SUMMARY

2013/14 New law requiring unions to have sufficient employee support not incompatible with ECHR (FR)

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Facts

In France, there are two types of representation of the workforce:

-elected representatives : i.e. works councils ('comités d'entreprise') which allow employees to express their views collectively and enable consultation before decisions are taken by the employer; and staff delegates ('délégués du personnel'), which present employees' claims to the employer. These representatives are directly elected by employees.

-appointed representatives : trade union delegates (*'délégués syndical'*) which are empowered to negotiate and sign collective bargaining agreements; and a union representative on the works council (*'représentant syndical au comité d'entreprise'*) who expresses the union's views during works council meetings. These representatives are appointed by trade unions.

Until 20 August 2008, any union affiliated with one of the five nationally recognised federations of trade unions was deemed by law to represent the workers in any company and

was therefore entitled to appoint one or more representatives to the company's works council.

In August 2008 this changed. An Act of Parliament dated 20 August introduced Article L.2324-2 of the Labour Code. The new rules have imposed new requirements on the appointment of trade union representatives to works councils. Only trade unions with elected members on works councils are permitted to appoint a union representative to sit on the works council.

On 14 July 2011, despite this rule, the trade union *Force Ouvrière* (FO) appointed one of its delegates within the smartcard manufacturer *Gemalto* to its works council, even though FO's works council had no elected representatives.

Gemalto brought an action for cancellation of the appointment of the FO representative. In its defence, FO invoked Articles 11 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'). Pursuant to these provisions, every individual has the right to freedom of association, including the right to form and join trade unions (Article 11) and the right not to be discriminated against on political or other grounds in the enjoyment of the rights and freedoms set forth in the ECHR (Article 14).

Judgment

The Court of first instance of Tours dismissed Gemalto's claim, holding that the prerequisite - set by article L. 2324-2 of the French Labour Code - to have elected representatives on the works council before being able to appoint union representatives to that council, was in breach of Articles 11[1] and 14[2] of the ECHR and therefore infringed upon freedom of association and led to discrimination amongst trade unions. The Court considered this provision to be in breach of the principle of equal treatment between trade unions, as those which have no, or only one, elected member on the works council cannot appoint a representative to that council, and will therefore not have access to information that should be available to the works council and is key in collective negotiations.

Gemalto appealed the decision. On 24 October 2012, the Supreme Court struck down the decision of the Court of First instance, holding that *"Articles 11 & 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms give Member States the discretion to make their own arrangements and thus to grant, where need be, special status to certain trade unions, depending upon the nature of the prerogatives they enjoy. Consequently, the legislature's choice to only allow unions with elected representatives on the works council to appoint a union representative to the works council is not in breach of the said Articles of the Convention for the Protection of Human Rights and Fundamental Freedoms."*

Commentary

In France, the influence of the trade unions has significantly decreased. Today, only 7.5% of employees are members of a trade union, whilst in 1949 the figure was 30%. This rate is one of the lowest among all industrialised nations in the European Union.

The main purpose of the Act of Parliament of 20 August 2008 was to strengthen the legitimacy of trade unions within organisations. The Act has greatly changed the trade union environment. It imposed new requirements on trade union representation, relying on the trade union's actual influence on the organisation, as assessed during works council elections. In the past, it was assumed that any trade union belonging to one of the five trade unions whose representation was recognised at national level, was representative of the employees in any organisation.

Today, every trade union wishing to operate in an organisation (including negotiating collective bargaining agreements and designating union delegates), must prove its legitimacy based on new legal criteria. Only those trade unions that have obtained 10% of the votes at the last works council elections are deemed representative and are permitted to appoint a trade union delegate and sign collective bargaining agreements. Further, pursuant to the Act, trade union delegates should be appointed from those candidates for staff elections who have personally obtained at least 10% of the votes.

It is unsurprising that the trade unions, which had benefitted from past privileges, should now make every attempt to challenge the Act. One of the arguments that the trade unions ran was that the Act was in breach of European law, in particular, Article 11 of ECHR.

On 14 April 2010, the Supreme Court reviewed a different case in which the trade union had attempted to strike down the requirements of the 20 August 2008 Act concerning the union's ability to represent and the appointment of a union delegate in the company (with the 10% minimum rule, evaluated according to the results obtained at the works council elections). Several trade unions alleged that those provisions were in breach of European law, particularly Article 11[3]. The unions contended that the Act prevented trade unions from establishing themselves in companies and was detrimental to their presence. However, the French Supreme Court held that the new obligations allowing the workforce to decide which trade unions should be representative did not qualify as a breach of Article 11[4]. This position seems in line with the views of the European Court of Human Rights which recognises that "*States remain free to organise their system and to grant, if appropriate, special status to representative trade unions*"[5].

