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Electronic version

URL: <https://journals.openedition.org/rdctss/1796>

DOI: 10.4000/rdctss.1796

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2018

Number of pages: 124-131

ISSN: 2117-4350

Electronic reference

Gilles Auzero, "The system of worker participation in private companies in France", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2018, Online since 01 November 2021, connection on 15 November 2021. URL: <http://journals.openedition.org/rdctss/1796> ; DOI: <https://doi.org/10.4000/rdctss.1796>

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THE SYSTEM OF WORKER PARTICIPATION IN PRIVATE COMPANIES IN FRANCE

ABSTRACT

If we confine ourselves to a formal approach, it would appear that French law has established a number of mechanisms to organise the participation of employees in the management of private companies, or, more accurately, in the legal entities that form their legal structure. While dividing this participation into two aspects, namely co-management and co-determination, the law, which governs these matters through both the Labour Code and the Commercial Code, is also meant to be coercive. Nevertheless, the fact remains that the legislator's first steps along this path have been distinctly timid. The mechanisms in question in fact include many inadequacies that mean that employee participation in the management of private companies has to be considered, if not as an edifice still to be constructed, then at least as a work in progress.

KEY WORDS: *Employee Participation, Legal Entity, Company, Co-management, Co-determination, Labour Law, Corporate Law.*

RÉSUMÉ

A s'en tenir à une approche formelle, il apparaît que le Droit français institue un certain nombre de dispositifs organisant la participation des salariés à la gestion de l'entreprise privée ou, plus exactement, de la personne morale qui, juridiquement, la structure. Déclinant cette participation sous ses deux versants que sont la cogestion et la codécision, les textes de loi, qui relèvent tout à la fois du Code du travail et du Code de commerce, se veulent qui plus est contraignants. Il n'en demeure pas moins que le législateur n'a emprunté cette voie que de manière bien timide. Les dispositifs en cause souffrent, en effet, de nombreuses insuffisances qui conduisent à considérer que la participation des salariés à la gestion de l'entreprise privée reste encore largement, sinon à construire, du moins à parfaire.

MOTS-CLÉS : *Participation des salariés, personne morale, société, cogestion, codécision, droit du travail, droit des sociétés.*

In France, the term “participation” is used to mean a variety of things. It has a narrow meaning when it is used to refer to employee’s sharing in company profits. In this eventuality, it is customary to talk about financial participation. It also has a wider meaning, which in our hierarchy of norms, is devoted to the highest level, that of constitutional principles. As specified in paragraph 8 of the Preamble to the Constitution of 27 October 1946, which we know to be an integral part of our constitutionality block, “All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place”.

This fundamental text encompasses at once the right of employees to collective bargaining and their participation in management, that is to say decision-making. No doubt reference is made, in both cases, to the participation of the workers. And yet, only participation in management will be considered in what follows as it alone implies the involvement of employees in decision-making. This is not the purpose of collective bargaining and its fruits, collective bargaining agreements and conventions. As set out in Article L. 2221-1 of the French Labour Code, the purpose of these norms is to fix all the conditions of employment, vocational training and working of employees, as well as their social guarantees. Therefore, collective bargaining, strictly speaking, does not deal with decisions liable to be taken by the employer. It does not constitute a sharing of power; it accompanies power.

Confining ourselves to participation in management, this notion can cover two separate systems. The first, which we will refer to as co-management, covers the rules ensuring the presence of employees’ representatives in the corporate bodies of the employer company. The second is co-determination, whereby certain decisions cannot be taken without the consent of the representatives of the staff, the latter then being entrusted with a right of veto.

Until relatively recently, French law only gave a very residual place to participation in management thus understood. Concerning first of all the presence of employees’ representatives in the corporate bodies of the employer company, this was abandoned to the free will of the shareholders.¹ Indeed, as specified, in substance, in Articles L. 225-27 and L. 225-79 of the French Commercial Code, “the articles of association may specify” that the board of directors or the supervisory board will contain directors or members elected by the staff. The system is therefore limited in three ways. Apart from the fact, as stated, that its implementation requires a stipulation in the articles of association, it supposes that the employer company has adopted a corporate form with a board of directors or supervisory board. Finally, and in any case, the employees’ representatives, who, it should be noted, do in fact have voting rights, always remain in a minority, by the very application of the law.

