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**“Loi Travail:
the Article 2 and the Reversal of the Hierarchy of Norms in
the French Labour Market”**

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*In Memory of
my Grandfather..*

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Introduction

This paper deals with one of the most discussed issues in France, the new French labour reform, *Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*, commonly called 'El Khomri law', referring to the name of the French Minister of Labour, Myriam El Khomri.

Being interested in this country, from a political and economic point of view and thanks to my long stay in France, I had the big opportunity to observe the real situation experienced by the French people, the French Government and by who has been touched by the approval of the Bill.

The *Loi travail* produced by the French Government is particularly significant for the evolution of the labour law and industrial relations in Europe. In fact, despite strong social protests promoted by a part of the unions, the reform keeps many of the original features and remains so innovative.

The paper is divided into three main chapters and a final reflexion as conclusion. Through the first chapter, we'll give you an overview about the current situation in the French country, what is behind the approval of the new reform and what are the factors causing a so strong criticism and protest in the French people. The dissertation, in fact, begins with the discontent of the French people, caused by the particular procedure used by the Government to impose the reform.

After having focused our attention on the current unemployment rate in France and after having "touched" almost the main critic points of the reform and so all the changes proposed by the draft law, the discussion will move to the role played by the Collective Bargaining in the new labour reform.

In the second Chapter, many aspects will be touched, giving you all the necessary to understand the evolution and the development of the Collective Bargaining Agreement in France. The subject will be taken into consideration from more points of view, by making comparison with other European countries, by analysing it in terms of numerical results (related to the past years), and also using a more economic approach.

In the Chapter three we'll have a deeper focus on the Company Agreement, to which is given more weight with the approval of the reform and plays a key role in this process of decentralization to the Collective Bargaining closer to the employees.

Its fundamental role is shown by the Article 2, today ex Art. 2 and become Article 8, which rewrites the whole working time of the Labour Code.

The philosophy of the article establishes that a company level agreement takes priority over branch level agreements, even if the company agreement is less favourable to employees. This is the reason why many opponents of the Law denounce an 'inversion of the hierarchy of norms'. It's the most discussed and contested article because it would change the balance of power between workers and companies, in favour of the second ones. In order to give you a 'concrete' example of how this new architecture of rules takes place, the last part of the paper analyses in a very detailed way almost all the more relevant provisions concerning the working time: effective working time, overtime hours, leaves, etc.

Reflexions and new perspectives are in the final conclusions, in which we'll make a point of the today situation, of the good and especially the bad side of the *Loi Travail*. These considerations will be the starting point to suggest you new ways of thinking about and looking at the discipline of *Droit du Travail*, but more in general at the true sense of Labour.

Being a very recent topic, continually changing and in progress, the writing of the paper has been based mostly on newspaper articles, short essays, interviews and reports, trying to give you a vision and a picture of the subject well updated, as much as possible.

1

A controversial French Labour Reform

1.1 Protest and criticism

“ A big and important step for the reform of our country: more rights for our workers, more visibility for small and medium-sized enterprises, more job.”

“ For me the text and the goal of this reform is to be able to just improve access to employment. ”

“..our labour code has become too complex, sometimes even unreadable. The reforms would give more flexibility, but not less protection to worker. ”

Manuel Valls, Premier Minister

“This law corresponds to the situation in our country. We have an unemployment rate of over 10 percent the same as it was 20 years ago. It has improved over the last month, however that is not satisfactory. Our country created fewer jobs than other European countries.”

Myriam El Khomri, Minister of Labour

“ We're resolutely against this development in the labour law. ”

Philippe Martinez, Head of the CGT union

“Ce texte doit être défendu, il doit être regardé comme un texte de progrès, il doit être aussi conçu pour les salariés comme pour les chefs d'entreprise. Moi, je ne veux pas les opposer”

Francois Hollande, President of French Republic

“La loi El Khomri attise la course au moins-disant social”

Alain Supiot, Jurist specialized in Labour Law

Above, little pieces of the interviews and declarations granted by the figures playing an important role during the French reform process, a reform that has generated significant attention in France, when it was just the beginning of the 2016 and the Bill wasn't yet approved.

The proposed reform has been presented with the publication of the first draft of the so-called *Loi travail* on February 27, 2016 and the second one on March 24, 2016.

It has led almost 390 thousand people, according to the police, and 1.2 million people, according to organizers, to manifest in the rain, in the streets of the *Hexagone* (a phrase designating the land of the metropolitan France).

Thousands and thousands of workers and high-school students joined protest marches across France, but not only. Protests and criticism took place also in other major cities such as Marseille, Lyon, Rennes and Nantes.

At the same time, the reform has been actively contested by a demonstration called *Nuit Debout* , literally night standing, who would later led thousands of people stay awake at night in the squares of several French cities as a form of protest.

This movement is the result of the lack of dialogue between the authorities and the citizens, who have the feeling of not being heard. In France the Government has acted in an emergency and without discussing with the social partners.

The draft has been presented on May at the National Assembly after four days of mobilization where the unions had focused the right on not to amend the labour code. Here, in the Assembly, the long debate has started, given the thousands of amendments filed, essentially from the radical left.

For about three months, the French Government has been thus caught in a dust bowl, a dust storm that has filtered into the homes of citizens through social networks, to launch

a public debate. Conditions of this tormented French atmosphere were closely related to the phenomena of the great transformation of work, that the French legislature repeatedly demonstrated to perceive and to want to read.

Since the beginning, workers and trade unions tried to block the country with transport strikes and street demonstrations against the measures, despite the premier was willing to open to some changes. But one of the reasons why they have continued to fight is that the grandchildren of the revolution of 1789 knows that in France several times the mobilization pushed who was in power to give up.

Two important cases to be taken as example: the reform of pensions by Alain Juppé in 1996 and the reform of contracts for those under 26 years in 2006 by Dominique De Villepin. Both measures were withdrawn after protests in the streets.

- In 1996, Alain Juppé, Mayor of Bordeaux, who is now the favourite for the Primaries that will choose the candidate of the French right for the presidential election in 2017, faced the wrath of the square. With a certain rigidity he proposed a vast and ambitious welfare and pensions reform, in particular of State officials.

Trains and subways were blocked in France for three weeks and two million demonstrators were on the streets. At the end the Premier had to withdraw his plan.

- In 2006, the Right party was in power again with Dominique De Villepin as Prime Minister. In order to reduce the youth unemployment, he proposed the CPE, the *Contrat Première Embauche*. It was a contract of indefinite duration, for young people under 26 years, which allowed the employer to fire freely within the first two years.

The story recalls terribly what's happening today with the Law El Khomri, pointing to labour market reforms and encouraging layoffs, as we can see later. PM De Villepin imposed his decision to Parliament, without a real negotiation. Consequently student movements and trade unions went

down heavily in the square. He used also an emergency procedure to pass the law in the National Assembly. In the end the law was promulgated, but then definitely repealed.

- On the other hand, in 2010, the President N. Sarkozy and his Prime Minister François Fillon faced similar protests to the current ones on their project of pensions reform. The Parliament approved the measure regularly, voting by absolute majority, but there were eight days of national mobilization, it was a turbulent period. There were also production and external blocks with stakes, refineries and fuel depots. But in this case, the President won and the reform was really approved.

Today the battle is called Law El Khomri or, more simply, *Loi Travail*.

The new outraged have been the first ones to complain and then the Trade Unions, especially the CGT (*Confédération Générale du Travail*), which tries more and more times to call for the withdrawal of the *Loi* and for the opening of real negotiations for a new labour code, the same for everyone.

This is not the first time that citizens take to the streets to contest an economic measure, but what was never occurred it's a head to head between a Government of the Left (socialist) and the CGT, which is the equivalent to our Italian CGIL, so left versus left.

Not just by the CGT, the protests have been led by a large network of trade unions and other student organizations.

Among the trade unions taking part in the social mobilization, the following are the most relevant.

- CGT: The General Confederation of Labour is the first of the five major French confederations of trade unions. The leader is Philippe Martinez.

- CFDT: It's the French Democratic Confederation of Labour and is one of the five major French confederations of trade unions, led since 2012 by Laurent Berger.
- FO: The Workers' Force, or simply *Force Ouvrière*. FO is a member of the European Trade Union Confederation and its leader is Jean-Claude Mailly.
- Mouvement des entreprises de France (MEDEF) : the largest employer Federation in France, established in 1998.

And other student organizations, like UNEF and UNL.

- *Union Nationale des Étudiants de France* (UNEF): It's the National Union of Students of France and is the main national students' union in the country. The organisation represents the interest of students towards the national and local Governments, the political parties and the government bodies.
- *Union Nationale Lycéenne* (UNL): It's a French high-school student union created in 1994. It aims the purposes of "brings together all students, regardless of their philosophical, political ideas or beliefs, wishing to defend their common interests for the emergence of a just and democratic society" , as declared by the Art 2 of the *Statut de l'Union nationale lycéenne*.

After his presentation to the National Assembly on May 3, Prime Minister Manuel Valls has used the procedure laid down in article 49. 3 of the French Constitution which made it possible to adopt the draft law by the National Assembly at first reading, without a vote by members. The same has happened on July 5. This is one of the relevant points to focus on, in fact the use of this particular procedure by the Government has been the major cause of the French social mobilization and its discontent.

In general, the so strong social manifestation has been caused because this reform is much more effective and potentially dangerous, if we think how it abolishes certain warranties, introduces new exceptions to labour law, in particular as regards working time, overtime hours and layoffs. It is said that businesses take advantage, but if they did, they could give rise to a form of social dumping between firms in the same industry, to the detriment of the workers.

And the protection of workers, those with regular contracts, as we know, is one of the reasons why the unemployment is so high-stably in France. It's preferred to protect the quality of employment contracts in relation to their amount, and the part time are much less numerous than in other countries as in Germany or the Netherlands.

The Bill El Khomri marks a rupture between the Left and the Government of Socialists . Also the Trade Unions for their part are split: some have come out in favour of the law in the name of realism and others, led by the CGT, as we've said before, calling for the withdrawal of the law.

1.2 Article 49. 3 of the French Constitution

It's necessary to give you a brief overview of the French Constitution, in order to understand better the fundamental article we will focus on and the principles on which the French Republic is based.

The current constitution of France is the Constitution of October 4, 1958 , which founds the Fifth Republic. The text, drafted by a Special Committee appointed by Charles De Gaulle, has been adopted through a Referendum on September 28, 1958. It organizes the public authorities, defining their roles and their relationships and it's the fifteenth fundamental text of France after the French Revolution.

The Constitution of 1958, the Supreme norm of the French legal system, was amended after its release twelve times by the Constituent power, both by the Parliament in Congress and directly by the people through a Referendum.

With the revision of February 22, 1996, the Constitution was divided into fifteen titles, for a total of eighty six articles and a Preamble. The revision of July 6, 1998 reinstated the title XIII, previously repealed, and added two articles, thus reaching a sixteen titles, eighty-eight articles and a Preamble. The latest revision has been made on 1999 , in order to adapt the Constitution to the provisions of the Treaty of Amsterdam. The Preamble refers directly and explicitly to other two fundamental texts: the "Bill of rights of man and the citizen" of August 26, 1789 and the Preamble of the Constitution of October 27,1946 (Constitution of the Fourth Republic).

The essential principles enumerated in these two texts have an important place in the constitutional framework, since the judges can apply them directly and the legislator is always attentive to respect them.

The fundamental feature of the new French Constitution can be found in the overcoming of Parliamentarianism, considered the cause of inefficiency in the management policy of the country, accompanied by the strengthening of the Executive and the centrality of the role played by the President of the Republic.

For the purposes of our research, the relevant part of the Constitution is represented by the title V '*Des rapport entre le Gouvernement et le Parlement*', Art. 34 to 51,2.

In particular, the Article 49, mentioned below, used by PM Valls, plays a fundamental role in the process of the approval of the new French reform.

“Le Premier Ministre, après délibération du Conseil des Ministres, engage devant l'Assemblée Nationale la responsabilité du Gouvernement sur son programme ou éventuellement sur une déclaration de politique générale.

L'Assemblée Nationale met en cause la responsabilité du Gouvernement par le vote d'une motion de censure. Une telle motion n'est recevable que si elle est signée par un dixième au moins des membres de l'Assemblée Nationale. Le vote ne peut avoir lieu que quarante-huit heures après son dépôt. Seuls sont recensés les votes favorables à la motion de censure qui ne peut être adoptée qu'à la majorité des membres composant l'Assemblée. Sauf dans le cas prévu à l'alinéa cidessous, un député ne peut être signataire de plus de trois motions de censure au cours d'une même session ordinaire et de plus d'une au cours d'une même session extraordinaire.

Le Premier Ministre peut, après délibération du Conseil des Ministres, engager la responsabilité du Gouvernement devant l'Assemblée Nationale sur le vote d'un texte. Dans ce cas, ce texte est considéré comme adopté, sauf si une motion de censure, déposée dans les vingt-quatre heures qui suivent, est votée dans les conditions prévues à l'alinéa précédent.

Le Premier Ministre a la faculté de demander au Sénat l'approbation d'une déclaration de politique générale.”

Art. 49 of the Constitution of 4 October 1958

This section is, as we've already pointed, part of Title V, on the relations between the Parliament and the Government, in fact it sets out the political responsibility of the French Government to the Parliament. In this, it gives the French Constitution whose character is still being debated, one of the principal traits of a parliamentary system. This parliamentarianism, however, is strongly rationalized, in that it is designed to ensure the stability of the Government. The article, in some sense, reuses and reinforces some elements already present in the Fourth Republic.

The article is designed also to prevent ministerial crises like those that occurred in France under the Fourth Republic and establishes:

- The requirements for a motion of confidence (*question de confiance*) initiated by the government, the executive branch.
- The procedures for a motion of no confidence (*motion de censure*) initiated by the National Assembly, the lower house of Parliament.
- The option for the Government to request approval of its policies by the Senate, with passage or veto immune to judicial action
- The rules that allow the government to force passage of a bill, unless the assembly is ready to overturn it and finally.

Comma 3 of the article is one of the most known clauses of the Constitution, often cited as a mere number: 49.3 or even the forty-nine three.

"The prime minister may, after deliberation by the Council of Ministers, commit the government's responsibility to the National Assembly on the passing of a bill concerning financial matters or social security financing. In this case, the bill shall be regarded as passed unless a motion of censure, tabled within the succeeding twenty-four hours, is passed under the conditions laid down in the previous paragraph. The Prime Minister may

also have recourse to this procedure again for another purpose or item of proposed legislation within the same session”

Comma 3 , Art. 49 of the Constitution of 4 October 1958

It introduces an arrangement without equivalent in previous Constitutions, or elsewhere in the world, which gives a powerful arm to the Government. This arrangement was designed to promote greater stability by protecting the Government from ‘*ad hoc majorities*’ in Parliament, which under previous constitutions frequently dissolved the government, but were unable to offer alternative arrangements to the country.

The section allows the government to impose the adoption of a text by the assembly, immediately and without a vote, that the assembly cannot oppose without toppling the government through a motion of no confidence.

When voting on a draft bill or bill, the Prime Minister may decide to engage the responsibility of the Government.

In that case, the use of Article 49.3 of the Constitution shall be the subject of prior deliberation in the Council of Ministers. Then, the bill is considered as adopted unless a motion of censure is filed within 24 hours and signed by at least one tenth of the members of the National Assembly. If no motion of censure is filed, the draft or proposal should be considered as adopted;

In the other case, if a motion of censure is tabled, it’s debated and voted on under the same conditions as those presented by the deputies. If the motion is rejected, the proposal or proposal is deemed to have been adopted. In the opposite case, the text is rejected and the Government is overturned.

