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COVID-19: a stress test for French employee representation

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1. *Introduction*

An unusual event, such as COVID-19, not only acts as a mirror, reflecting gaps in a legal framework, but also represents a stress test which challenges confidence in the system itself.

In France, this issue was all the more important in terms of workplace representation, given that the legal framework in question had been broadly amended in 2017. The main source of this legal framework, the French Labour Code, was modified by Order No. 2017-1386[1], which aimed to unify the workers' elected representatives within companies[2]. Although the roles of trades unions remained the same, this legislation got rid of the former employees' representative bodies[3]. What were previously known as the "*délégués du personnel*", the role of which was to resolve day-to-day problems;

[1] Order no. 1386 of 22 September 2017. This Order was confirmed by a parliamentary Act (Act no. 217 of 29 March 2018). *See* LOISEAU, *Le comité social et économique*, in *DS*, 2017, pp. 1044-1049; BORENFREUND, *La fusion des institutions représentatives du personnel, Appauvrissement et confusion dans la représentation*, in *RDT*, 2017, pp. 608-624; ODOUL, ASOREY, *Comité social et économique : nouvelles dispositions*, in *RDT*, 2018, pp. 142-144.

[2] France has a dual system for representing workers' interests. This communication will focus on the elected aspect of the system and will not present the role of trade unions.

[3] The words "employee" and "worker" are used as synonymous in this communication.

the "*comité d'hygiène, de sécurité et des conditions de travail*", which focused on health and safety issues; and the "*comité d'entreprise*", which worked on economic issues, no longer existed. Instead, a new institution was created, known as the *Comité Social et Économique* (CSE), bringing together all the roles previously covered by employees' representatives[4].

Initiated in companies between 1 January 2018 and 31 December 2019, these new CSEs are an institution within which employers' and workers' representatives are supposed to discuss topics affecting the company. In particular, the employer must consult the employee representatives before taking any major decisions.

Was this system relevant in light of the COVID-19 crisis? What were the problems that led the legislator, the administration and judges to clarify or modify the framework that had just been created?

Three main problems were revealed by the pandemic. They relate to the scope of the duty to consult the CSE (2), the way in which it should be consulted (3), and the appropriate time to do so (4).

2. *Is it mandatory to consult the CSE for a risk assessment?*

The French Labour Code specifies the tasks of the CSE. These vary according to the number of employees in the company[5]. If there are fewer than fifty employees[6], the CSE has certain prerogatives[7], but does not have the right to be consulted. If there are fifty or more employees, then consultation is mandatory[8]. However, there is a difficulty with the scope of this obligation. The Labour Code states that the CSE must be informed and consulted on issues relating to the organisation, management and general running of the undertaking. To clarify the meaning of this vague formulation, the same ar-

[4] The "*comite social et économique*" (CSE) is the staff representation body in the company. It is composed of the employer and a staff delegation elected for a 4-years mandate.

[5] Art. L2312-1 LC (Labour Code).

[6] The creation of a CSE is not mandatory if the undertaking has fewer than eleven employees.

[7] Art. L. 2312-5 to L. 2312-7. In particular, workers' representatives may submit claims to the employer and have a right of alert. They also have roles to play in the field of health and safety and are allowed to conduct investigations relating to workplace accidents (Art. L2312-5 LC).

[8] Art. L2312-8 to 2312-84 LC.

ticle adds that this consultation is mandatory on several topics "in particular", notably in the event of a significant change in health and safety conditions or working conditions[9]. During the pandemic, the meaning of this sentence was at the centre of a key legal debate. There was no doubt that the spread of COVID-19 was to be considered as "changing circumstances" which, according to European Directive No. 89/391[10] and its implementation into French law[11], requires the employer to adjust the measures taken for the safety and health protection of workers[12]. In order to achieve this, French employers were helped by several governmental guidelines[13]. These guidelines were not legally binding but they summarised the state of knowledge at a given point in time and, therefore, had to be taken into account by employers. Employers had first to assess the risks in the company and then, with the help of the governmental guidance, decide on the protective measures to be taken. At the core of the dispute was the role of workers' representatives at the key stage of risk assessment: should the CSE only be informed of the risks and consulted on protective measures or should it be consulted at both stages?