As for co-determination, it was and, as we shall see, it remains virtually non-existent. Indeed, it scarcely needs to be reiterated that the works council, except for a few very rare cases, has only been given a consultative role. In other words, even when the employer has made the effort to seek its opinion, it remains master of the final decision. The forthcoming

¹ It must be pointed out, however, that in companies listed on the Stock Exchange, when the employees hold at least 3% of the company’s share capital, one or more directors are elected by the general meeting from among the employee shareholders or, where applicable, the employee members of the supervisory board of an employee investment fund holding shares in the company (Commercial Code, Art. L. 225-33). Although they are employees, these directors represent less the latter than a particular category of shareholders. For that essential reason, this system will not be discussed here.

abolition of the works council, whose remit will be covered by a “social and economic committee”, which also encompasses the staff representatives and the health, safety and working conditions committee (CHSCT), does not fundamentally alter the situation. But, and we will come back to this, the reform seems to want to make room for a certain amount of co-determination, but without making it mandatory.

It therefore appears that certain changes are afoot in the French legal system. Initially, in 2013, they concerned co-management. Having finally realised that freedom has its limits in this domain, the aforementioned provisions of the Commercial Code having rarely been implemented, lawmakers have opted for compulsion, imposing the presence of employees’ representatives in the corporate bodies of the employer companies. Better to say certain companies as, and again we will come back to this, the scope of the reform is very limited. Nevertheless, the qualitative leap is real. This deserves to be emphasised all the more as, in an important decision dated 26 July 2013, which curiously has gone relatively unnoticed by labour law jurists, the Constitutional Court was able to assert, without any real explanation, that the “eighth paragraph of the 1946 Preamble does not impose the presence of employees’ representatives in the management bodies of companies”.²

It will be noted that a more detailed version of the arrangement was expected of the Orders reforming the Labour Code. The Habilitation Law did in fact authorise the Government to take measures “improving the conditions of employee representation and participation in the directors’ and supervisory bodies of companies with a workforce exceeding a certain threshold”.³ Unless we have failed to read those Orders correctly, this *habilitation* has not been acted upon, without there being any explanation as to why.

The fact remains, however, that positive law now guarantees a certain degree of employee participation in management, through arrangements that we will first of all present (I), before going on to highlight their inadequacies (II).

I - THE EXISTING ARRANGEMENTS

Leaving aside the purely optional arrangements, which have only been put into practice on rare occasions, we will concentrate on the mandatory system intended to ensure employee participation in management. Using the distinction already established, we will consider, in turn, co-determination (A) and co-management (B).

A - CO-DETERMINATION

Insofar as, in fact, it is impossible to entrust the power of co-determination to all the employees in a company, it can only be attributed to a body representing the staff and elected by them. The least that can be said is that French legislators have, to date, barely explored this route, preferring to multiply, over and over again, hypotheses in which, before taking a decision, the employer, has only to seek the opinion of the works council.

Nevertheless, there is mention, in the Labour Code, of some very rare cases in which the works council does enjoy true powers of veto. This applies to such areas as individualised

2 Const. Council, 26 July. 2013, no 2013-333 QPC, Dr. sociétés, Nov. 2013, comm. 179, obs. D. Gallois-Cochet. A different, more demanding position could have been taken.

3 Art. 2, 4° of the Habilitation Law.

working hours,⁴ the appointment of the occupational health officer⁵ or the proposal of internal redeployment posts to employees concerned by redundancy measures.⁶ Everyone can appreciate the proportion of the employer's decision-making powers that is subject to the approval of the works council.

A change could come from the effect of one of the Orders reforming the Labour Code. The first effect of the Order on the new organisation of social and economic dialogue within companies, which encourages the exercising and enhancement of trade union responsibilities, is to merge the elected staff representative bodies within the company. In the near future, the "social and economic committee" will replace the staff representatives (*délégués du personnel*), the works council (*comité d'entreprise*) and the health, safety and working conditions committee (*comité d'hygiène, de sécurité et des conditions de travail*).

However, a company or branch-wide collective agreement may turn this social and economic committee into a "company council" (*conseil d'entreprise*) which, on top of the prerogatives conferred by the law on the former, is competent, except where there are legal exceptions, to negotiate and sign conventions and collective labour agreements. Now, in application of the future Article L. 2320-2 of the Labour Code, the collective agreement setting up the company council must set forth "a list of topics, such as professional equality, that are subject to the assent of the company council". What we are talking about here is therefore co-determination, and although the text is not perfectly clear, there is an obligation to open certain "topics" to co-determination. For it is not an obligation to negotiate that is at issue here, but clearly an obligation to conclude. It will also be noted, furthermore, that the aforementioned article makes training a "mandatory topic". In other words, if there is a company council, training matters must necessarily be subject to its agreement.

All in all, it seems that the development of co-determination in our positive law has been abandoned to the wishes of the social partners, that is to say to an agreement between the employer and the employee unions. It is far from certain that the former will freely agree to give up a part of its decision-making powers. It can safely be assumed therefore that it is the social and economic committee that will generally prevail and, with it consultation rather than co-determination.