Since the constitutional revision of 23 July 2008, the responsibility of the Government can be engaged on the vote of a bill for the financing or financing of social security and on only one other bill or proposal during the same session.

Previously, the Government could appeal to it as many times as it deemed necessary and whatever the nature of the text; From 1988 to 1993, the Government used article 49.3 on 39 occasions.

More in general, we could state that this clause reveals a reversal of the relationship between Governments and Parliaments in the 20th century in favour of the former: the executive power is no longer subordinated to the legislative one and must be able to adopt laws in accordance to its policy. Various solutions have been implemented to ensure the ability of the government to pass laws and with this procedure, the governments of the Fifth Republic are stronger than ever.

The article allows the government to compel the majority if reluctant to adopt a text, and also to accelerate the legislative process, and in particular to end any obstruction from the opposition. In other terms, if the Prime Minister decides to use it, this rule allows the government to bypass the vote on a measure, for which there is concern there is no majority willing to approve it. So, the project is considered to be adopted. Eventually, members can then put to the vote the motion of censure.

This is what's happened on May 10, 2016, when Manuel Valls decides to commit the government's responsibility on the vote of the bill to establish new freedoms and new protections for businesses and assets.

"Prendre une telle décision n'est jamais facile. Nous le faisons car nous avons la conviction que ce projet agit pour l'emploi durable, pour faire entrer sur le marché du travail celles et ceux qui en sont exclus et pour que, notamment, nos petites entreprises puissent embaucher."

PM Valls to the National Assembly

Since 1958, article 49.3 has been used on around 86 occasions by Prime Ministers, and 50 motions of censure have been tabled. So, the use of this article has allowed the adoption of a large number of texts. Following, the most relevant cases:

- After the filing of some 3800 amendments against the Bill on the privatization of public enterprises, Édouard Balladur (1993 - 1995) commits the responsibility of the Government. The motion of censure filed by the opposition was rejected and the text was then adopted.

- Jean-Pierre Raffarin (2002-2005) calls for Article 49.3 two times. The first time to adopt the reform of regional and European voting methods; A second time in 2004, for the draft law on local freedoms and responsibilities, dealing in particular with the decentralization.

- Dominique de Villepin, once. In 2006, Dominique de Villepin used article 49.3 to pass the Equal Opportunities Bill, which includes the contract of first employment (CPE). The Bill was passed and was described by the President Francois Hollande as a brutality and a denial of democracy, at the time.

- The responsibility of the government of Alain Juppé is committed twice during the two years that its government lasts. Firstly, to enable it to legislate by ordinance on the reform of social protection, a second for the reform of the status of France Telecom.

During the parliamentary session 2014-2015, Prime Minister Manuel Valls had already used article 49.3 to vote on the law of 6 August 2015 for growth, activity and equal opportunities , the so called *Loi Macron*. So, this is the second time that PM Valls has taken the risk.

The President Francois Hollande has split the majority and forced the hand of the Parliament to pass the labour reform, what he calls “the last major reform of the last five years”, launched by the Government Valls.

After a council of ministers convened at the last minute, the French Government has authorized the Prime Minister to resort to the article of the Constitution.

To Hollande and Valls has been a big gamble, based on the hope that *Frondeurs* of Left will not join with the Conservatives of centre-right to push down the French Government.

"We must go forward, to overcome the blocking minority. Even at the cost of risking the fall of the government"

PM Manuel Valls

He has underlined more times the constant willing to search for a compromise, this is the reason why the text was supplemented with around 469 amendments, but nevertheless the alliance between *Frondeurs* and Conservatives has continued in order to boycott the law. The Premier, who had made use of Article 49.3 also on July, has justified its decision with the need for a reform that will help the growth of employment in the public interest.

From their point of view of CGT and FO, which have been engaged for months with their subscribers in a strong resistance to the Valls design, the passage of the reform is the most contested provision of collective bargaining in favour of the company, which is considered positively by the reformist trade unions, who see in this more opportunities.

"It is an admission of failure"

Philippe Martinez, leader of the CGT

The Bill has created divisions even within the same Socialist Party in Government, as briefly outlined in the first section, as well as being challenged by the conservative right, for entirely different reasons.

For the Socialists, the reform has threatened the protections of workers, exposing them to the insecurity, giving entrepreneurs a large freedom to dismiss, change the level of wages and extend working hours. For conservatives, it doesn't intervene enough to free the market from the current constraints imposed by labour law.

"Denying a majority compromise, abuse of 49.3, it is a decision of incredible brutality. Nothing made it mandatory, no one will forget"

Christian Paul, leader of Frondeurs

"It's sad, the compromise would be possible. Valls seems to have adopted his usual intransigence. "

Laurent Baumel, Member of Socialist party

To the President Hollande, who in the past had described the use of the 49.3 as a brutal act and a denial of democracy, in other terms the tool you need to curb or prevent the parliamentary debate, the last year the use of the procedure was necessary and the bill was a just and dynamic compromise and a progressive text.

"Je préfère qu'on garde de moi l'image d'un président de la République qui a fait des réformes, même impopulaires, plutôt que d'un président qui n'aurait rien fait.[...]L'investissement qui reparte, la compétitivité de l'économie, les créations nettes d'emploi, la progression du pouvoir d'achat. "

Francois Hollande, President of French Republic

F. Hollande has continued with the last measure its convergence on the positions of the Right, now prevailing in Europe, and certifies once more the complete disorientation that has plunged the French political landscape, unable to find any stable and lasting reference point.

As we could remember, the President Francois Hollande was welcomed with great hope, but he has progressively rejected any expectation. He has demonstrated a perennial weakness and to be detrimental to the stability of France, the reason why his re-election in 2017 has been seen as difficult and compromised.

In fact, the French President Francois Hollande, one of the least popular leaders of the country's history with a 15% approval rating at present, has decided not to run in the presidential elections in April 2017. He has already announced not to stand for election to get a second term. He would take this decision in the interest of France, of its unity and its social balance. He has preferred to put aside personal ambitions and prefer the interest of the Nation.

It's right to point out that he had based his re-election in 2017 on the improvement of the unemployment data. In front of the world disorder, facing an uncertain economic climate and persistent unemployment, there was also a state of economic and social emergency to be proclaimed. This is the reason why François Hollande had announced its most ambitious plan, the one that should have aimed to decrease unemployment.

In other terms, the reform has also been the starting point for grand manoeuvres on the Left in preparation for the presidential elections. This law could be a perfect opportunity for some in Hollande's Socialist Party (PS) to sharpen their profile.

1.3 The fight against the French unemployment

“..and it's rising. Even if the rate of the progression is lower, it's still unbearable. It's time to make labour market more flexible”

Francois Hollande

Among the reasons why a reform has been said necessary there's the French high unemployment rate, which is around 10 % .

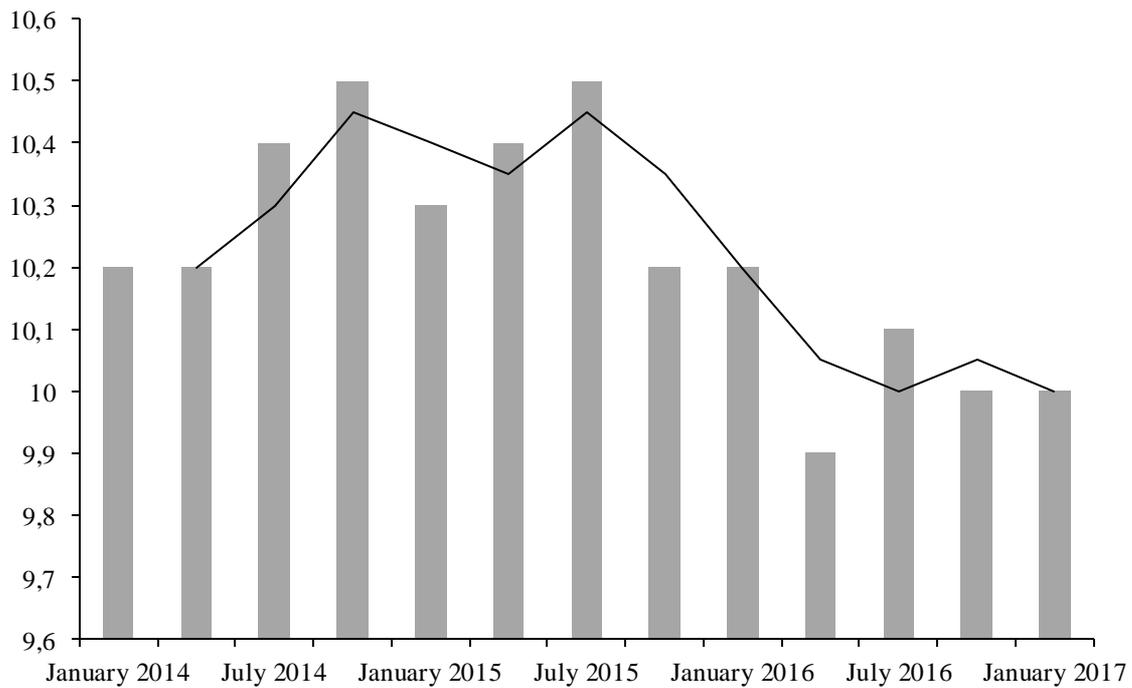
After the 2008 crisis, the unemployment rate didn't grow in the same proportions as other European countries. During the early 1980s , the rate was at 8 % , so a solid rate, but already with Francois Mitterrand, in 1992, the Government had tried to fight against unemployment, without any result. Politicians had tried to reduce working time, to lower taxes for employers, (...) but none of these measures had generated a substantial impact. In particular, youth and long-term unemployment are really high.

More than that, 87% of hiring is temporary contract and, since 2000, their number has grown up, while those of permanent contracts has stagnated.

So, there have been strong reasons to act for the French President, at the beginning of 2016. First at all: the reversal of the unemployment curve. Secondly, the EU has long been asking for impacting changes in the French labour market, trying to simulate the case of the plan 'Hartz IV'¹ in Germany, which benefits from its fiscal leniency and an accommodating monetary policy .

¹ The Hartz plan is the definition of the proposals of the Committee 'modern services to the labour market' (*Kommission für moderne Dienstleistungen am Arbeitsmarkt*, also called *Hartz-Kommission*). The Committee, in Germany, operated under the guide of Peter Hartz and presented its report in August 2002. The proposal , starting from January 1,2015, are about the unification of the unemployment benefit (*Arbeitslosenhilfe*) and the social aid (*Sozialhilfe*).

% France Unemployment Rate

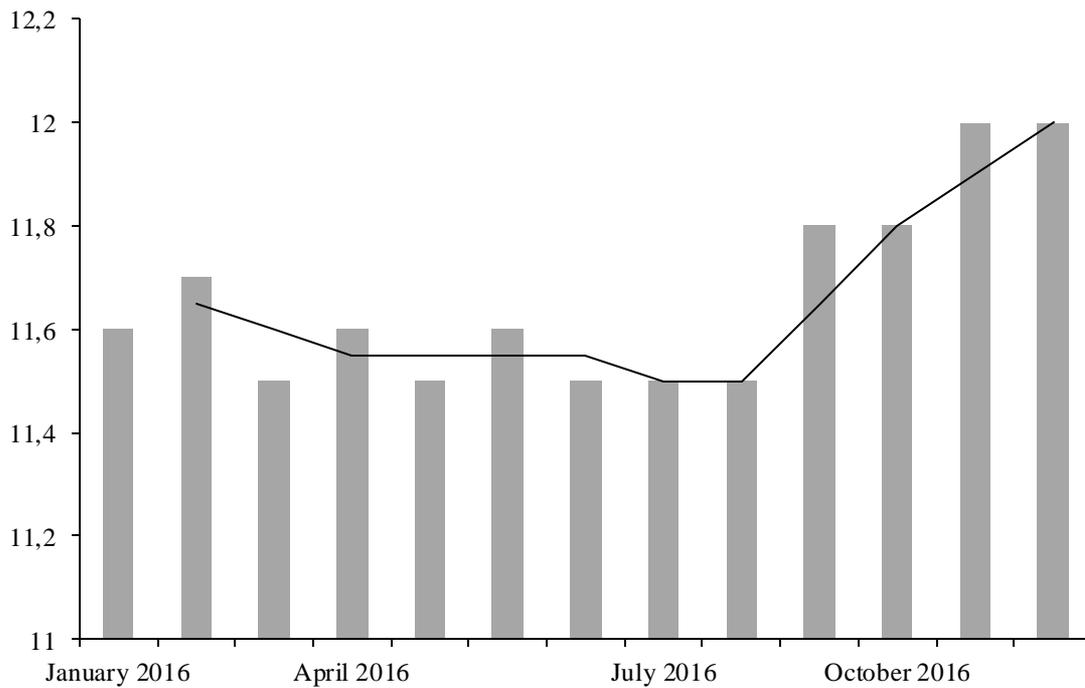


INSEE, France

This is a graphic showing us how the French unemployment rate has dropped to 9.9 % in the June quarter of 2016 from 10.2 % in the first quarter. It has been the lowest jobless rate since the September quarter 2012, just after the President Hollande took office.

Unemployment in France has declined more slowly than in most leading European economies, as a gradual recovery in economic growth and job creation is offset by the number of young people entering the labour force every year.

% Italy Unemployment Rate

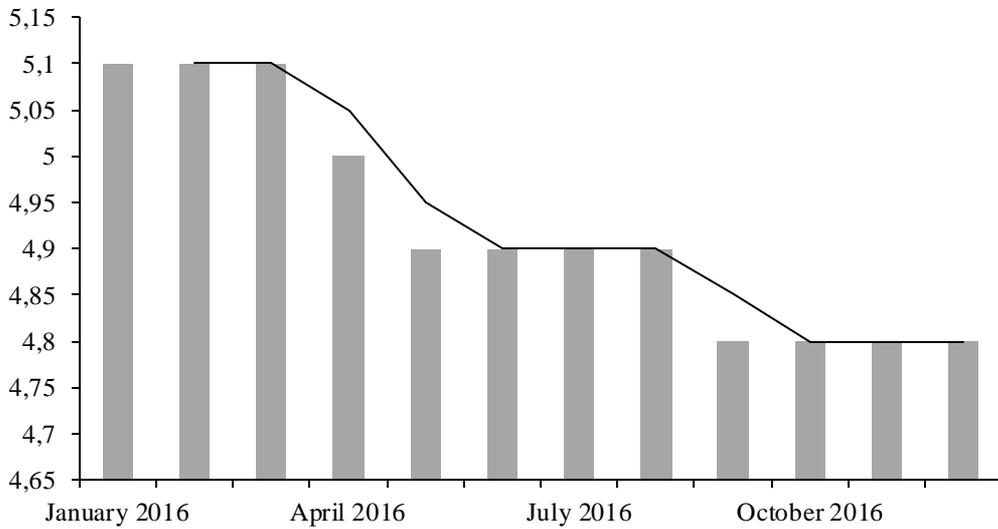


ISTAT, Italian National Institute of Statistics

Making a comparison to the Italian unemployment, France is at a lower level, but the highest in 18 years. Italy's jobless rate has been recorded at 11.9 % in November 2016.

Despite the slow fall, the French unemployment rate remains high compared with some major economies: UK and German. Below, the unemployment trend reported in the last year 2016.