Because the Labour Code provided no clear answer, the problem was resolved by the courts, mainly in proceedings for interim relief[14]. Many courts of first instance[15], in several rulings issued between April and June 2020, in other words at the beginning of the pandemic, did not adopt a strict interpretation of the Labour Code. Based on recommendations from the Labour Minister and the National Institute for Research and Safety[16], the judges pointed out that the more the employees' representatives were in-

[9] Art. L2312-8 LC.

[10] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

[11] Act no. 1414 of 31 December 1991 amending the Labour Code and the Public Health Code to promote the prevention of occupational risks and transposing European directives on health and safety at work.

[12] Art. 6.1 Council Directive 89/391/EEC and Art. L4121-1 LC.

[13] Some information may be found on the government website (https://www.gouvernement.fr/info-coronavirus). The Ministry of Labour also provided a benchmark guide that was often updated (https://travail-emploi.gouv.fr/le-ministere-en-action/coronavirus-covid-19/article/guide-repere-des-mesures-de-prevention-des-risques-de-contamination-au-covid-19).

[14] Zernikow, *Les représentants du personnel en France et en Allemagne et la protection de la santé des salariés quelles leçons de la crise sanitaire?*, in *RDCTSS*, 2022/1, p. 30.

[15] In France, the "*Tribunal de justice*" (TJ) is the first level of jurisdiction for issues relating to the CSEs.

[16] Institut National de Recherche et de Sécurité (INRS).

volved, the better the risk assessment. They thus stated that the CSE must be "included" in this assessment[17]. Although the exact meaning of this term "included" remains unclear, it underlines the need for active participation by the CSE. In a key ruling, one court of appeal also used the term "consultation" to describe the prerogatives of the CSE[18]. Dating from April 2020 and concerning the multinational company Amazon, this decision received widespread coverage[19] and had a significant impact on practice. However, the highest jurisdiction, the *Cour de Cassation*[20], did not reach the same conclusion and subsequently denied the CSE the right to be "consulted"[21]. This latest decision, in May 2021, was, however, too late to have any effect on practice. Moreover, the legislator confirmed the direction of the earlier rulings by amending the Labour Code. According to Act No. 2021-1018, which was adopted in August 2021, employers must consult the CSE regarding risk assessments in the company[22].

Court rulings and legislative changes concerning consultation of the CSE on risk assessment drew attention to the role of employees' represen-

[17] TJ Le Havre, ord. 7.05. 2020, No. 20/0043; TJ Lille, ord. 5.05.2020, No. 20/00399; TJ Lille, 24.04.2020, No. 20/00395. See also TJ Paris, ord. 9.04.2020, No. 20/52223 TJ Lyon, ord. 22.06. 2020, No. 20/00701. Guiomard, *Les référés, juges de la prévention*, in *RDT*, 2020, 5, pp. 351-355; Montpellier, *Prévention sur ordonnances: intérêt et limites de l'intervention a priori du juge de référés*, in *BJT*, 2020, 5, pp. 20-26; Gallon, *De Lille à Nanterre en passant par Versailles: les points cardinaux du droit à la sécurité en temps d'épidémie*, in *DO*, 2020, 5, pp. 305-348.

[18] *Cour d'Appel* Versailles 14 April 2020 no. 20/01993, in *RDT*, 2020, 7-8, pp. 482-485 (obs. Berthier); in *RJS,* 2020, 8-9, pp. 587-590 (obs. Adam); in *Dalloz actualité*, 29 April 2020 (obs. Malfettes).

[19] Even the newspaper *Le Monde* devoted several articles to relevant case law (Picard, *Coronavirus: la justice confirme le rappel à l'ordre d'Amazon*, in *Le Monde*, 24.04.2020; *L'affaire Amazon appelle à s'interroger sur les conséquences de décisions rendues en urgence*, in *Le Monde*, 2.02.2020; Picard, *Coronavirus: le ministère du travail refuse la demande de chômage partiel d'Amazon*, in *Le Monde*, 04.05.2020; *Amazon entame la réouverture de ses six entrepôts en France*, *Le Monde*, 20.05.2020).

[20] The *Cour de cassation* is the highest court in the French judiciary. Its role is to control the correct application of law by the courts of first instance and courts of appeal, thus ensuring a uniform interpretation of law.