B - CO-MANAGEMENT

We owe to the Law on employment security of 14 June 2013 the imposition of the presence of employee representatives with voting rights in boards of directors and supervisory boards. Although the compulsion is real, it must nevertheless be kept in perspective, in view first of all of the scope of the obligation in question.

In fact, the election of employees' representatives to the board of directors or supervisory board is only imposed in companies that employ, after two complete, consecutive financial years, at least a thousand permanent staff in the company and its subsidiaries, whose registered office is in France, or at least five thousand permanent staff in the company and its subsidiaries when the registered office is both in France and abroad.⁷ Given their size, the workforce thresholds must be assumed to limit the application of the system. And

4 Lab. Code, Art. L. 3121-48, which mentions "l'avis conforme du comité d'entreprise" (the assent of the works council).

5 Lab. Code, Art. L. 4623-5, which mentions "l'accord du comité d'entreprise" (the agreement of the works council).

6 Lab. Code, Art. L. 1233-45, which mentions "l'avis favorable du comité d'entreprise" (the favourable opinion of the works council).

7 Comm. Code, Art. L. 225-27-1 and L. 225-79-2.

it must be stressed that they were lowered by the Rebsamen Law of 17 August 2015 as previously they were 5,000 and 10,000 employees respectively! It will be noted, however, that notwithstanding the regrettable legal wording, it is not the workforce of a company that is taken into account, but that of the group to which it belongs. In other words, a public limited company employing 60 people will be subject to this legal obligation if it is a subsidiary of a company that employs more than 1,000 people in France.

Even when this condition is met, the implementation of the system appears to very variable in practice. Indeed, as specified by the Commercial Code, a company is not subject to the obligation to have employees' representatives in its corporate bodies when it is a subsidiary, direct or indirect, of a company itself subject to this obligation.⁸ Which can be translated as follows: if in a group, the parent company has employees' representatives present on its board of directors or supervisory board, all its subsidiaries are exempt from the same obligation...

The rule, is, so to speak, reversed when the parent company is a holding company employing fewer than fifty people⁹. In this case, it may choose not to implement the legal obligation if it owns one or more subsidiaries that meet the conditions and apply the same obligation.

Finally, it should be noted that when a company is obliged to have employees' representatives sitting on its corporate bodies, the latter, even though they have voting rights, will be in a minority. Under the law, the number of directors or members of the supervisory board representing the employees must be at least two in companies where the number of the more "classic" directors or members is greater than twelve and at least one if it is twelve or fewer.

In the final analysis, it clearly appears that the presence of employees' representatives in the corporate bodies of private companies must be kept in perspective. Again, it is regrettable that the Government did not take up this issue again when it was drafting the Orders to reform the Labour Code.

However, there is one mandatory system that is more widely applied. The Labour Code has long allowed the works council to delegate two of its members to attend board of directors and supervisory board meetings. This delegation may be increased to four members, or on the contrary, reduced to one member, in particular if the corporate body has at least one member who is a representative of the employees under the system described above.¹⁰ This limitation may be debated, on the one hand, because the representatives of the works council only have a consultative role, which is not of a nature to upset the balances within the management body, and, on the other hand, because representatives elected by the employees and representatives designated by a staff representative body are not the same.

⁸ Comm. Code, Art. L. 225-27-1 and L. 225-79-2.

⁹ Or more precisely, to use the wording of the law, "a company whose main activity is to acquire and manage subsidiaries and equity holdings".

¹⁰ Lab. Code, Art. L. 2323-65.

II - AN INADEQUATE SYSTEM

The descriptions and comments above will already have provided a glimpse of some of the inadequacies of the French system of worker participation in the company to which they belong. But there are other deficiencies, no doubt more serious and insidious, which relate to the insufficient account taken of the corporate form adopted by the employer, on the one hand (A), and of the way the company operates, on the other (B).

A - INSUFFICIENT ACCOUNT TAKEN OF THE CORPORATE FORM

When I presented the mandatory co-management arrangements, there was much talk of the participation of employees or representatives of the works council in boards of directors and supervisory boards. However, among the different corporate forms offered by French law to legally structure a company, only public limited companies (*sociétés anonymes* or SAs) and partnerships limited by shares (*sociétés en commandite par actions* or SCAs) are obliged to have such corporate bodies. Although historically the number of companies taking the latter form has been very small, the numbers of the former are also constantly falling since the advent of the simplified joint stock company (*société par actions simplifiée* or SAS). The official figures prove this. INSEE thus revealed that in 2016, 40% of companies created were private limited companies (*sociétés à responsabilité limitée* *sociétés* or SARLs) and 56% SASs. The remaining 4% included all types of companies, SAs, SCAs, limited partnerships (*sociétés en commandite simple*, SCSs), non-commercial companies (*sociétés civiles*), etc.¹¹