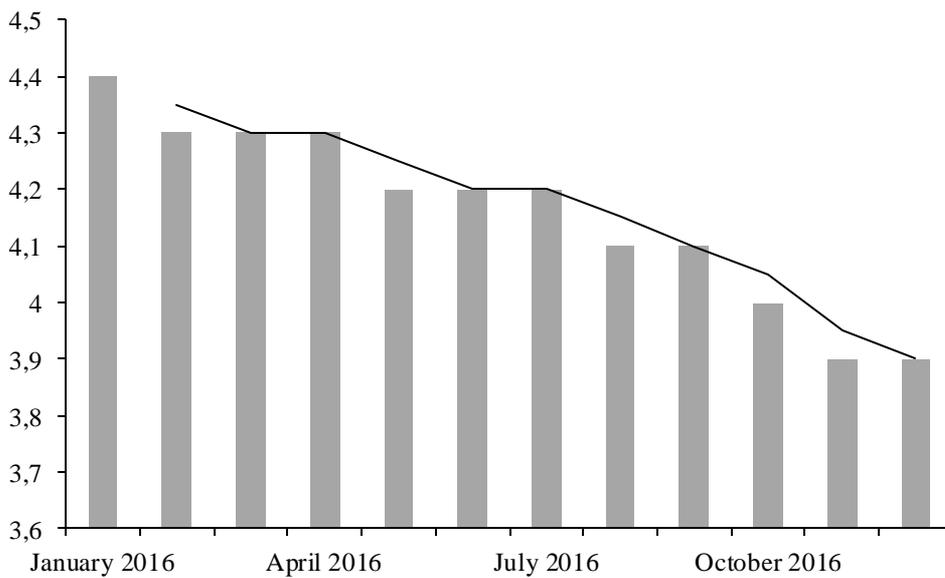
% UK Unemployment Rate



Office for National Statistics

Concerning the UK unemployment rate is at 4.8 % in the period between October and December 2016, in line with the market expectations.

% Germany Unemployment Rate



Federal Statistics Office

As we can see, German jobless rate is stable at 3.9 % , according to the data in December of 2016. This percentage is the lowest since December of 1980.

Through the passing of the new reform, the will of the President is creating a French market model based on flexibility, or *Flexisecurity* in French terms, like in the Scandinavian countries. *Flexisecurity* models put together more labour market flexibility and social protection for those that loses the job or are out of work.

As we know, the French labour market is very rigid and it's necessary to introduce more flexibility to allow companies to hire and, at the same time, more protection and security for employees whose situations may change.

One of the ways of looking at the Bill is attempting to address and to solve the structural problem of the unemployment.

1.4 The Draft Law

The aim of this section is to give you an overview about the most impacting and concrete measures proposed by the new reform, which has been definitely approved the last August 8, 2016.

The law, as we've already said before, has the aim to make more flexible the labour market in and out, to reduce the cost of layoffs and, above all, the judges' discretion on bonuses "except the facts of particular seriousness on the part of company".

Particularly significant are the flexibility allowed in the field of working time, the waiver of a simple fixed amount of compensation in case of dismissal, even if France, like all the European countries, doesn't know the sanction of mandatory reinstatement of the worker and will have further simplified the dismissal mode assuming that this encourage hiring. We are thus faced with a different and innovative reform with regard to our own Italian Jobs Act. Below, a more detailed look at the most impacting measures.

One of the most important changes proposed by the reform is concerning the layoffs. The law makes it easier for companies primarily economic dismissals, reducing to a minimum the discretion of the judges.

The draft law clarifies the definition of the economic reason for dismissals in order to give greater clarity to the applicable rules, in particular in SMEs, small and medium-sized enterprises. In the definition of economic dismissal are included the reasons given by the jurisprudence of the Court of Cassation, and so: the cessation of business and the reorganization of the company in order to safeguard its competitiveness. Moreover, the difficulties that can justify an economic dismissal are clarified by taking into account elements resulting from the jurisprudence: a reduction in orders or turnover, operating losses, a significant deterioration in the cash position.

In order to take into account the specificities of the different activities, a branch agreement may define the duration of the decrease in orders or turnover and the duration of the operating losses. In the case of a missing agreement, the criteria will be established by the Labour Code.

The text has to define more precisely the reasons that could lead to an economic layoff. The economic difficulties faced by the company can be characterized by a decrease in orders or sales, as we've just said, for a number of consecutive quarters, depending on the size of the company. This number is fixed at:

- One quarter of decline in the turnover or of orders for companies with fewer than 11 employees
- Two quarters for companies employing between 11 and 49 employees
- Three quarters for companies with between 50 to 299 employees
- Four quarters for companies with 300 employees or more.

It's also specified the perimeter of the assessment of the economic reasons. It's assessed at the level of the company, if the company doesn't belong to a group; It's appreciated at the level of the sector of activity common to the companies of the group located in the national territory, if the company belongs to a group.

The law clarifies also that if the economic difficulties are created artificially just for the purpose of creating jobs, the dismissal for economic reasons will have no real and serious cause.

The main objective is to make available, in particular to small and medium-sized enterprises which don't always have legal advice or human resources services, the criteria for determining whether or not economic grounds are justified.

By reducing legal uncertainty on economic layoffs, this reform could have positive effects on the labour market and on growth, in fact:

- The reluctance to hire in small and medium-sized enterprises will be removed and encouraged the hiring in open-ended contracts (CDI) .
- A greater attractiveness of France for large groups. Today, a group whose French subsidiary is in economic difficulty can't resort to redundancy, if its global situation is satisfactory. As a result, foreign companies are reluctant to set up or expand their business in France, because they know

that in the event of failure or proven economic difficulties, they will not be able to adjust.

- More favourable reclassification conditions: economic dismissal gives the employee the right to accompanying measures that help return to employment and provide higher compensation than unemployment insurance. Faced with the difficulty of characterizing the economic dismissal, the employer now prefers to resort to conventional termination or dismissal for personal reasons, less favourable for the employee.
- Making an economic dismissal can make it possible to restore the situation of an enterprise in order to avoid the need to carry out more layoffs, or even judicial redress.
- The companies that adapt quickly to economic change, are more growth-oriented firms, and create more jobs.

Another important role is played also by the introduction of CPA, *Compte personnel d'activité*. The personal activity account represents a considerable social advance, which must prefigure the social protection of tomorrow, allows everyone to build his professional career and the creation of a universal right to training. Everyone can now accumulate rights throughout his active life and use them at the time when he wants, according to his needs.

The Bill specifies its content and enriches it, by including the personal training account (CPF), the creation of a future citizen engagement account which will allow to benefit from hours of training in the event of volunteering or voluntary work and the increase in the number of hours of training for workers without degrees.

The law introduces also, for the first time, the 'right to disconnect' (*droit à la déconnexion*) that will apply to all employees. Companies will have the duty to put in place instruments of regulation of the digital tool. These measures will ensure the

respect of the time of rest and holidays as well as the balance between work and personal and family life.

In order to implement these measures, priority will be given to negotiating with the social partners. Companies who have a representative will have to engage in a negotiation to define the modalities according to which the employee may exercise its right to disconnect. Failing agreement, the employer must still implement this right; this should take the form of a Charter.

This measure has come into force on January 1, 2017.

Currently, the law provides the possibility for a company that is in difficulty to sign a '*Accord de maintien dans l'emploi*', also called 'defensive agreement', in which may be provided for changes in wages or in working time.

In a perspective of 'development' of the employment, the new law opens this possibility of agreement in case of development of the company, the so called *Accord offensive*, 'offensive' agreement, especially when it wants to conquer new markets and sign new contracts. The company can then let work harder its employees (without paying more) to meet the new needs of its activity, to become more competitive.

This agreement can be applied for a period of 2 years.

The text affirms also that an employee who refuses to implement this offensive agreement can be dismissed by the employer. Following the review of the text, this would be an economic dismissal and not a personal dismissal.

An interesting discipline has to be mentioned concerning the *Prud'homme*.

Any employee unfairly dismissed by his employer can turn to the tribunal, in order to get benefits. Before the law, these benefits were no subject to particular limitations and their amount could be freely set by the judges, who determined it on a case by case basis. This freedom can be seen as a source of uncertainties, especially for employers for which it's difficult to assess in advance the amounts they will pay at the end of a process.

In order to harmonize the amounts awarded by the courts, the Bill aims to establish labour compensation ceilings, depending on a scale. These maximum amounts will be determined depending on seniority.

Originally planned as compulsory, the scale of benefits in case of abusive dismissal should finally be only indicative for the labour courts. Unless the employer and the employee jointly ask its application to the judge.

Concerning the measures for workers with disabilities, there're some news. By strengthening the awareness of disability, the *Loi Travail* contributes to improve the conditions of access and maintenance of all in employment.

Certain people need to rely on his family or his close entourage to be helped in everyday life. That's why the law wants to support both people with disabilities and families.

The missions of the *Cap Emploi*² placement agencies in terms of professional integration for people with disabilities, will be expanded to the maintenance in employment. The goas is the accompaniment of people with disabilities in the long term through greater integration and greater continuity of supply of service.

Workers recognized with disabilities will benefit from individual monitoring strengthened of their health, from the visit of information and prevention to the hiring.

A new mission will be given to the CHSCT³ in favour of workers with disabilities.

The law also established an accompanied employment for disabled workers. This support includes medical follow-up and support for the integration, in order to allow disabled workers to access and maintain employment. Its implementation also includes a support and accompaniment by the employer.

If there is a child or adult disabled at home, a derogation to the prohibition to take more than 24 working days of vacation will be implemented.

² The *Cap employ* is a national network of entities of placement specialized at the service of the people with disabilities and of employers for employment, skills and disability adequacy

³ The CHST is the Committee of hygiene, safety and working conditions that aims to protect the health and safety of employees in the company.

Finally, just to mention the central topic on which we'll focus later, the discipline adopted in relation to the working time: in terms of working time, in fact, the French country puts his hand to a law that for the French is untouchable, making larger the weekly timetable flexibility and cutting overtime pay, but with this topic we'll discuss in the next chapters.

To be more precise, all the Decrees concerning the working time section of the Labour Law promulgated in August and entered into force from January 1, 2017, establish the primacy of the company agreement on the branch agreement. The publication of these decrees makes it possible to apply the Article 8 (the old Article 2), the main article of the law which has been at the heart of the dispute, and the Article 9 concerning the specific leaves, according to the Ministry of Labour.

If in the past, branch level agreements took priority over company level agreements, now the situation is changing. This is the reason why it's said that France are facing a 'reversal of the hierarchy of norms'. This is the topic on which this paper is mainly focus and which proposes a re-definition of the balance between workers and companies, favouring the second ones, by making the company agreement the new norm.

1.5 Jobs Act and *Loi Travail*: a difficult comparison

The new French labour reform has also been called French Jobs Act, taking into consideration the many similarities with the Italian reform, as for example by supporters of the *Loi Travail*, who have more times expressed not to take seriously the idea of an 'Italian model' for France, because of the presence of significant differences in the dynamics of labour markets in the two countries.

Between the two laws, there're certainly common things. First at all, the prosecution of the modernisation of labour markets by reducing the safety devices for workers, with particular reference to the controversy about changes on layoffs for economic reasons.

Starting from an intervention on the regulatory system for labour, the French reform reviews the hierarchy of sources establishing the primacy of company negotiations, aspect not touched by Italian reform that is more focused, unlike the French, on forms of employment.

In terms of working policies, the French law introduces a modern concept of active policies through the protection you can get thanks to the CPA, the personal account of activities that groups a set of protections anchored to the person, regardless of their status or profession. This is something different from the Italian relocation agreement, then removed and replaced by little or nothing financed cheque.

On the face of the technology, the difference of approach is clear by comparing the introduction of more controls thanks to technologies, in Italy, and the right of disconnection of the French reform.

We're facing with two opposed visions in the regulation of labour relations.

On the one hand, a measure of centralist inspiration, the Italian one, who takes credit for the marginalization of the role of representation.

On the other hand, the French reforms aims at establishing the centrality of collective bargaining law, by giving to the law a residual and additional role, with the belief that the closeness and adaptability are the only viable dimensions in a context of

international competition and globalization that marginalizes the role of the national legislation.

We can observe the paradox of the change of identity of French and Italian systems.

The first one has always been strongly 'statist', characterized by a centralized bureaucracy, which pervaded the regulation of relations between the parties.

The second one inspired by the Anglo-Saxon tradition, in which the parties have always been free to decide its own rules and its own game.

In this sense, *Loi travail* and Jobs Act seem to reverse these traditions.

What is most striking, however, is not the different vision but, in both cases, the distance between the design and the final alignment of legislation. Because this is where the real strength of the two Governments is measured. In processing the Jobs Act, the Italian Premier Matteo Renzi didn't find a single real obstacle in his way. It's not the same for The Premier Manuel Valls, who had to face unions still able to speak to the hearts of the people and mobilize a massive opposition to induce the French Government to make widely backed off more times.

The development of the Collective Bargaining Agreement

2.1 A brief overview

A company is a centre of production of goods and services. This production is based on expertise, investment and more often on a community of work of employees. For reasons concerning organization and management, but also sociology, psychology, history, ideology and right, the individual or collective work relation is one of the most complex subject with which the modern societies have to deal.

These relations are essential in order to define the principles on which is based the company, its competitiveness and sometimes its existence, and in particular the daily life of millions of workers: work contracts, rights and obligations of the employer and employees, wages, working time, working conditions, health and safety at work, articulation between private and professional life.

The labour law is built since the 19th century on an essential observation: the contract concluded between the employer and the employee was an unequal contract by nature that benefits only the employer.

Gradually, a series of legislative provisions in the labour code have been taken in order to compensate for the inequality and ensure the protection of the employee.

If we take into consideration the France, the code has been gradually enriched with multiple provisions, not only for a better protection of workers, but for a better regulation of a complex society and to meet the demand of legal security by different actors, including enterprises and professional organizations.

Other factors have contributed to a significant increase in provisions in this code.

Firstly, the necessary transposition of a legislation particularly abundant in work and employment, since the beginning of the 1980s, especially in the field of safety and health at work. Secondly, a form of politicization of the code, contributing to a legislative and regulatory instability. Finally, a broad interpretation of the skills of the legislator in the definition of the basic principles of the labour law.

This is the context in which, since the beginning of the 20th century, was gradually created between the law and the employment contract the faculty recognized to, on the one hand, trade unions of employees and, on the other hand, employers and to the organisations representing them, to sign collective agreements. By delegation of the law and in conditions defined by the labour code, these agreements can create standards for companies and their employees.

A collective agreement , also called Collective Bargaining Agreements (CBA) is a commercial agreement negotiated 'collectively' between an employer or a group of employers , more in general the management , on behalf of the company, and one or several trade union organizations, on behalf of employees, in order to establish rules, relating to the work conditions, employment or social guarantees for employees.

It regulates the terms and conditions of employees in the workplace, their duties and those ones of the employer. Collective agreements represent, in other terms, the result of the process of negotiation between employers, whose interests are represented by trade unions to which employees belong, and a group of employees, commonly represented by management, aimed at the regulation of working salaries, working conditions, benefits, and other aspects of workers' compensation and rights.

The collective agreements reached by these negotiations usually set out specific topics: salaries, working hours, training, health insurance, safety, overtime, grievance mechanisms, and rights to participate in workplace or company affairs.

In this sense, collective agreements differ from the *conventions collectives* , which relate to working conditions as a whole and whose scope is therefore broader.

Concerning the fields of application, unless subject to an extension by ministerial order⁴, a collective agreement applies only to employers who join organizations that are signatories to the text.

⁴ In this case, we refer to the *Accord étendu* , which is a type of collective agreement that is the subject of an order of extension by the Ministry of Labour. The ordinary collective agreement commits only employers joining employers organizations signatories to the text, instead the 'extended' collective agreement applies to all enterprises taking part of the agreement, even to those ones who had not joined a signatory union. To be applicable, an extension order must be published in the *Journal Officiel*.

These collective agreements, in France, take place essentially at three levels: national, industry and company level and at each level there are detailed rules about who can negotiate and the requirements for an agreement to be valid.

In general, industry level agreements are the most important for negotiation, in terms of numbers covered.

- *Accords Nationaux Interprofessionnels* (ANI): The national inter-professional agreement is the result of a negotiation between social partners at the national level, usually related to the terms of contracts of work in all the areas.

