be a schedule, on several years, setting in advance how labor and management will be associated to the program and how social dialogue will take place. According to the report, that program could be presented by the government in a formal way.

Moreover, the agenda will be revised periodically. This agenda will be then partly flexible. This will allow initiatives decided outside the agenda. But, still, in that case, social dialogue should be a priority.

b. To reserve a specific time for dialogue, or even negotiation, when implementing reforms.

Any reform at the initiative of the government includes a time for preparation, including dialogue and consultation. However, when it comes to labor law, this process could lead to a phase of social bargaining between labor and management. Thus, in any reform, there would be a specific time for social dialogue between the different partners.

Practically, this would mean that there would be a minimum period between the announcement of a reform and the adoption of the text at the ministers' council. The report quotes the 3 months period in Great Britain. However, the procedure wouldn't set regulation for the details of implementation of the social dialogue, but, then, the method chosen by the government should be clearly publicized.

This would imply to revise the Constitution writes the author, to specify at the article 39 that a law should precise the procedure concerning the elaboration of the bills before they are

presented at the ministers' council. The government should also submit a document about the social dialogue procedure and the results of this dialogue. There would be an exception though: in case of particular emergency, the government could make this time shorter, its reason being controlled by the judge though.

For the author, the procedure will be even more specific concerning labor law, allowing management and labor to start social bargaining on the topic of the reform. The length of the period of dialogue will be then extended to allow this bargaining to be achieved. It also implies that, during this bargaining time, the government or the Parliament should take no initiative concerning this topic.

At the end of the process, the government could accept the text resulting from the negotiations between labor and management representatives or reject it and give up its reform project. Same thing for the Parliament, that could accept it of reject it, as a whole. Several Unions (FO and CGT) rejected this latter solution, fearing unions action would interfere on political action.

c. Reform of the dialogue bodies: simplification.

Basically, in the Chertier report, the solution is to make these bodies less numerous. The report identified more than one hundred bodies where social dialogue takes place. This, obviously, creates confusion and makes the social dialogue complicated and unclear The government should then review all these bodies, and simplify the system suppressing some of them, merging some of them together, *etc*. while setting strict rules for the creation of new bodies.

At the same time, the report calls for a revision of the rules, composition and missions of the CES (Conseil Economique et Social) in order to make this central body more representative and give it a more central role.

IV The law of January 31 2007.

Following the recommendation of the report, a draft for a reform of the social dialogue was presented to the social partners during the meeting of the National Commission for the social bargaining on September 27, 2006. It was voted by the 2 assemblies and is now a law.

The law in itself is very short. It adds 3 articles at the Labor Code and modifies 2 other ones. The text starts stressing the fact, in a rather long preamble (5 pages, compared to the articles themselves, 2 articles and 3 pages), that this law is of particular importance for the future of the country, and that the reform steam from the will of the President of the Republic. Then come the articles of the law, only 2. Both of the articles modify existing articles of the Labor Code.

What is interesting is that the first article of the law adds in the Labor Code, before the first title of this latter, a preliminary Title called “Dialogue social” (Social Dialogue). The law introduces, at the beginning of the Labor Code, general rules, basic rules concerning existence of the social dialogue and how this one should be conducted.

Basically, this new title states that any project of the government implying reforms regarding working relations, employment or vocational training must at first start with a period of dialogue with unions and management (interprofesional workers and employers trade unions representative at the national level).

Practically, the government still has the initiative of the process, sending to unions and management a general document showing its analysis of the question, objectives to be reached and the different options possible. If labor and management want to start negotiation on the topic, they let the government know about it and inform the government on the time necessary to make such negotiations.

However, this procedure will be put aside in case of emergency, clearly declared by the government, that informs labor and management sides.

The law also organizes, at the end of this period of dialogue with labour and management representatives, a general procedure of consultation of the usual bodies of the social dialogue (the CES, the national Commission for social bargaining, the upper employment Comity and the national council for vocational training) about the text elaborated by the government.

The law sets a better information concerning the agenda of the government. To that extent, Every year, the government will present to labor and management side its plan concerning collective and individual labor relations, employment, and vocational training for the coming year. This presentation will also include the schedule of the reforms. On the other side, management and labor sides will detail the government the situation of present interprofesional collective bargaining and the schedule for such negotiations for the coming year.

Following the report, the article 2 of the law, replacing an existing paragraph of an article of the Labor Code, widens the competences of the *CES*. This body must be consulted on laws concerning general norms related collective labor relations, like before, and, that is the novelty, on individual labor relations (which explains why it wasn't consulted on the *CPE*).

Quite ironically, but fairly understandably, as the negotiations of this autumn seems to show, this text is a double edged blade. The law of January on social dialogue is for sure constraining for the government, but also for labor and management representatives, who have to come up with results at some point. And this is particularly true in the present round of negotiations. Facing the will of the President Sarkosy to reform in every fields, the social partners can not open negotiations on all the topics proposed. This is already the case for overwork or minimum service in period of strike, two matters for which unions have announced they will not open negotiations[5]. Multiplying the invitations to negotiate while unions and management can't, for a matter of time and organization, bargain on everything, the President might get back into the government's hands the initiative on some social questions.

However, getting back the main topic of this paper, and as we hinted in our introduction, there has not been a comprehensive reform of the social dialogue in France. First, the recent changes were made in an illogical order, in our opinion. First should have come the actors of the dialogue, because that is with them that the discussions can start. Then should have been taken care of the rules of the social dialogue and, at last, the relations between the different texts steaming from this dialogue. Things didn't go this way in reality. First the State dealt with norms and their articulation, with the law of 2004, and then , with the rules of the social

[5] Le Monde, September 3 2007, p.8.

dialogue in 2006. Concerning the actors of the dialogue, no legal rules came out despite the Habas-Lebel report. And that leads us to the second point: this reform is incomplete. This is a shame, indeed, as this last point is crucial. This is with reforming the rules concerning the actors of the social dialogue, in a move to guarantee a real representativeness, that the trust form the workers and, more widely the general population in the social dialogue and industrial relations can be won. We do hope this won't hinder the pace and the credibility of the negotiations round of this autumn, as they are capital for the social and economic future of the country.