[21] Cass. soc. 12 May 2021, no. 20-17.288, Chastagnol, Godefroy, Djedaini, *La DUERP, le cœur du réacteur de la prévention en entreprise?*, in *SJ-S*, no. 11, from 22.03.2022, 1081. This case law did not concern the CSE but the former "*Comité d'Entreprise*". Nevertheless, this is of little no importance, since both bodies have the same prerogatives in terms of health and safety.

[22] Article L4121-3 LC. The situation changes if the company has fewer than fifty employees, in which case, the CSE does not have the right to be consulted. Nevertheless, the Labour Code was also amended to strengthen the involvement of the CSE (Art. L2312-5, al. 3 LC).

tatives on health and safety issues. As a result of the dispute that arose during the pandemic, the prerogatives of the CSE were clarified and strengthened. However, strengthening the legal framework only makes sense if the representative body is able to exercise its prerogatives in practice. As we will see, during the first months of the health crisis quite the opposite occurred.

3. *How should the CSE be consulted?*

The way in which the consultation is conducted is highly important for the satisfactory implementation of the CSE's prerogatives. Before the pandemic, according to the Labour Code[23], the principle was face-to-face consultation. Nevertheless, online consultation was also possible. The use of video conferencing could be decided by the employer alone, up to a limit of three meetings per year. In order to use videoconferencing more than three times a year, an agreement between the employer and the employee delegation was required[24]. This framework was temporarily modified during the health emergency caused by COVID-19. Several Orders introduced two significant time-limited changes[25]. The first related to the use of videoconferencing[26]. The limits set out in the law were removed. As a result, the employer was able to use videoconferencing for all consultations with the CSE, without having to obtain prior agreement from the employee delegation[27]. The second change concerned the technical devices that were allowed for online meetings. Videoconferencing was no longer the only authorised device and employers were entitled to organise phone conferences under the same conditions as video conferences. In addition, the Order permitted instant messaging. Nonetheless, the conditions for using this third mechanism

[23] On this topic, the Labour Code was amended by Act no. 994 of 17 August 2015. This Act enshrined in the law the possibility of using videoconference.

[24] Art. L. 2315-4 LC.

[25] Order no. 389 of 1 April 2020 (Art. 6) and Order no. 2020-1441 of 25 November 2020 (Art. 1).

[26] Decree no. 508 of 2 May 2020, KERBOUC'H, *Les délais d'information et de consultation du CSE pendant la crise sanitaire*, in *SJ-S*, n° 19 from 19.05.2020, pp. 3-6.

[27] Order no. 1441 of 25 November 2020 made an exception for important consultations, such as those on collective redundancies. In this situation, a majority of the employees' representatives can, under certain conditions, object to the employer's decision on how they are consulted.

were stricter. The employer had to either obtain the agreement of the CSE or be unable to organise a video or phone conference[28].

Even if these rules were only in force for a brief time[29], they made major change in the way the CSE operated during the pandemic. However, the results of this experimentation remain mixed[30]. Although the health, ecological and financial advantages of online meeting are recognised, it is also pointed out that it was accompanied by a loss of mutual understanding. It is also noted that it created an imbalance of power in favour of the one, generally the employer, who had control over the technological tool. As a result, although few companies are considering continuing to use digitalization after the health crisis, it is generally accepted that certain issues (redundancy, working hours) cannot be effectively discussed in this way. Studies also underline that the digitization of social dialogue can only be done in a satisfactory way if collective agreements are concluded in the company to specify the arrangements for remote meetings[31].

In many respects, these legal provisions applicable during the pandemic rather weaken the role of the CSE, making it dependent on the goodwill of the employer. In fact, this temporary rule does not seem to have been primarily intended to help the representatives in their tasks. Rather, they were intended to allow employers to manage their affairs easy and quickly, without being slowed down by consultation with the CSE. The same problem also arose with regards to the timing of the consultation.

4. *When should the CSE be consulted?*

According to European Directive No. 89/391, workers' representatives shall be consulted "in advance and in good time" by the employer[32]. The

[28] Order no. 1441/2020 also gave the majority of employees' representatives the ability to object to the employer's decision, under certain conditions.

[29] Art. 6 of Order no. 389/2020 was applicable until 31 September 2021 (Art. 8, Act no. 689 of 31 May 2021).