The National and Inter-professional level corresponds to the major agreements with the main employers ' organizations and the trade union confederations, such as CGT, CFDT, FO. Coming from a dialogue between the social partners, the national inter-professional agreement is adopted when the representative majority of unions and employers accept the terms of the text.

An ANI can open new rights to employees and bring more flexibility to companies. It can also work to introduce more social justice.

The themes covered are negotiated between the parties or proposed by the Government. The measures discussed by the professional agreements already made evolutions in the labour law as on partial unemployment compensation, the working time arrangements, rights to training, or may focus on creations of bodies such as the Joint Funds of securing career paths (*Fonds paritaire de sécurisation des parcours professionnels*) . The FPSPP is a charge to secure professional careers of employees but also to help maintain and the return to employment of the most vulnerable groups on the labour market. This Fund was created through the national inter-professional agreement of January 7, 2009, succeeding unique Equalization Fund (*Fonds unique de péréquation, FUP*). The FPSPP takes

the form of an association made up of unions of employers and employees, representative at national and intersectoral level.⁵

- *Accords de Branche* : A branch agreement is an agreement between one or more groups of companies belonging to the same sector of activity and one or several representative trade unions. Its content covers the conditions of work and employment as well as social guarantees granted to employees. The branch agreement allows to supplement the law through rules specifically adapted to a professional branch, namely a set of undertakings in a given sector of activity (banking, building, etc.).

In principle, a branch agreement applies only to employers adhering to one of the organisations employer signatories to the text. But the agreement may nevertheless be the subject of an extension by ministerial order, in this case we talk about *Accord de branche étendu*. This is an industry agreement, subject of an order of extension on the part of the Ministry of Labour. The branch-wide agreement applies to all companies in the industry covered by the text. In this sense, it differs from the branch '*ordinaire*' agreement that applies to companies adhering to one of the organisations employer signatories to the agreement.

Signing an agreement of branch allows to make a regulatory framework to the companies in the same branch. It allows to adapt the law features of a professional branch, but also to improve and supplement the provisions of the Labour Code. The branch agreement rules: the exercise of the right

⁵ Among national inter-professional agreements, we can take into account other many examples. The national inter-professional agreement of 21 February 1968 on partial unemployment compensation, the national inter-professional agreement of 23 November 1989 on professional equality between men and women, the national inter-professional agreement of 3 July 1991 on vocational training, the agreement of 13 November 2003 relating to supplementary pensions Agirc and Arrco, the national inter-professional agreement of 5 April 2005 on the convention of custom reclassification. The agreement of January 11, 2013 for a new economic and social model at the service of competitiveness of businesses and securing employment and career paths of employees: it changed including personal training account, rechargeable rights to unemployment insurance, the presence of workers in the governing body, the generalization of the minimum health insurance and supervision of part-time.

and freedom of opinion of employees, hiring conditions and the life of the contract of employment, the essential elements of the classifications and levels of qualification, the elements of the wage for each professional category, the leaves, vocational training, the procedures of access to a pension scheme, the minimum coverage for the employees.

- *Accords d'entreprise et accords d'établissement* : The company agreement is an agreement on working conditions and social guarantees for employees of a company. It is the result of negotiations between Union representatives and the employer. It seeks to adapt the general rules laid down by the Labour Code to the specific needs of a company.

The company agreement may offer less favourable provisions to the employees than an agreement regarding a territorial or professional scope wider.

The new French labour law, adopted on 21 June 2016, gives more power to this type of agreement, as we're going to analyse later.

The company agreement has always played an important role in the development of the collective bargaining, in the French country, since the 2004, especially the company agreement so called *dérogatoires*. The Law No. 2004-391 of May 4, 2004 opened the faculty to negotiate collective agreements (at the level of the company) derogating *in peius* to the agreements covering a territorial or professional field over wide (branch agreements, inter professional agreements), with the condition that the latter don't prohibit this type of derogation.

The authors of the Law No. 2004-391 of 4 May 2004 wanted to "*instituer de nouvelles marges d'autonomie dans les rapports entre les accords d'entreprise et les accords de branches ou interprofessionnels*".⁶ According to the Minister of Labour, the aim was to give a "*place renforcée*" to the company agreements.⁷

⁶ Projet de loi relatif à la formation tout au long de la vie et au dialogue social, *Assemblée Nationale* 19 novembre 2003

⁷ Circulaire DRT No 09, 22 septembre 2004, *BOTTEFP* n° 2004/20, 5 novembre 2004

2.2 A constant evolution in the French reforms

It's commonly said that France gives the law a large spaces, as a mode of regulation, rather than the collective agreement and the employment contract. But it's interesting to observe how this statement could be analysed and discussed.

Historically, France labour relations were organized by the State.

In 2001, a study of comparative legislation in the Senate shows that, in most of the industrialized countries, employers and unions enjoy a broad normative autonomy, whereas the French situation is characterized by an omnipresent State, involving the law prominently in labour relations at the expense of collective bargaining with the social partners. Several reasons have to be taken into consideration in order to explain the peculiarities of France.

On the one hand the French Revolution distrusts intermediary bodies between the State and individuals. In 1791 the *Décret d'Allarde*⁸ removes the corporations and the *Loi Le Chapelier*⁹ prohibited coalitions of workers. The State owns the legitimacy, in order to embody and implement the general interest. Protection and individual rights of workers have been firstly the case of the State that through the law fixed a valid social public order for all: "*L'Etat ne doit pas chercher à tout régenter mais il a un rôle de garant de la cohésion sociale.*" (Jacques Chirac, January 2000).

⁸ The Decree of Allarde is a law of 2 and March 17, 1791, by Pierre of Allarde, who abolished the guilds. Guilds were associations of persons engaged in the same trade, which regulated every city across the profession.

⁹ On June 14, 1791, in coherence with the Decree of Allarde, the French Constituent Assembly prohibited the replenishment of any professional associations.

"Les citoyens d'un même état ou profession, les entrepreneurs, ceux qui ont boutique ouverte ne pourront, lorsqu'ils se trouveront ensemble, se nommer ni présidents, ni secrétaires, ni syndics, tenir des registres, prendre des arrêtés ou délibération, former des règlements sur leurs prétendus intérêts communs" (Art. 2 of the law of the Member Isaac Le Chapelier)

On the other hand, the French Trade Union culture has been based on confrontation rather than on compromise, either before or after the Law of 21 March 1884¹⁰, whose ambition was already to substitute dialogue for confrontation. The social partners (employers and unions) have a common reluctance to engage in collective bargaining.

The Labour Law in France is marked by the importance of its regulatory character, the part of the *Droit contractuel* resulting from the negotiation is low, as shown in the report of Yves Robineau in 1997, which shows an overview about the distribution of social standards between law and collective bargaining.

At the same time, many reports suggest that negotiation and agreements between employers and trade unions play a more important role than drafting the law. This is the case, as example, of the report of Michel de Virville in 2004.

A number of experts also insists on a more contractual development of law, in order to reconcile efficiency and economic progress. The law of 4 May 2004 , as we can see later, will lead *de facto* to a re-joint between the law and collective bargaining. (Report of seminar of ENA, *École Nationale d'Administration*).

If the State doesn't have a monopoly on the production of social norms, it nevertheless has a pivotal role in their development. It defines the rules of the game, introducing laws to define a framework for social relationships. It arises from the extension of a collective agreement process (created in 1936), the process of *Négociation Collective Annuelle Obligatoire* (NCAO) established by the laws of 1982, the possibility of emergence of new themes of negotiation.

The Law of February 2001 did so for the theme of the savings. It also sets out what is considered to be the minimum status of employees, for example by fixing the level of the minimum wage through the *Salaire Minimum Interprofessionnel de Croissance*, SMIC, the rules concerning the duration of work or hygiene and safety.

An important role is also played by the *Direction du Relations du Travail* (DRT) and by the *Direction Générale de l'Administration et de la Fonction Publique* (DGAFP).

Since many years, it's in progress a re-definition of the roles played by the State and social partners, underlying the re-launch of the social dialogue, the evolution of national

¹⁰ It's called *Loi de "Waldeck Rousseau"* on the establishment of professional unions.

and community legislation, and the competitive economic context. A sort of decentralization to the collective bargaining is what's happening in the French country.

In fact, in reality, the France is a country strongly characterized by collective bargaining and, since about fifteen years, it plays a more and more important role.

The branch, whose perimeter is freely defined by the social partners, is considered to be the relevant determination level of a minimum base of social guarantees for employees (minimum wage, training, qualifications, pension, etc.) and general framing of the organization and working conditions of a sector of economic activity more or less extended.

The role of the branch agreement is of course decisive when the latter is composed primarily of very small businesses or medium-size enterprises, which explains how important it is for professional organizations representing agriculture, the liberal professions or the social economy.

Most of the trade unions see it as a negotiation level mature and secure, but also the way to limit the risk of a competition between companies of the same sector who would engage in "social dumping", in practice at the expense of employees.

More than 95% of employees are covered by an agreement of branch in France, a figure that is almost unrivalled in other countries. One of the reasons for this is that the branch agreements apply to employees in the sector and not only to employees adhering to the unions that have signed the agreement.

The laws of 1982, creating the derogatory agreements, introduced a major innovation: the annual obligation to negotiate in the company on effective wages and effective duration and the organisation of working time. But apart from this mandatory negotiation, company agreements are many and focus on the most various themes.

The first formal recognition that the derogatory agreements have received within French law, as we've just said, has been in 1982, through the so called *Loi Aurox*, including a set of four texts which have changed more than a third of the labour code, by strengthening the rights of workers and their representatives.¹¹

¹¹ Loi n° 82-689 du 4 août 1982 relative "aux libertés des travailleurs dans l'entreprise". It's characterized by four texts: Loi du 4 août 1982 sur "les libertés des travailleurs dans l'entreprise", Loi du 28 octobre sur le

1. Law of August 4, 1982 on the freedoms of workers in the company. The text stipulates in particular that a prior interview is compulsory for a sanction, the employee having the right to appeal to labour courts. It introduced a mandatory rules in enterprises and also granted employees the right to the direct and collective expression on the content and organization of their work, a point that hasn't had the expected impact.
2. Law of October 28, on the development of the representative institutions of the personnel. This text reinforces the protection of representatives of the employees, including termination.
3. Law of November 13, relating to collective negotiation and the settlement of collective disputes of the travail. It requires employers to provide an annual negotiation on wages and the work organisation. These negotiations, however, needn't necessarily lead to an agreement.
4. Law of December 23, relating to the Committees of hygiene, safety and working conditions (CHSCT). The text gives the birth to the CHSCT in enterprises with at least 50 employees. These must be consulted before any decision amending the working conditions and conduct investigations in case of an accident at work or occupational disease. The law also allows the employees to exercise a right of withdrawal in the event of serious and imminent danger.

"développement des institutions représentatives du personnel", Loi du 13 novembre relative à la "négociation collective et au règlement des conflits collectifs du travail", Loi du 23 décembre relative aux "comités d'hygiène, de sécurité et des conditions de travail (CHSCT)".

This law has opened a light in the system of sources of French labour law, leading to configure the subsidiarity of the branch agreements to the company agreements and, secondly, the first ones became supplementary to the second ones, as well as the social partners themselves had proposed with the inter-professional agreements of 1995 and then with the so called *Position Commune* of July 16, 2001 , which contributes to the achievement of the following three objectives: development of the collective negotiation, the strengthening of the social dialogue and the creation of complementarity between the role of the law and the dynamics of collective bargaining.

At this point, it's necessary to make a brief parenthesis.

In the French Law, long relationships between the different levels have been governed by the so called *Principe de Faveur*. It's also known as "principle of the most favourable", or "principle of the most favourable provision", which allows you to resolve conflicts of standards for the benefit of the provision that is the most favourable to employees.

The Principle of Favour is a fundamental principle of the Labour Law. It was formalized in 1973 by a judgment of the Council of State according to which we can negotiate a convention or an agreement by improving the rights of the employee. A collective agreement or an agreement of branch must, to be valid, be more favourable than the law, and at the same time a company agreement should improve the protection offered to employees by the branch agreement or the Labour Code.

It's considered a basic principle within the meaning of Article 34 of the French Constitution: "*Lorsque deux normes sont applicables à une même relation de travail, il faut, en principe, retenir la plus favorable aux salariés*".

This provision is exceptional in the French law, as it's in contradiction with the principle of the hierarchy of norms. In principle, each standard must conform to the standards which are higher in the hierarchy. In this case, contracts may derogate from provisions at a superior level, with the requirement that they must be more favourable to the employee. The judge therefore strictly controls what contains a most favourable clause.

The legal source of the principle of favour lies in article L 2251-1 of the Labour Code, which states:

“La convention et l'accord collectif de travail peuvent comporter des dispositions plus favorables aux salariés que celles des lois et règlements en vigueur. Ils ne peuvent déroger aux dispositions d'ordre public de ces lois et règlements”.

Additional source, Article L. 2254-1:

“lorsqu'un employeur est lié par les clauses d'une convention ou d'un accord collectif de travail, ces clauses s'appliquent aux contrats de travail conclu avec lui, sauf stipulations plus favorables.”

As we've told before, this general framework of collective bargaining has changed greatly since 1982, in the sense of a reference even more frequent and substantial of the Labour Code to the collective bargaining as well as empowerment of different levels of negotiations, strongly limiting the scope of the principle of favour.

In fact, starting from 1982, the legislature modifies this *“ordre public social”* by making possible the conclusion of derogating agreements, negotiated under this threshold of protection. The principle starts to lose its strength and sees its scope reduced and become spectators of a decentralization towards collective bargaining.

This evolution in the laws occurred in several stages.

The first ones are represented by the *Lois Aubrey* of June 13, 1998 and January 19, 2000. The RTT, *Réduction du Temps du Travail*, is a policy implemented by Martine Aubry, under the Government of Lionel Jospin, in order to reduce weekly working time with the idea that it would create jobs and revive the economy in France, to fight against unemployment by sharing the work.

These political ideas gave rise to the *Loi d'orientation et d'incitation relative à la réduction du temps de travail* (Law No. 98-461 of June 13, 1998) that aims to prepare the ground and inform employers and then to the *Loi relative à la réduction négociée du temps de travail* (Law No. 2000-37 of 19 January 2000) that lays down the rules of application of the transition to the 35 hours. As example: the 35-hour crossing times depended on the size of the company.

These two laws expand the “derogatory” on working time agreements.

With the *Position Commune* of 2001, mentioned before, and the Law of 4 May 2004, called *Loi Fillon*, there’s a new step in empowering the company compared to the branch agreement.

As we know, If the option of stipulating the so called *accords dérogatoires*, especially at the enterprise level will be submitted to the compliance of the conditions and procedures laid down in detail by the law, the collective bargaining remains subjected to the will of the legislator and we cannot talk about any change in the traditional relationship between sources of labour law.

What is necessary and that, before the parties and then the legislature want to pursue with the reform of 2004, is the recognition of the collective bargaining, especially the most decentralized. Such recognition is quite legitimate as long as the *accords dérogatoires* maintain a level of worker protection at least equivalent to that provided by the law. It is only in this way that it’s possible to achieve not only an alteration of the traditional hierarchy of legal sources of labour, but also and especially all the emancipation of the collective bargaining by law, condition that is necessary in order to speak in France about a sort of “collective autonomy” of the social parties. This is the path taken by the parties through the *Position Commune* of 2001 and then with the Law of 4 May 2004.