Neither the SARL or the SAS are under any obligation to set up a board of directors or supervisory board. They can of course do so voluntarily, by means of a stipulation in their articles of association. But, even in this case, it transpires that they will not be subject to the mandatory co-management arrangements. More precisely, the law itself provides that these companies are not subject to the obligation to have representatives elected by the employees sitting on their corporate bodies, even if they do have a board of directors or a supervisory board.¹²

It is therefore necessary to face the facts and accept that these types of companies, and especially the SAS - which is a form that in practice has met with considerable success and can be legally be used to organise companies of a substantial size - remains outside the mandatory participation requirements. In other words, to get round the law on this subject, all a company has to do is opt for this form... Fortunately, companies listed on the Stock Exchange can, under our legal system, only adopt the form of a public limited company (*société anonyme*).

To come back to the SAS, it was in fact difficult to subject it to the employee participation arrangements introduced by the Commercial Code. Indeed, these can only be envisaged when there are collegial corporate bodies on which the employees' representatives can sit. However, under the law, these companies are only obliged to have a chairman. But at the very least the Commercial Code could conceivably have extended the arrangements in question to SASs that voluntarily set up a collegial body.

¹¹ Insee Première, no.1631, Jan. 2017.

¹² Article L. 227-1 of the Commercial Code purely and simply excludes the application of the mechanism in question to SASs.

It should be noted that, concerning the participation of representatives of the work council in boards of directors or supervisory boards, Article L. 2323-66 of the Labour Code provides that “in simplified joint stock companies, the articles of association shall specify with which corporate body the delegates of the works council will exercise the rights defined in this subsection”. When the company only has a chairman, this clause will be easy to word: it will be with the chairman that the representatives of the works council exercise their prerogatives. But this will not facilitate the exercising of those prerogatives. There is a difference between participating in a collegial body and finding oneself in a one-to-one situation with a single person. But here we are already addressing the inadequacies of the law regarding the way companies operate.

B - INSUFFICIENT ACCOUNT TAKEN OF THE WAY THE COMPANY OPERATES

Imposing participation in the management obviously means imposing the sharing of power. This therefore necessarily implies asking some questions about where that power lies. At first sight, it is tempting to assume that power lies with the corporate bodies, namely the board of directors and the supervisory board. But this is to forget that, in a company, power is held first of all by the shareholders and that the directors and managers are only their representatives. This situation is now exacerbated by the extraordinary financialisation of the economy, which contributes to giving extensive prerogatives to the shareholders, which the theory of *corporate governance* has furthermore served to reinforce.

Although there are a certain number of methods, which are more or less insidious, by which a shareholder, especially a majority shareholder, can implement its power over a company, that power is first and foremost, formally at least, exercised at general meetings. Now, the law does not provide for employees to attend general meetings, unless they are also shareholders.

Nevertheless, mention should be made of Article L. 2323-67 which, in its third paragraph, provides that “two members of the works council (...) may attend general meetings. They shall be heard, at their request, during any deliberations requiring a unanimous vote by the shareholders”. This provision, which allows employees’ representatives to be present at general meetings in a very indirect way, clearly appears inadequate.

First of all, although the delegates of the works council can attend all general meetings, whether ordinary or extraordinary, they only have the right to speak out on extremely rare occasions. Indeed, they are only entitled to express themselves for deliberations requiring a unanimous decision. Now, without going into this issue in detail, it should simply be emphasised that the law only requires such unanimous decisions on very marginal matters, for example a change of nationality or to increase the shareholders’ liability.

And then, and this needs to be mentioned again, SASs do not necessarily hold general meetings of the shareholders. It is true that the articles of association may provide for them, but in practice it is rarely the case.

To come back to the works council, Article L. 2323-67 grants it other prerogatives, which are not without interest. Indeed, this article provides that, “in companies, the works council may ask the courts to appoint a representative tasked with calling a general meeting of the shareholders in an emergency. It may also request the insertion of draft resolutions into the agenda for these meetings”. This mechanism is particularly interesting as it obliges the shareholders to consider issues raised by the work council. But these issues have to be within the prerogatives of the general meeting... Furthermore, even if this is the case, it does not authorise the representatives of the works council to address the shareholders.

In the final analysis, what this tells us is that French lawmakers have managed to organise a few mechanisms to allow some genuine power-sharing, by enabling employees or their representatives to leave the sphere of the company and enter that of the legal entity that organises it from a legal point of view and holds the powers over it. But the same lawmakers have kept these measures to the minimum. It would therefore no doubt be useful that they look again at these issues with a view to increasing employees' rights to participate in the management of their companies. But, from my point of view, such a reform cannot concern only labour law. An overall vision needs to be adopted in reforming not just labour law, but also company law at the same time. However, this - and this goes without saying - is an important stumbling block.

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