[30] GÉA, *La digitalisation du dialogue social*, in *RDT*, 2021, pp. 625-633.

[31] *Ibid.*; ANACT, *Les organisations du travail à l'épreuve de la crise. Les pratiques du dialogue social*, in *Expo. QVT*, May 2021, 5/3, p. 12.

[32] Art. 11.2.

French Labour Code adds that they shall have "sufficient time" to review[33]. In order to implement these guidelines, priority is given to collective bargaining. Agreements between trades unions and employers[34] set the timeframe for the CSE to submit its opinion to the employer. If no agreement is reached, the deadline is set by the Labour Code.

As COVID-19 spread around the world, companies needed to take emergency measures. However, emergency situations had not been anticipated by the legislator. To remedy this problem, a governmental decree temporarily modified the legal time limits for consultation and thus impeded the representatives in their tasks. Of course, these rules were only in force for a few months, from May to August 2020, and were limited in scope to decisions that aimed to deal with "the economic, financial and social consequences of the spread of the COVID-19 epidemic"[35]. Nevertheless, it marked a major change at a crucial moment in time. The basic consultation period[36] was reduced from one month to eight days. If the CSE needed to be helped by an expert, the expert only had either 24 or 48 hours to carry out certain tasks[37]. This forced him to often perform a summary analysis and reduced his interactions with staff representatives. In addition to this Decree, information provided by the Ministry of Labour also contributed to undermining the role of the CSE. In an FAQ available on its website, the Ministry asserted that, if a prior consultation was not possible due to the health crisis, an "*a posteriori*" consultation was required. Such a formula makes no-sense. The purpose of a consultation is to generate a discussion before a measure comes into force. There can be no ex-post consultation. The vocabulary of the FAQ was equally revealing, using in the same sentence the formula "*a posteriori* consultation" and the word "information", as if the two were synonymous.

[33] Art. L2312-15 LC.

[34] The Labour Code also states how to conclude a collective agreement if there are no trade unions in the company (Art. L2232-21 to L2232-29-2 LC).

[35] The decree was then struck down by the highest French administrative court, the *Conseil d'État* (19.05.2021, no. 441031, in *D.A.*, 27 May 2021 (obs. DOMERGUE)). The *Conseil d'État* recalled that the legal basis for Decree no. 508 of 2 May 2020 was Order no. 460 of 22 April 2020 and that the legal basis for this Order was Act no. 290 of 23 March 2020. Since the issue of time limits for consultation was not addressed by this law, the Order had no legal grounds to deal with this issue.

[36] The Labour Code provides different time limits depending on the subject of the consultation and whether or not an external expert is used.

[37] Art. 1. Decree no. 508 of 2 May 2020.

In conclusion, how did the French representative framework fare with regard to the pandemic? Did the French system pass this stress-test? Analysis and practitioners' testimonies reveal mixed results[38]. On the one hand, the prerogatives of employees' representatives in occupational health and safety were strengthened. On the other, representatives found it more difficult to exercise these prerogatives in practice. These difficulties were not only related to COVID-19 itself or to the unpreparedness of the parties, but also to the way the authorities handled it. The forced digitalisation of social dialogue and the consultation short deadlines reduced the possibilities for genuine exchanges between employers and employee representatives. This echoes a longstanding trend in French law: praised for its merits, social dialogue is in practice slow to materialise.

[38] Bernard, Roulet, *Controverse: Le CSE et le droit à la participation des travailleurs: des victimes collatérales de la covid-19?*, in *RDT*, 2020 p. 440.

Abstract

The crisis caused by covid-19 was a baptism of fire for workplace representation in France. The legal framework for work councils, which is established by the legislator, had been amended shortly before the spread of covid-19. However, there were no provisions to deal with emergencies. This framework also suffered from inaccuracies which the crisis brought to light. Clarifications and adjustments were therefore necessary. As a result, the role of employee representatives is somewhat ambiguous. On one hand, their prerogatives in occupational health and safety have been strengthened. On other hand, the rules laid down regarding the methods and timing of employee representatives' involvement make this more difficult in practice.

Keywords

Employee Representatives, Work Council Consultation, Risk Assessment, Occupational Risks, Covid-19.