One of the main objectives pursued by the documents referred to, there’s the development of collective bargaining and the strengthening of the means of social dialogue and especially the aim of creating a dynamic complementarity between the rules of law and that of collective bargaining. There was also an intervention in order to qualify directly and specifically some standards as supplementary or dispositive and no longer as imperative; It’s enough to add to the legal text the expression “unless otherwise specified by the applicable collective agreement”. The goal to be achieved, as is very clear from both documents referred to, is that the law will become supplementary in relation to the collective bargaining, and in particular in favour of the more decentralised level, the company level.

In general, with the Law of 4 May 2004, a new stage is reached by empowering the company agreement in relation to the branch agreement. The branch agreements can waive to an agreement at higher level, unless it provides otherwise.

This possibility of derogation is open to all the subjects of negotiation, except for minimum salaries, classifications, pooling funds of vocational training and the pooling of funds of the supplementary social protection (Art. L. 2253-3 of the Labour code).

The Larcher Law, of January 31, 2007 , is inspired by the system applicable in the European Union; It gives inter-professional collective bargaining a new place, establishing that any reform envisaged by the Government in relation to the employment, work and professional training, must be preceded by a request at a national inter-professional level (Article L. 1 of the Labour Code).

Finally, the law of 20 August 2008, known as the Bertrand Law, confers, always on the duration of the work agreement, to the enterprise agreement the competence to elaborate certain rules concerning overtime, allocation and scheduling of working time. The branch agreement applies only in the absence of such a company agreement, and the Labour Code in the absence of a collective agreement.

The most flexible part of the current Labour Code is thus the part devoted to the working time because it proceeds to what the specialists call a “reversal of the standards” in favour of the enterprise agreement.

Parallel to this reinforcement of the place of the agreement and in particular of the company agreement, the laws of 20 August 2008 and 5 March 2014 aim at strengthening the legitimacy of actors by reforming the rules of their representativeness and by strengthening the rules of validity of agreements.

The law of 20 August 2008 defines as representatives the trade unions of employees who have a results-based legitimacy in the professional elections, enterprises committees and staff delegates, and in a specific election for the small businesses (TPE).

The Act of March 5, 2014, known as Sapin Law, has, on the other hand, reformed the representativeness: only organizations that have a significant number of companies

members can sign the agreements on behalf of businesses at the national and inter-professional and branch level.

In the field of employment, the place of collective bargaining is also strong, as it belongs to the representative social partners at inter-professional level to negotiate the unemployment-insurance convention. Also the Act of March 5, 2014 strengthened the place of negotiation in the field of professional training.

Finally, the plans of backup of the employment, which were the subject of an unilateral procedure of the employer with the consultation of Committee of companies, are since the law of June 14, 2013 open to the negotiation.

Beyond these texts, all of the laws passed during this period regarding employment, work and professional training conduct referrals to the collective bargaining, whether industry or business, including in particular: the choice of the day of solidarity, savings, work on Sunday, forward-looking management of jobs and skills, equality between men and women, contract generation, maintenance of employment and mobility agreements.

The more recent laws, whether the Law of August 6, 2015 for growth, activity, and equality of economic opportunity, said *Loi Macron*, on the Sunday work, or the Law of August 17, 2015, said *Loi Rebsamen*, on social dialogue and employment reflect and amplify this evolution. The first one places the collective agreement to the centre of the various devices of Sunday work, the second one aims to rationalize and to combine the different obligations to negotiate at the enterprise level.

2.4 The role played by the Jurisprudence and the State

It's important to precise that this development is not only legislative, since the judge has accompanied this evolution. The Court of Justice of the European Union (CJEU), the institution of the EU that encompasses the whole judiciary, also called Court of Luxembourg, defines the collective bargaining as a principle at community level.

The Constitutional Council has recognized the role of collective bargaining on the basis of paragraph 8 of the Preamble to the 1946 Constitution, according to which:

“Tout travailleur participe, par l'intermédiaire de ses délégués, à la détermination collective des conditions de travail ainsi qu'à la gestion de l'entreprise” (Decision No. 77-79 DC of the July 5, 1977)

Meanwhile, the Council of State, in its consultative functions, is a vigilant guard of the correct application of article L. 1 of the Labour Code. Its contentious formations ensure the correct application of constitutional principles and of rules of the Labour Law.

These jurisprudences are characterized by ups and downs. The Court of Luxembourg had to balance collective bargaining with the major freedoms of the European Union, which are the free movement of persons and the free provision of services. In such contested jurisprudence, the Court found that collective agreements could ignore these freedoms and hinder, for example, the free movement of workers.

The application of the principle of equality by the judicial or administrative judge is appeared particularly destabilizing for the negotiation, whose one of the objects, by nature, is to make differentiations.

Concerning the issue of the validity of collective agreements, the judge became a full player of the collective bargaining. This role as a final player of the collective bargaining is not without risk for the judge himself, in fact the reality of negotiation and of its issues is different from the reality of the contentious that is subjected to him.

The main thing is noting that the Jurisprudence, in essence, rather than accompanying the legislative movement to give more room to the collective agreements, it discourages them. The Labour Law in France, in general, has been criticized more and more times, because it's one of the furthest law in the recurrence to the collective bargaining in all its forms.

If we take in consideration the role played by the State, we'll observe two opposite points of view. The services of the State, and more particularly those of the Ministry of Labour, plays an essential role in this area. In terms of collective bargaining, the State, on the one hand, facilitates the legislative movement and avoids delays, on the other hand, it becomes the "policeman" who controls the violations of the law.

The State plays a supporting role when it contributes directly or indirectly to accompany, encourage, and facilitate the negotiation. This action is not so known or recognized and sovereign tools are not requested. Everything goes around the practice, expertise and especially a lot of time of agents of the State put at the service of the social partners.

At the industry level, the State is present in the form of the Presidency of mixed Committees, which are formed if the negotiations are blocked. When the subject becomes very sensitive, socially and politically, the DGT *Direction General du travail* can intervene. More in general, the DGT is engaged in the development of legislative and regulatory texts and in the development of the actions related to its field of expertise: labour relations, support and monitoring of the collective bargaining, working conditions, health protection and safety in the workplace.

The DGEFP , *Délégation générale à l'emploi et à la formation professionnelles*, is also very active, especially during the negotiation of the convention of unemployment-insurance, with also a mechanisms of lifts at the highest levels in case of serious difficulties.

The State plays also a role of support and impetus through its decentralized services , the action of the DIRECCTE , *Directions régionales des entreprises, de la concurrence, de la*

consommation, du travail et de l'emploi, concerning the agreements stipulated at company level.

In the majority of cases, the presence of the State is not imposed to the social parties, but it's requested by them. The only limit is the capacity of the services of the Ministry of Labour and Employment to cope with this demand.

The same State plays a different role when it ensures the control of the legality of the branch agreements, through the orders of extension taken after notice by the Minister of Labour of the National Commission for collective bargaining composed by the social parties representatives. The control of the State is not exclusively legal and integrated, in law, to the refusal of extensions, but also to the considerations of opportunity on the value of the agreement for the branch concerned.

In front of the growing complexity of the texts submitted to the extension and because of the delicate questions of opportunity that may cause these agreements, delays for the extension procedures were significantly lengthened, causing criticism of the part of the social parties concerned.

On the other hand, the State doesn't play this role of control, except in the case of particular agreements concerning employee savings, for the company agreements.

In fact, company agreements are the object of the control exerted by the DIRECCTE, but this procedure doesn't allow the services to operate a control of legality on these agreements, like the State exert on branch agreements.

So, only the judge can control the validity of the company agreement.

To these interventions of the State and its services in the field of negotiation, recently has been added an intervention in the form of punishment that is usually referred to as *négociation administrée*. This term is not so exact, legally speaking, but it's often used by the Ministry of Labour. It designates all those mechanisms, put in place in the years 2010, which aim to strongly encourage companies, under penalty of contributions generally sitting on the payroll, to encourage business or, failing that, to negotiate

unilateral plans taken after notice of the enterprises Committee, on topics considered as politically and socially sensitive.

Governments are very “fond” of these devices, which are very simple in appearance, since it’s about to apply a maximum contribution of 1% of the payroll in absence of agreement or to plan on topics such as the equality between men and women, the employment of senior citizens, the generation contract.

These devices can force the existence of a negotiation, and so the presentation of statistics can seem advantageous, but not to the quality or the efficiency of the negotiation that in these fields should be essential.

2.4 Bilan 2015: An analysis of the results

Despite the multiple efforts of governments and legislators to the collective bargaining, not forgetting of course those of the actors themselves that are the social parties, the balance sheet remains mixed.

However, there are obviously positive elements regularly underlined by the annual review of collective bargaining established by the services of the Ministry of Labour (DGT, DARES).

“Il est d’usage (...) de souligner le rôle toujours plus essentiel de la négociation collective dans notre modèle de relations sociales du travail ; l’année 2014 s’inscrit dans ce mouvement de longue durée. Comme en 2013, la persistance d’une négociation dynamique notamment au niveau des branches et des entreprises, nonobstant un contexte économique difficile, atteste que le dialogue social constitue toujours un levier essentiel pour à la fois préserver et transformer notre modèle social et assurer un développement économique durable, source de progrès social”

Bilan 2015 de l’année 2014

There is a sustained conventional activity at the branch level which, according to the years, varies approximately from 1000 to 1300 agreements, precisely 951 in 2014. About the company agreements, the numbers are relatively stable and are around 35000 per year, more in detail 36500 in 2014.

From a qualitative point of view, the negotiation is active. On the one hand, if we take into account the branch level, the main themes are wages, complementary pensions, professional training, the employment contract, professional equality and working time. The company agreement, on the other hand, has the priority over wages, working time and employment.

Finally, contrary to what it’s said about some trade unions that don’t sign collective agreements, the signature rates show us that all the representative trade unions participate fully in the negotiation and in the signing of agreements.

The assessment that can be made is that collective bargaining, at all levels, is characterized by a stable activity which shows a real involvement of the actors.

This statement may appear reassuring, but at the same time that stable character of negotiation is not without surprise in a period where, in the circumstances previously set, the legislator has operated big reforms aimed at making the collective bargaining, in a systematic way, an essential lever of the regulation in the society.

These reforms, concretely, haven't triggered a new dynamic for the collective bargaining. Below, a brief focus on the effects of the most important changes during the last years in France.

The effects of the law of 4 May 2004 to derogate through a company agreement to a higher level, including out-of-favour principle, seem to have been limited.

One check on the law has shown us that the social parties have tried to "block" the faculty to derogate from enterprises, in the branch agreements, as allowed by the law.

For the following years, it hasn't been done, nor by the social partners or by the State, a follow-up to assess today the importance of the *accords d'entreprise "dérogatoires"*.

It would seem very strange, but this issue doesn't seem to be taken into consideration by interest the actors of the negotiation. From both the sides of the trade unions and human resources, many negotiators of company agreements recognize that the negotiation of these agreements is blind, and so there's no worry about the content of the branch agreement covering the area in which is located the company, and so without worries about any clauses of "blocking".

The Act of August 20, 2008 conducted a reform without precedents in terms of working time by reversing the standards for the benefit of the company agreement, concerning the quotas overtime, distribution and development of scheduling.

But it's important to analyse the way in which the tools, provided by the law mentioned above, have been used by enterprises. These provisions seem to have been little used even if the theme of the working time remains the second theme of negotiation (21% of agreements addressing this problem in 2014).

“Les entreprises, surtout les grandes et les moyennes, n’ont pas souhaité s’engager dans une remise en cause des accords de RTT conclus dans le sillage des lois Aubry”

Yves Struillou, Directeur of DGT

According to DARES, company agreements on working time in 2010 are less than those ones in 2009. This decrease underlines the weak appropriation by the enterprises of the opportunity of development and derogation provided by the law of 2008.

In the parliamentary investigation of 2014 on the impact of 35 hours, the Director of DGT, Yves Struillou, pointed out that there was nothing in the statistics report to conclude that there has been an effective appropriation of these tools. In fact, he affirmed that enterprises, in particular the big and medium enterprises, didn’t want to question the agreements concluded with the Aubry Law. More often, they have preferred the continuity, with a possible development of the organisation of the working time.

A central theme as the theme of working conditions seems to be not so common in the company agreements. In fact, in 2014, this topic was addressed in only 2% of the agreements, against 4% in 2013 and 5 % in 2012. At the level of branches, the finding is similar: the agreements addressing this issue is little more than 4% of the agreements in 2013 and 2014.

It’s important to say that these data have to be taken into account with caution. In fact it’s possible that only few agreements are characterized explicitly by this title, but the theme of working conditions however can be present in agreements concerning other themes. Finally, on March 31, 2015, and since the entry into force of the device, the cumulative number of branch agreements relating to the prevention *de la pénibilité* concluded is 16, no new agreement has been signed in 2014.

The various laws on the equality between men and women that refer to a collective agreement have led to collective agreements little innovative on this subject and limited to paraphrase the legislative provisions of the Labour Code.

Finally, the small business are largely excluded from the collective bargaining. The modes of derogatory bargaining, in the absence of delegate union, have been little used in recent years, except in the particular field of the employee savings.

Regarding the content of the agreements, their review shows that social innovative agreements remain few in number. However, there are 'real' innovative agreements on the issues such as the forward-looking management of jobs and skills (GPEC) or women and men equality, but they represent an exception.

In addition, a specific difficulty regarding in particular employment.

By nature, the agreement is intended to protect the situation of the employees, in terms of wages, working conditions or employment. But there are very few innovative agreements focusing "outside" and more particularly on the precariousness and the unemployed people. So the collective bargaining tends to accentuate the duality of the labour market.

There is only one exception, very surprising, for which the both quantity and quality assessment is positive. Two years after the vote on Article 13 of the Law of security of employment of 14 June 2013, on the dismissals and the employment backup plans (PSE), the social parties signing the National Inter-professional agreement on January 11, 2013 which is at the origin of the law consider that the results are the most favourable of this time. The PSE are now largely traded in all the companies, whatever their size. Although more qualitative studies should yet to be conducted, it's clear that the negotiation of PSE by union organizations improve their content for employees.

The PES are much more secure for businesses, since the appeal rate to the Tribunal declined from 25 % to 8 %.

It's important to see that in a particularly sensitive subject to the employees and companies, the referral made by the legislature for the benefit of the company agreements seems to be working. But with this notable exception: everything happens as if multiple reforms to the benefit of collective bargaining had very limited effects and didn't truly changed. Therefore, the imperative is trying to look for the causes.

They can be in the content of the Labour Code, but also in the 'game of actors' , who are companies and their professional organisations and trade unions. In other terms, it's difficult to say if one of these two causes come before. The certainty is that they are combined.

2.5 An economic approach to the Collective Bargaining

For some economists, the collective agreement, as a branch agreement, is first at all a form of agreement which, by nature, violates the rules of competition, especially in that it reduces the entry in the branch of new enterprises.

Then, the relation of forces that translate the negotiations at different levels can be decoupled from the economic efficiency in the short term: it prevents any adaptation 'in decline' of the employment conditions remuneration, since the unions put themselves in a place and a logic of distribution of benefits.

Finally, there's a growing decoupling between the time of negotiation, long and not mastered, and the time of economy, shorter and forced.

We could say that collective bargaining is a "double face".

The economy recognizes for a very long time that negotiation can play a very fundamental role in the company, not only to defend the interests of workers, but also to improve the exchange of information between employer and employees. It has been shown that the signature of company agreements allows the companies to reduce the rotation of workforce in France. More than that, the collective bargaining, beyond the companies, can supplement the malfunctioning of markets to reduce the risk of social dumping. But, beyond these statements, the practice show us the actual distance between companies and collective bargaining.

The current trend is that the collective bargaining isn't directly involved in the value creation of the company or even in valorisation of Labour, know-how and intelligence of the work community. It's seen more as a 'cost center' rather than a 'lever of performance'. And this is confirmed if we look more closely at the situation of companies in relation to their size.