The Supreme Court took a similar view in another recent case, where the trade unions challenged the requirement of the 20 August 2008 Act that they should have existed at the

workplace for at least two years before appointing candidates in the first round of works council elections. The Court held that this requirement did not infringe the right of any employee to form or become a member of a trade union and was consequently not in breach of the international and European provisions to which the trade unions referred[6].

Thus, the case at hand and the decision of the French Supreme Court - which relates this time to trade union representatives on the works council, is simply another illustration of trade unions' so far unsuccessful attempts to leverage European law in order to circumvent the 20th of August 2008 Act.

In our view, the new condition set by the 20 August 2008 Act that only trade unions with elected representatives on the works council can appoint trade unions representatives on that council positively enhances the legitimacy of trade unions representatives – and is therefore entirely consistent with the purpose of the 20 August 2008 Act.

To exist and to act within organisations, trade unions must now demonstrate their legitimacy primarily by an increased presence and success at works council elections.

In our view, the position taken by the Supreme Court is also justified for another reason: the claimant's argument that the Act would have a negative impact on their negotiating power is not convincing. Indeed, although this point was apparently not discussed, French law imposes on the employer an obligation to provide trade unions with relevant information before entering into negotiations. Accordingly, those trade unions which do not have a representative at the works council will not be severely impacted. Therefore, even if it is regrettable that the European Court of Human Rights was not given the opportunity to give its views on the subject, it is fair to say that it would have probably approved of the solution adopted by the French Supreme Court.

Comments from other jurisdictions

Austria (Martin Risak): This case is a good example of the diversity of national provisions regarding the collective representation of workers at the company and industry level as well as the problems connected therewith. In Austria the issues reported on would not have come up due to the different setup of the collective labour law. On the company level only a works council structure exists; unions on the other hand only operate at the industry level. Given that individual employers may only enter into collective bargaining agreements as an exception to the rule, the main role of the unions at the company level is to support the works councils and not to act on their own behalf. And there is only one trade union council (the Austrian Federation of Trade Unions), which is the umbrella organization for all unions. Although the unions have different political wings, they act with one voice when it comes to

dealing with the other side of industry. And of course, not having any competing unions avoids all those problems the French employment legislation and the courts have to deal with in the case at hand ...

Germany (Paul Schreiner/Dagmar Hellenkemper): In Germany, one has to distinguish between:

a)the power to negotiate collective bargaining agreements, which rests exclusively with the trade unions, as the works council has no authority to conclude such agreements;

b)the right to attend a works council meeting.

The Works Council Act grants trade union representatives a right of access to the company's premises, but only to fulfil their trade union duties in the company. Trade union representatives have no right to take part in works council meetings, even if several members of the works council are also members of the trade union. If a quarter of the members of the works council so request, a delegate from a trade union represented on the works council may be invited to attend meetings in an advisory capacity. In the late eighties the Federal Labour Court decided that this right can also be exercised by the Economic Committee (a committee that every company with more than 100 employees must have, on which the works council is represented), thus allowing trade union delegates to attend Economic Committee meetings in the same way.

Footnotes

1.Article 11 "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

2.Article 14 "The enjoyment of the rights and freedoms set forth in this Con- vention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

3.The trade unions also referred to Article 4 of the ILO Convention N°98, article 5 of the ILO Convention N°135, Articles 5 and 6 of the European Social Charter and Article 28 of the Charter of fundamental rights of the European Union.

4.Supreme Court, 14 April 2010, n°09-60426.

5.DEMIR AND BAYKARA - v - TURKEY, application no. 34503/97.

6.The trade union referred to Articles 2, 5, 22 et 26 of the International cov- enant on civil and political rights dated 16 December 1966, Articles 2, 7, 23, 29, 30 of the Universal declaration of human rights, Articles 2, 3, 5, 6, 7 and 8 of ILO Convention N°87 concerning freedom of association and protection of the right to organise, Articles 5 A, E and G of the European Social Charter, revised on 3 May 1996, Articles 11, 14, 18 et 53 of the European convention on human rights, and finally Articles 12, 20, 21, 52 et 53 of the Charter of fundamental rights of the European Union.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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