Taking into consideration the big enterprises, the leaders of the major groups, including a part of facilities located in the French territory, now have a vision very international of the business, of their development and their projection capabilities in emerging markets. Because of their training and this global approach, they consider the collective bargaining as a local characteristic of the France to be satisfied, but without seeing a lever of competitiveness.

They are more interested in the programs put in place unilaterally such as recruitment plans or talent and skills management, and in the indicators followed by financial analysts in these areas: hiring, turn over, management skills and dismissals. This approach, which is not usual in France, is characterized by an Anglo-Saxon inspiration. These leaders are widely encouraged by firms in the strategy; the key words are: emerging markets, digital world, decision speed, return on investment, new standards of consumption, explosion of management methods. But it's no question about collective bargaining, social dialogue or wages.

In these groups, the collective bargaining is referred to the HR executives who apply a strategy that the top management has hardly associated with them. The issue of collective bargaining seems to be ignored and the modern management includes not or little negotiation.

The human resources departments are accompanied, more often, by experts who generally think that the negotiation of new devices in area of the employment (forward-looking management of job and competences, agreements on the maintenance of employment, mobility agreements, etc.) are less assured legally and have financial and tax implications less advantageous than the backup plans of employment.

With regard to medium-sized businesses, the situation is partly different.

To the constraints of globalization, to which these companies are also faced, are added the constraints imposed by large groups in their position of contractors. Leaders see in the collective bargaining, which could improve the functioning of the company, a triple barrier. On the one hand, there's the time too long and slow of the negotiation that they are not able to control; on the other hand, a legal complexity that hides to them the real issues and consequences for the company.

Finally, concerning very small enterprises (TPE), these questions are still more important because there's no a real interlocutor to the side of employees.

These employers, in fact, believe that the direct and daily relationship that they have with their employees exceeds in terms of quality all the devices of consultation and negotiation that could imagine the Labour Code.

2.6 An European view

Making comparisons is very difficult because, as we know, both the legal and the social systems, differ from one country to another one.

The collective bargaining systems at national level are usually different, depending on the degree of centralization, which is based on the importance of the branch or inter-branch agreements in the regulation of working conditions. But if we look at the company agreements, we can observe as countries where the collective bargaining is dynamic are those characterized by several levels of negotiation, articulated between them. These countries are called “multilevel” and we can mention : Germany, Italy, Nordic countries, etc. They have a double regulation of industry and business, and have Labour Code playing a more limited role.

The France shares the ‘multilevel’ character of its negotiations with these many European countries. Consequently, it seems to be difficult to understand and identify, since the number of levels involved jointly, which is the dominant negotiation and the place of the legislative and regulatory standard.

The French country is also distinguished by the lack of coordination characterizing the social parties of different levels of collective bargaining. On contrary, in countries with a stronger coordination in strategic or leader areas, they impose themselves and become references for negotiations concluded in other sectors, in other regions, or in business, thanks to the strength and to the structuring of the Trade Unions and employer organizations.

In the case of France, it’s the legislation that ‘coordinates’ and harmonizes the content of the agreements. Over the past decades and according to rhythms and variable terms, countries combining several levels of negotiation have known a trend moving the centre of gravity of their system to the company, so a sort of decentralization. Since 2008, the crisis has contributed to increase or to accelerate this trend to decentralization in many countries.

An interesting example to be taken into account is the case of Germany.

In Germany, the collective bargaining is mostly conducted at the sectoral level. Anyway, some employers leave or refuse to join the trade unions, so it’s allowed a greater

flexibility at the company level. Agreements at the industry level, between trade unions and employers organisations, represent the principal level for setting the remuneration and the working conditions in this country.

This aspect is considered as one of the strengths of the system, in fact the conflicts about wages and working conditions take place at the industry level, while at the level of workplace can be developed more cooperation and collaboration, by employers and the Works Councils, the employee representative.

The separate agreements involving trade unions and individual businesses are singular..

According to statistics of the IAB, the Research Institute Government German, in 2011, around 61% of workers in the former West Germany are covered by collective agreements, of which 54% were signed at the industry level and 7% at the level of the companies. In the former East Germany, the overall figure is lower: 49% of workers are covered by an agreement, which only 37% are governed by sectoral agreements and 12% by company agreements.

Sectoral agreements are generally concluded at the regional level and not at national level. There is so slight differences between regions. However, the main provisions of the conventions, including the amount of salary increases, are usually identical in all the regions.

Works councils are not allowed to conclude collective agreements. However, they can sign agreements with individual employers on issues that are not covered by the collective agreement.

Works councils are also able to negotiate over areas covered by collective agreements in two specific circumstances: where they negotiate improvements (better pay, longer holidays and so on), under the so called "*principe du faveur*", and where the collective agreement itself contains a so called "*clauses introductives*", which allows the works council to negotiate on the issue.

It's becoming increasingly common the fact that collective agreements more often take into consideration the specific circumstances of the company. These clauses that allow the works council to negotiate arrangements which are less favourable than those set

out in the industry-level agreement are seen as important way of providing flexibility to the system.

In general, trade unions were thus confronted, following reunification, with a wave of uncontrolled decentralization, collective agreements was substituted by “wild” agreements with the governing boards or simply by disaffiliating themselves from employers' organizations. In order to cope with them and maintain a regulatory role at the sectoral level, trade unions have opted for a strategy to accompany this decentralization by framing them with opening clauses, which in the collective agreements derogate on schedules and wages revaluations, in return for guarantees on employment.

These *accords d'entreprise dérogatoires* have really taken off in 2004, in relation to the initiative of the so called “Pforzheim” agreements in the metal industry, this faculty has been used to improve or maintain the competitiveness objectives, the innovation capacity and the investment conditions. It allows an employer to implement a temporary reduction in compensation below the minima set in a region-wide collective agreement if such steps can be shown to preserve or create employment or to boost competitiveness at the firm.

According to these agreements, the analysis and negotiation of the measures should be done by the dealing parties at company and industry level, the exhaustive information should be made accessible by companies and the conclusion of the derogation agreements have to be in charge of the negotiating parties at industry level (IG Metall¹² 2014) . The main goal was at securing existing jobs or facilitating the creation of new ones. They can only be concluded by the union and the employers' association, anyway the works council and the management of the applying firm are directly involved in the bargaining process.

¹² The *Industriegewerkschaft Metall* is a German Trade Union Federation representing workers in the metallurgical sector, particularly automotive. It represents 2246000 workers and is the largest and most representative among the eight German trade union federations affiliated to the *Deutscher Gewerkschaftsbund* (DGB) and is headquartered in Frankfurt am Main.

It's interesting to see how collective bargaining and corporate policy trends have been developing during the last years. The two important cases of application of the Pforzheim agreement, Siemens and DaimlerChrysler, which signed the agreements in 2004, show us how highly profitable companies were able to derogate from collectively agreed benefits and regulations in order to improve their cost structure, competitiveness and profitability.

In other countries, the crisis has acted as an accelerator to this decentralization, in particular with regard to wages. The countries of the South and some of Eastern, the most affected by the crisis of the debt, have seen an accelerated decentralization by transformation of their negotiation system: the limitation of extension of agreements, the Portugal, the limitation of the renewal of the branch agreements (Spain), the possibility of derogation, or the primacy given to the company agreement, the Ireland. Moreover, many European countries have a legal minimum wage. The moderation or even the reduction applied to this have contributed to strengthen the autonomy of wages negotiations at a more decentralized level, and in particular at the company level.

This dynamics of decentralisation underlines some important reflexions about its effects. Primarily, there's a growing 'dualization' between sectors where collective bargaining still plays a role in structuring (Industry, Bank, etc.) and certain areas of services where this role and the conventional coverage tend to weaken. More generally, this decentralisation puts pressure on the organizations unions, generally accompanied by a decline in unionization.

Secondly, the company level isn't actually a homogeneous space. Within this level, there is a trend in the 'recentralization' of negotiation, at the level of groups of companies seeking to streamline their management, at the national level, and international.

Finally, the crisis could result in different countries in a form of recentralization of wages regulation under the influence of Governments seeking social pacts or more drastically willing to impose fiscal and wage policies much more restrictive.

The issue for the France is about answering to the constraints of globalization by referring to a collective bargaining in line with the French social system.

Copying models, such as Germany social system, which have economic and social performances much more satisfying than the French ones, could be suggested, but it's not the right answer that will let escape the French economy from the constraints of globalization.

3

A reversal of the Hierarchy of norms

Taking into consideration the context above, we're going to introduce you into the focus of the discussion, into the new structure of the French Labour Code, which shows us a new architecture of the standards and a new way of looking at the Labour Law.

In order to do so, we'll analyse in a more detailed way all the measures taken about the working hours and the leaves of the employers, the rules of which are included in the Article 8 and no more in the Art. 2 (by considering the final version of the legislation published in the Official Journal).

The Art. 2 of the French Labour Law covers around 50 pages of the whole project. This is a very long article, which rewrites the provisions of the *Code du Travail* relating to the organization of the working hours and payment of overtime and gives the primacy to the company agreements, in other terms wants to make company agreements the new norm.

This is the reason why It's said that the French Government has chosen to reverse the "hierarchy of norms" by giving priority to the company rather than the national and branch agreement. But this reversal has been rejected by opponents of the text, by the *Force Ouvrière* and, especially, the CGT.

On the one side, the union led by Philippe Martinez has shown more times its willing to break the law, article 2 in the first place. It has been a scandal for the CGT, which underlines the risk of creating a Labour Code for each company and therefore to be less protective for employees. But, beyond this official discourse, the CGT fears that Article 2 will compromise its very future. If the negotiations now take place at company level, it is very likely that the staff will want to have trade union representatives who promote the culture of compromise. This is not the case with the organization of Philippe Martinez which privileges the conflict.

On the other side, the CFDT, for its part, was in favour of the article. To Laurent Berger, the text, as it stands, carries 'more rights for employees'.

But, if we can point out that some specific decisions about work breaks and work schedules can only be taken at company level, at the same time we can affirm that others that are more structural must be decided at national level, otherwise broad competition between companies may lead to bad practices, such as social dumping.

3.1 The hierarchy of standards

The hierarchy of norms was developed by Hans Kelsen¹³. It's a hierarchical vision of legal standards.

The lawyer represents this hierarchy in the form of a pyramid at the top of which there's the Constitution. His reasoning is based on the need to have a conformity between lower legal texts and higher ones. In the French labour law, the logic that articulates in this hierarchy of standards is that one of the Principles of Favour: more we go down in the texts, more benefits go up for employees.

There are two types of control of these legal standards: the control by way of exception and the control by way of action.

The first one is done by ordinary judges. The question of the unconstitutionality of a legal standard will be raised in a specific dispute, and studied only on this occasion.

The second one involves a specific body that, by declaring unconstitutional the standard in question, prevents its entry into force.

According to Kelsen, any legal standard receives its validity of its conformity to a higher standard, thus forming a hierarchical order. More they're important, less the standards are: the overlapping of standards (circulars, regulations, laws, Constitution) acquires a pyramid shape, which explains the reason why this theory is called pyramid of standards.

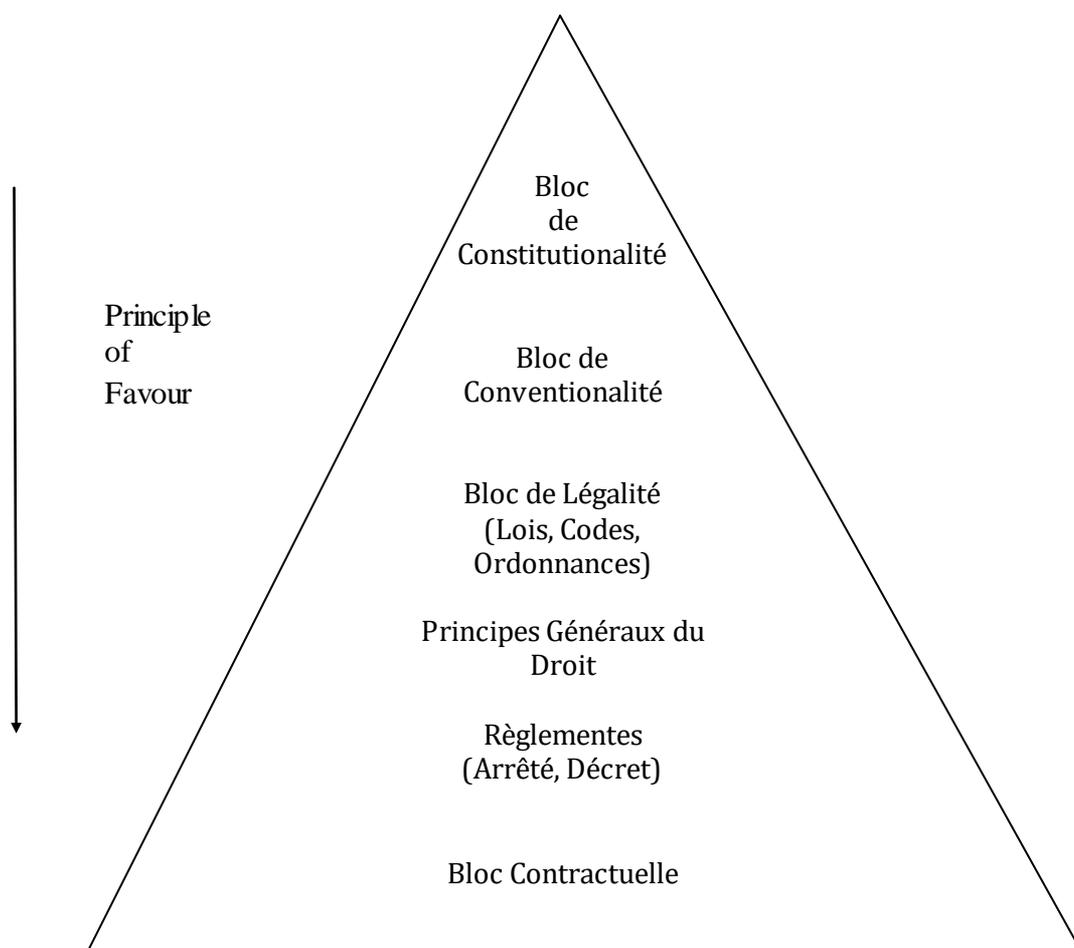
This order is said to be "static" because lower standards must meet the higher standards, but it's also "dynamic" because a standard can be changed according to the rules laid down by the standard that is superior.

The standard placed at the top of the pyramid is the Constitution. Since the Constitution itself couldn't receive its validity of conformity to a higher standard, and that there was no such a standard, the lawyer involved the concept of 'fundamental norm', which consists mainly in a methodological presupposition that is necessary in order to give coherence to the theory of the law.

¹³ Hans Kelsen (1881-1973) was an Austrian jurist and philosopher. He was one of the most important theorists of 20th century law and the greatest exponent of Normativism.

As Kelsen explains in the *Lineaments of pure doctrine of law* (1934) and in the next *General Theory of Standards*, the law is the legal system, which is a system of rules. The unity of the multiplicity of the rules of the system is guaranteed by the 'fundamental rule' (*Grundnorm*), in other words when the validity is traceable to a single basic rule that gives unity to the plurality of standards.

Kelsen explains that standards are worth more than others and that any lower standard must respect that lies above it. As example: a law must be in line with the Constitution, an agreement between two parties, between the social partners or a contract between an employee and his leadership, must conform to the law.



By taking into analysis the Pyramid theorized by Kelsen, following the order from the top to the down, we'll find:

- The Constitutionality block, which includes:
 - Constitution of October 4, 1958 funding the V Republic
 - Preamble of the Constitution (October 27, 1946)
 - Declaration of the Rights of Man and of the Citizen *DDHC* (August 26, 1789)
 - Charter of the environment
 - Fundamental principles

In the French law, this block takes into consideration all the principles and provisions that the laws must meet and of which the Constitutional Council is the guarantor.

- The so called *Bloc de Conventionnalité* includes all the rules from the treaties and international conventions, signed with the States and/or international organizations. In the hierarchy of norms, the block of conventionality is located below the block of constitutionality and above the block of legality. Different types of standards are included in this block:
 - International Treaties
 - Community law

In France, it's called control of conventionality the act of checking if a law or a regulation is in line with international commitments.

The Art. 55 of the Constitution of the fifth French Republic that defines the place of international treaties and agreements in the hierarchy of norms in France states that international treaties have a value greater than the law.

*“Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.”*¹⁴

- In France, we call *Bloc de Légalité*, all the legal texts emanating from the legislative power, mostly. In the hierarchy of norms, the legality block is below the block of conventionality (treaties and international conventions) and the block of constitutionality. So, each of the texts must meet constitutional and conventional standards. The block includes:
 - Ordinary laws, emanated by the legislative power (Parliament)
 - Organic laws
 - Decisions of the President (Art. 16 of the Constitution)
 - European Directives

- The General Principles of French law (PGD) and the Jurisprudence are un-written rules of general scope which are formulated in no text, but that the judge considers as imposed to the administration and to the State and whose violation is considered a violation of the rule of law. They meet three criteria:
 - they apply even in the absence of text
 - they are identified by the Jurisprudence
 - they are “discovered” by the judge at a given moment.

Examples of general principles of law based on the equality are:

- In France, the so called *Bloc Réglementaire* includes all the legal texts emanating from the Executive power. The regulatory power is held by the Prime Minister .

¹⁴ Article 55 of the Constitution of Octobre 4, 1958, *Légifrance*.

By delegation, ministers, prefects, mayors and the deliberative assemblies of local authorities hold a regulatory power.

In the hierarchy of standards, the regulatory power is below the General Principles of Law and over the Administrative acts.

The regulatory block includes, by descending the order in the hierarchy of norms:

- Decrees, signed by the Council of Ministers
 - Simple Decrees, signed by the Premier Minister
 - Decrees in Council of State, signed by the PM after approval of the Council of State
 - Ministerial or inter-ministerial Orders
 - Prefectural Orders
- In the hierarchy of norms, the so called *Bloc Contractuelle* includes all the conventions and agreements.

The contracts are legal acts with the aim to create legal effects intended by the contracting parties. They are located at the lower level of the pyramid of the standards, and must conform to all of the above standards. As soon as it has been concluded, a contract has force of law between the parties.

This block consists of :

- Bilateral or multilateral contracts and agreements
- In the hierarchy of the social public order: collective agreements, internal company agreements, employment contracts.

Collective agreements are of several kinds, as we've already told in the first part of this paper: they can be concluded at national, branch and company level. More than that, these collective agreements may have a national, regional or local scope.

In the situation before the approval of new French Labour Law, in application of the principle of favour and the hierarchy of norms, a lower standard couldn't provide for provisions less favourable than those provided for by the higher level. Thus, a company agreement couldn't be less favourable than a branch agreement, which itself couldn't be less favourable than the labour code.

Even if there're exceptions to this principle of favour that are developed in recent years, the principle remained.

The *Loi Travail* completely re-thinks this principle and the structure of the labour code. In fact, with the new architecture, for each theme of the Labour Code, the rules are divided into 3 levels:

- "*Ordre public*" : the rules concerning public order and, therefore, cannot be maintained in the reduction of protection by collective bargaining
- "*Champ de la négociation collective*": the rules that are postponed to collective bargaining
- "*Dispositions supplétives*": the supplementary and residual rules that only apply in the absence of agreement

This new structure will be concretely observed in the last section of this Chapter, by analysing the discipline of the Working time and leaves .

3.2 The role of Company Agreements and the Majority plan

The negotiation of a company agreement allows to adapt the general rules laid down by the Labour Code to the specific needs of a company. It's the result of negotiations between Union representatives and the employer. But in order to encourage negotiation in small business, an agreement can be concluded, under certain conditions, by the elected representatives to the Council (or by the staff representatives) or, in the absence of representatives elected, by a specifically authorized employee.

In all the cases, company agreements are subjected to certain conditions of validity, and to the respect of specific formalities. The conditions of validity of company agreements differ according to the object on which they carry.

In companies with one or more union delegates, the convention or company agreements are negotiated between the employer and the trade unions representative of employees in the company. The delegation must include the delegate of the organization in the company, or in case of plurality of delegates, at least two union delegates.

Under penalty of incurring penalties for union discrimination, the employer must invite in the negotiation all the organizations' union representatives present in the company, and not just some of them. Each trade union organization can complete its delegation with employees of the company. In absence of an agreement with the employer, the number of employees, by delegation, may not exceed the number of the union delegates; except in businesses with only a single union delegate, in fact in this case, two employees may participate in the negotiation.

Time spent in negotiation is paid as working time.

In companies without union delegates, company agreements can be negotiated, concluded and revised by one or more employees expressly mandated by one or more representative unions in the branch or, failing that, by one or more representative trade unions at national and inter-professional level.

These agreements can focus on all the actions that can be negotiated through a company agreement on the basis of the labour code. This negotiation takes place according to the

procedures laid down by Art. L. 2232-24 to L. 2232-27 and L. 2232-27-1 to L. 2232-29 of the labour code.

Moreover, they must have been approved by the employees with the majority of the votes expressed in accordance with the general principles of the electoral law.

The conditions under which the employer collects the approval of employees, the modalities of consultation and information of employees are laid down by Art. D. 2232-2 to D. 2232-5 and D. 2232-8 and D. 2232-9 of the labour code. These articles have been changed at the last by Decree No. 2016-1797 on December 2016, whose provisions apply:

- The agreements on working hours, rest and leave starting from January 1, 2017
- Company agreements for the preservation or development of employment (Art. L. 2254-2)

Negotiation may be required (with themes imposed) or free.

In the first case, the employer is engaged in:

- Each year, a negotiation on remuneration, working time and sharing of added value in the company. (Art. L. 2242-5)
- Each year, a negotiation on professional equality between women and men and the quality of life at work. (Art. L. 2242-8)
- Every three years, in enterprises with at least 300 employees, a negotiation on the management of work and career paths. (Art. L. 2242-13)

Apart from the required annual negotiation, employers and trade unions are free to negotiate on topics they choose.

One of the most impacting changes made by the new labour reform is about the majority company agreements, which become the standards.

In fact, all company agreements are gradually moving to the majority plan. They will have to be signed by trade unions representing at least 50% of the votes cast in favour of representative unions. And a referendum mechanism is nevertheless conceded to the minority agreements.

The obligation to collect the signature of majority unions has been applied from January 1, 2017 to the agreements relating to the duration of work, rest and leave and from September 1, 2019 to the other collective agreements, with some exceptions.

However, there're cases of agreements already submitted to majority rule.

There are already a number of majority agreements, created by prior labour reforms:

- Agreements to waive the periodicity of the mandatory negotiations
- Agreements creating a unique instance of representation of personnel
- Agreements on the backup plan of employment (PSE)
- Maintaining employment agreements

Agreements creating an unique instance and mandatory periodic negotiation agreements will be subject to the new conditions of validity from September 1, 2019.

This means that, from that date, if there is no majority signature, they will be 'validated' through a Referendum.

With exception, the maintaining employment and PSE agreements will retain their own plan: after September 1, 2019 a majority signature will be needed, otherwise, they will be not valid. The signatory unions will not be able to ask for a referendum.

Before the *Loi Travail*, a collective agreement needed, on the one hand, to be signed by trade unions representing at least 30% of the votes cast in the first round of the professional elections and, on the other hand, shouldn't be the subject of opposition by majority unions.

Today, about the new condition of validity, according to the regime of the new French labour law, a collective agreement must be signed by representative trade unions having collected more than 50% of the votes cast for representative organizations in the first round of the last professional elections. Logically, there is no more opposition, since the signature is majority (Art. L. 2232-12 modified) .

There's also a different calculation basis, in fact the reform also changes the basis of calculation of the votes. It's taken into account no more all the votes in the first round of the elections, but only those in favour of representative trade unions.

In the case of failing to represent more than 50% of the votes, signatory unions have the option of submitting the agreement directly to staff. To exercise this prerogative, these unions must represent more than 30% of the votes cast for representative organizations in the first round of the last professional elections.

From the signing of the agreement, the signatory unions have one month to formulate their request for a Referendum. This consultation is at the initiative of the trade unions, who are the key players in the negotiation. It gives the opportunity to the employees to express themselves on their lives at work and choices that directly affect them.

This request marks the starting point for a period of 8 days, intended to give non-signatory unions the time for reflection.

If, at the end of this period, there're no new signatures to exceed the 50% threshold, the employer organizes consultation. The referendum will take place within 2 months following the expiry of the period of 8 days.

Its methods are defined in a specific Protocol, concluded between the employer and the signatory unions. A decree should specify the modalities of the vote.

The agreement must be approved by workers in the majority of the votes cast. It's then valid and may be subject to the formalities of filing with the administration. If failing the approbation by a majority of the votes cast, the agreement shall be considered as not written.

The agreements thus rely on much broader consensus and the employees are better defended. This new rule, as we've said before, has been applied first to the chapter relating to the working time, leave and the rest, as well as employment agreements. And

it will then gradually extended to the other chapters of the labour code, after a first review in 2018.

However, the branches are reinvigorated. The law of August 8, 2016 significantly strengthens the role of them to regulate the competition between the companies and fight against the social dumping. Through permanent negotiation commissions created by the law, they continue to define a “*socle social*” applicable to all employees, so to define the themes on which company agreements cannot be less favourable than the conventions and agreements concluded at the branch level, excluding the themes for which the law provides the primacy of the convention or the company agreement.

More precisely, the law introduces two new themes for which the branch agreement takes precedence over the company agreement.

With the approval of the law, the themes concerned are: classifications, minimum wages, vocational training, difficult working conditions, as well as equality between women and men. The branch also maintains areas of own competence such as the fixing of the minimum period less than 24 hours for part-time employees. Finally, the law of August 8, 2016 has planned that the branches are required to negotiate, within two years, on the definition of their conventional public order (determining through negotiation the other themes for which company agreements cannot be less favourable).

They will coach some new flexibility offered to the companies as the modulation of working time over a period longer than the year. They also will stock each year a report of the new agreements concluded in terms of working hours, leaves and rest and may make recommendations to enterprises.

One of the objectives of the law is also their reduction in terms of numbers. The goal is to rise from 700 branches to 200 professional branches within 3 years.

These branches are very different from each other. Some include several dozens of companies and hundreds of thousands of employees, while other branches are only a few companies and a few dozen employees. Branches that don't reach a significant size can difficultly offer companies the expected benefits in terms of pooling structures and economies of scale.

In the less important industries, social negotiation is not so dynamic, for example certain collective agreements simply repeat the provisions of the labour code and become obsolete when the law is changing.

So, this restructuring should have the effect to strengthen the branches. Social negotiation, in fact, will be more balanced and invigorated. Thus, the branches will be more able to realize their economic, social and normative functions and conventions and collective agreements negotiated will be better.

More than that, the role of branches is further strengthened through an annual review of company agreements to check their impact on working conditions and competition between enterprises, and to make recommendations to the enterprises of the branch. This completes the new role given to the branches that will be grouped within the next 5 years in order to be stronger.

Finally, the law strengthens their role in supporting small enterprises , who need to be better supported. The branches may conclude 'agreements-types' directly available to these companies, allowing them, as well as their employees to benefit from the flexibility open by the company agreement.

3.3 The discipline of the Working time in the French reform

This section of the chapter deals with all the issues related to the working time, one of the most discussed topics with the approval of the *Loi Travail*, whose provisions are contained in the contested ex Article 2, now Article 8.

In terms of working time, as we're going to see, the new French Labour reform provides in many cases that an agreement negotiated within the company, a company agreement, can replace the provisions of a branch agreement, even if these provisions are more favourable to employees. So, the law provides more flexibility to companies, through the conclusion of agreements derogating the branch agreements or the law.

The discipline concerning the working hours is contained in the third Chapter of the Law, entitled "*Une nouvelle architecture des règles en matière de durée du travail et des congés*". which concerns a new architecture of rules on working hours and leaves.

This division responds primarily to the need to give greater weight to the collective bargaining, which, as a legislative source close to businesses and workers, is detected by the supporters of the bill as a vital form project to modernize Labour Law and adapt it to the continuous transformations through the world of work.

This trend is in continuity with the previous *Loi n. 2008-789 du 20 Août 2008*, which provided for the prevalence of the company agreements on the branch ones in certain aspects of working times, as it was considered the most appropriate instrument to meet the specific needs of particular enterprises.¹⁵

¹⁵ The *Loi n. 2008-789*, in particular, provided for the supremacy of the company's agreement in fixing the overtime rate and conditions of overcoming it, the provision of compensatory rest, conventions "*forfeit en heures ou en jour*" for the full year, organization of working time over a period of a week and up to one year, the preparation of the so called "*Épargne-temps*"; the choice of the "Solidarity Day".

Now, we're going to analyse the most relevant parties of the *Titre II*, entitled '*Durée du travail, répartition et aménagement des horaires*', which deals with the duration of work, the repartition and the arrangement of working hours, by focusing on the sections that have been modified mostly through the "*Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*".

The Chapter takes into account a vast and diverse group of provisions, ranging from the discipline of the effective working time to the overtime hours, from the "*conventions du forfait*" to the measures for the distribution and organization of schedules and rules regarding the work during the night, from the part-time work to the intermittent work, and finally to the definition of the daily rest period, public holidays and paid holidays.¹⁶

The Title II of the chapter "*Durée du travail, répartition et aménagement des horaires*" deals with the duration of work, the repartition and the arrangement of working hours. In particular, the section I is about the "*Travail effectif, astreintes et équivalences*" , the real and effective work and constraints.

In order to analyse it, it's needed to consider the new architecture of the Labour Code, by taking into account firstly the sub-section , in this case the "*Travail effectif*", then the three paragraphs, in the following order:

- Public order
- Field of the collective bargaining
- *Dispositions supplétives*

Sub-section I : Effective work

Paragraph I , Public order:

¹⁶ Article. 2 did not instead comprises the provisions relating to the so called "Repos hebdomadaire", which have been recently reformed in the context of the Loi No. 2015-990 du 6 août 2015 pour la croissance, the activité et l'égalité des chances économiques.

Art. L. 3121-1. – “ *La durée du travail effectif est le temps pendant lequel le salarié est à la disposition de l'employeur et se conforme à ses directives sans pouvoir vaquer librement à des occupations personnelles.* ”

Art. L. 3121-2. – “ *Le temps nécessaire à la restauration ainsi que les temps consacrés aux pauses sont considérés comme du temps de travail effectif lorsque les critères définis à l'article L. 3121-1 sont réunis.* ”

Art. L. 3121-3. – “ *Le temps nécessaire aux opérations d'habillage et de déshabillage, lorsque le port d'une tenue de travail est imposé par des dispositions légales, des stipulations conventionnelles, le règlement intérieur ou le contrat de travail et que l'habillage et le déshabillage doivent être réalisés dans l'entreprise ou sur le lieu de travail, fait l'objet de contreparties. Ces contreparties sont accordées soit sous forme de repos, soit sous forme financière.* ”

Art. L. 3121-4. – “ *Le temps de déplacement professionnel pour se rendre sur le lieu d'exécution du contrat de travail n'est pas un temps de travail effectif. Toutefois, s'il dépasse le temps normal de trajet entre le domicile et le lieu habituel de travail, il fait l'objet d'une contrepartie soit sous forme de repos, soit sous forme financière. La part de ce temps de déplacement professionnel coïncidant avec l'horaire de travail n'entraîne aucune perte de salaire.* ”

Art. L. 3121-5. – “*Si le temps de trajet entre le domicile et le lieu habituel de travail est majoré du fait d'un handicap, il peut faire l'objet d'une contrepartie sous forme de repos.*”

Paragraphe II, field of the collective bargaining:

Art. L. 3121-6. – “*Une convention ou un accord d'entreprise ou d'établissement ou, à défaut, une convention ou un accord de branche peut prévoir une rémunération des temps de restauration et de pause mentionnés à l'article L. 3121-2, même lorsque ceux-ci ne sont pas reconnus comme du temps de travail effectif.*”

Art. L. 3121-7. – *“Une convention ou un accord d’entreprise ou d’établissement ou, à défaut, une convention ou un accord de branche prévoit soit d’accorder des contreparties aux temps d’habillage et de déshabillage mentionnés à l’article L. 3121-3, soit d’assimiler ces temps à du temps de travail effectif.”*

“Une convention ou un accord d’entreprise ou d’établissement ou, à défaut, une convention ou un accord de branche prévoit des contreparties lorsque le temps de déplacement professionnel mentionné à l’article L. 3121-4 dépasse le temps normal de trajet.”

Paragraphe III, Dispositions supplétives:

Art. L. 3121-8. – in case of absence of the agreements to the art. L. 3121-6 et L. 3121-7 :

1° *“Le contrat de travail peut fixer la rémunération des temps de restauration et de pause”*

2° *“Le contrat de travail prévoit soit d’accorder des contreparties aux temps d’habillage et de déshabillage mentionnés à l’article L. 3121-3, soit d’assimiler ces temps à du temps de travail effectif”*

3° *“Les contreparties prévues au second alinéa de l’article L. 3121-7 sont déterminées par l’employeur après consultation du comité d’entreprise ou, à défaut, des délégués du personnel, s’ils existent.”*

The definition of the effective working time given by the Art. L. 3121-1 is really important, since all the effective working time has to be remunerated by the employer. According to the article above, the effective working time has been defined as the time during which the worker is at the employer's disposal and shall comply with its directives, without being able to devote to their own personal pursuits.

The Article L. 3121-2 on the time spent by workers related to the food service or more in general to the break has been changed by the new reform and equated to the previous one.¹⁷

In a context of collective bargaining, the Art. L. 3121-6 in the Paragraph II confirms that the time of restoration and break, even if they're not considered as effective working time, they can be subject of a remuneration, according to a convention, a company agreement or, in case of absence, a branch agreement.

Taking into consideration the residual provisions, the Art. 3121-8 in the Paragraph III confirms that in case of absence of the Art. 3121-6 and 3121-7, an employment contract can fix the remuneration of the time of restoration and break.

The Article L. 3121-3 shows that the effective work doesn't include the time spent by a worker to wear any uniform boards, the so called *temps d'habillage*, and the travel time of commuting to work. However, with the company agreement you might decide that the time of 'dressing' or the travel time of a commuting to work longer than normal can be the subject of specific remuneration or giving the right to a compensatory rest.

In a context of collective bargaining, the Art. L. 3121-7 in the Paragraph II confirms that a company agreement or, in case of absence, a branch agreement, provides for a compensation and assimilates that time as effective working time.

Taking into consideration the residual provisions, the Art. 3121-8 in the Paragraph III confirms that in case of absence of the Art. 3121-6 and 3121-7, an employment contract can stipulate a compensation to the *temps d'habillage et de déshabillage* mentioned in the Art. L. 3121-3 and assimilate that time as effective working time.

¹⁷ Concerning this article, a second paragraph has been removed, which said that even if these times weren't considered as effective working time, they could be remunerated through a convention, a collective agreement, a contract of employment. The text was the following: "*même s'ils ne sont pas reconnus comme du temps de travail effectif, ces temps peuvent faire l'objet d'une rémunération prévue par une convention ou un accord collectif de travail ou par le contrat de travail.*" (Art. L. 3121-2)

Other important provisions are about the maximum duration of the daily and weekly working time, the so called "*Durées maximales de travail*".

Sub-section I: Break time

Paragraph I, Public order

Art. L. 3121-16. – "*Dès que le temps de travail quotidien atteint six heures, le salarié bénéficie d'un temps de pause d'une durée minimale de vingt minutes consécutives.*"

Paragraph II, field of the collective bargaining

Art. L. 3121-17. – "*Une convention ou un accord d'entreprise ou d'établissement ou, à défaut, une convention ou un accord de branche peut fixer un temps de pause supérieur.*"

Sub-section II : Maximum duration of the daily work

Paragraph I, Public order

Art. L. 3121-18. – "*La durée quotidienne de travail effectif par salarié ne peut excéder dix heures, sauf:*

1° En cas de dérogation accordée par l'inspecteur du travail dans des conditions déterminées par décret

2° En cas d'urgence, dans des conditions déterminées par décret

3° Dans les cas prévus à l'article L. 3121-19."

Paragraph II, field of the collective bargaining

Art. L. 3121-19. – "*Une convention ou un accord d'entreprise ou d'établissement ou, à défaut, une convention ou un accord de branche peut prévoir le dépassement de la durée maximale quotidienne de travail effectif, en cas d'activité accrue ou pour des motifs liés à*

l'organisation de l'entreprise, à condition que ce dépassement n'ait pas pour effet de porter cette durée à plus de douze heures."

Sub-section III: Maximum duration of weekly work

Paragraph I, Public order

Art. L. 3121-20. – *"Au cours d'une même semaine, la durée maximale hebdomadaire de travail est de quarante-huit heures."*

Art. L. 3121-21. – *"En cas de circonstances exceptionnelles et pour la durée de celles-ci, le dépassement de la durée maximale définie à l'article L. 3121-20 peut être autorisé par l'autorité administrative, dans des conditions déterminées par décret en Conseil d'Etat, sans toutefois que ce dépassement puisse avoir pour effet de porter la durée du travail à plus de soixante heures par semaine. Le comité d'entreprise ou, à défaut, les délégués du personnel, s'ils existent, donnent leur avis sur les demandes d'autorisation formulées à ce titre. Cet avis est transmis à l'agent de contrôle de l'inspection du travail."*

Art. L. 3121-22. – *"La durée hebdomadaire de travail calculée sur une période quelconque de douze semaines consécutives ne peut dépasser quarante-quatre heures, sauf dans les cas prévus aux articles L. 3121-23 à L. 3121-25."*

Paragraph II, field of the collective bargaining

Art. L. 3121-23. – *"Une convention ou un accord d'entreprise ou d'établissement ou, à défaut, une convention ou un accord de branche peut prévoir le dépassement de la durée hebdomadaire de travail de quarante-quatre heures calculée sur une période de douze semaines consécutives, à condition que ce dépassement n'ait pas pour effet de porter cette durée, calculée sur une période de douze semaines, à plus de quarante-six heures."*

Paragraph III, dispositions supplétives

Art. L. 3121-24. – “A défaut d'accord prévu à l'article L. 3121-23, le dépassement de la durée maximale hebdomadaire prévue à l'article L. 3121-22 est autorisé par l'autorité administrative dans des conditions déterminées par décret en Conseil d'Etat, dans la limite d'une durée totale maximale de quarante-six heures.”

« Art. L. 3121-25. – “ A titre exceptionnel, dans certains secteurs, dans certaines régions ou dans certaines entreprises, le dépassement de la durée maximale de quarante-six heures prévue aux articles L. 3121-23 et L. 3121-24 peut être autorisé pendant des périodes déterminées, dans des conditions déterminées par décret en Conseil d'Etat.”

Art. L. 3121-26. – “Le comité d'entreprise ou, à défaut, les délégués du personnel, s'ils existent, donnent leur avis sur les demandes d'autorisation formulées auprès de l'autorité administrative en application des articles L. 3121-24 et L. 3121-25. Cet avis est transmis à l'agent de contrôle de l'inspection du travail.”

Starting from the daily working hours, the Art. L. 3121-17 fixes the maximum at 10 hours per day of effective work.¹⁸ Through a company agreement or, failing that, a branch agreement, it may be increased from 10 to 12 hours, in case of increased activity or for reasons related to the organization of the company, under the condition that this growth don't overcome to more than 12 hours (Art. L. 3121-19) .

In other terms, the daily duration of work will remain set at 10 hours a day like today. And like today, it will be possible to derogate from this period by collective agreement within the limit of 12 hours per day, or with the authorization of the labour inspector. The new *Loi Travail* doesn't change limits, nor the modalities according to which it's possible to derogate.

It's also determined that the company agreement or the branch one can waive the minimum 11 hours daily rest, under the conditions laid down by Decree. This provision

¹⁸ The maximum may be waived in cases of urgency or with the prior authorization of the *Directions régionales des entreprises, de la concurrence, de la consommation, du travail and de l'emploi (Direccte)* and the conditions shall be laid down by Decree.

has been harshly criticised since the right to rest (best defined as a right to “free time”)¹⁹ is a fundamental and inalienable right of the worker that is not subject to negotiation.

Taking into consideration the entire week, the weekly maximum working time will remain set at 48 hours, like today. It’s not possible to exceed 48 hours by collective agreement, as is mentioned in the Art. L. 3121-20.

However, in some exceptional circumstances, the exceeding of the maximum period defined in article L. 3121-20 may be authorized by the administrative authority, under certain conditions determined by Decree of the Council of State, without that this overrun could have the effect of bringing the working time to more than 60 hours per week. This rule is today engaged in very exceptional circumstances, for example ship repair. (Art. L 3121-21)

The weekly working time calculated over a period of twelve consecutive weeks cannot exceed 44 hours, as is mentioned in the Art. L. 3121-22 , except in the cases provided for in articles L. 3121-23 and in the residual provisions (Art. L. 3121-24 and L. 3121-25).

In fact, it will always be possible, by company agreement, to move to a weekly average of 46 hours over 12 weeks, instead of 44, as is mentioned in the Art. L. 3121-22.

It was already possible through branch agreements, now it can be made by company agreement. This agreement should be majority. This doesn’t mean that employees will work 46 hours all the weeks, but these 46 hours are averaged. In other words, the periods “*hautes*” will have to be offset by periods of “*basses*”.

Moreover, the maximum daily working time and the minimum daily rest period must be respected.

Finally, all the overtime hours will lead to increases in wages or counterparties at rest.

¹⁹ About the right of workers to “temps libre” is interesting the position of the group of University students, called Pour un autre Code du travail, which launched an “alternative” proposal to reform the labour law which, among other things, supports the need to reduce working hours

It's also necessary to have a focus on the discipline of the overtime hours, after the new reform. In fact, the El Khomri bill brings strong changes in the workers' overtime discipline. In the *Loi* we can find a section dedicated, the section III, entitled *Durée légale et heures supplémentaires*.

Paragraph I, public order

Art. L. 3121-27. – *“La durée légale de travail effectif des salariés à temps complet est fixée à trente-cinq heures par semaine.”*

Art. L. 3121-28. – *“Toute heure accomplie au delà de la durée légale hebdomadaire ou de la durée considérée comme équivalente est une heure supplémentaire qui ouvre droit à une majoration salariale ou, le cas échéant, à un repos compensateur équivalent.”*

Art. L. 3121-29. – *“Les heures supplémentaires se décomptent par semaine.”*

Art. L. 3121-30. – *“Des heures supplémentaires peuvent être accomplies dans la limite d'un contingent annuel. Les heures effectuées au delà de ce contingent annuel ouvrent droit à une contrepartie obligatoire sous forme de repos.”*

“Les heures prises en compte pour le calcul du contingent annuel d'heures supplémentaires sont celles accomplies au delà de la durée légale.

Les heures supplémentaires ouvrant droit au repos compensateur équivalent mentionné à l'article L. 3121-28 et celles accomplies dans les cas de travaux urgents énumérés à l'article L. 3132-4 ne s'imputent pas sur le contingent annuel d'heures supplémentaires.

Art. L. 3121-31. - *Dans les entreprises dont la durée collective hebdomadaire de travail est supérieure à la durée légale hebdomadaire, la rémunération mensuelle due au salarié peut être calculée en multipliant la rémunération horaire par les cinquante-deux douzièmes de cette durée hebdomadaire de travail, en tenant compte des majorations de salaire correspondant aux heures supplémentaires accomplies.”*

Paragraph II, field of the collective agreement

Art. L. 3121-32. – *“Une convention ou un accord collectif d’entreprise ou d’établissement ou, à défaut, une convention ou un accord de branche peut fixer une période de sept jours consécutifs constituant la semaine pour l’application du présent chapitre.”*

Art. L. 3121-33. - I. – *“Une convention ou un accord collectif d’entreprise ou d’établissement ou, à défaut, une convention ou un accord de branche :*

1° Prévoit le ou les taux de majoration des heures supplémentaires accomplies au-delà de la durée légale ou de la durée considérée comme équivalente. Ce taux ne peut être inférieur à 10 % ;

2° Définit le contingent annuel prévu à l’article L. 3121-30 ;

3° Fixe l’ensemble des conditions d’accomplissement d’heures supplémentaires au-delà du contingent annuel ainsi que la durée, les caractéristiques et les conditions de prise de la contrepartie obligatoire sous forme de repos prévue au même article L. 3121-30. Cette contrepartie obligatoire ne peut être inférieure à 50 % des heures supplémentaires accomplies au-delà du contingent annuel mentionné audit article L. 3121-30 pour les entreprises de vingt salariés au plus, et à 100 % de ces mêmes heures pour les entreprises de plus de vingt salariés.

Les heures supplémentaires sont accomplies, dans la limite du contingent annuel applicable dans l’entreprise, après information du comité d’entreprise ou, à défaut, des délégués du personnel, s’ils existent.

Les heures supplémentaires sont accomplies, au-delà du contingent annuel applicable dans l’entreprise, après avis du comité d’entreprise ou, à défaut, des délégués du personnel, s’ils existent.”

Art. L. 3121-33. - II. – *“Une convention ou un accord collectif d’entreprise ou d’établissement ou, à défaut, une convention ou un accord de branche peut également :*

1° Prévoir qu’une contrepartie sous forme de repos est accordée au titre des heures supplémentaires accomplies dans la limite du contingent ;

2° Prévoir le remplacement de tout ou partie du paiement des heures supplémentaires, ainsi que des majorations, par un repos compensateur équivalent.”

Art. L. 3121-33. - III. - *“Une convention ou un accord d’entreprise peut adapter les conditions et les modalités d’attribution et de prise du repos compensateur de remplacement.”*

Art. L. 3121-34. - *“Dans les branches d’activité à caractère saisonnier mentionnées à l’article L. 3132-7, une convention ou un accord d’entreprise ou d’établissement conclu en application de l’article L. 1244-2 ou, à défaut, une convention de branche ou un accord professionnel ou interprofessionnel peut, dans des conditions déterminées par décret, déroger aux dispositions de la présente section relatives à la détermination des périodes de référence pour le décompte des heures supplémentaires et des repos compensateurs. La convention ou l’accord organise également des procédures contradictoires de décompte des temps et périodes de travail.”*

Paragraphe III, dispositions supplétives

Art. L. 3121-35. - *“Sauf stipulations contraires dans une convention ou un accord mentionné à l’article L. 3121-32, la semaine débute le lundi à 0 heure et se termine le dimanche à 24 heures.”*

Art. L. 3121-36. - *“A défaut d’accord, les heures supplémentaires accomplies au-delà de la durée légale hebdomadaire fixée à l’article L. 3121-27 ou de la durée considérée comme équivalente donnent lieu à une majoration de salaire de 25 % pour chacune des huit premières heures supplémentaires. Les heures suivantes donnent lieu à une majoration de 50 %.”*

Art. L. 3121-37. - *“Dans les entreprises dépourvues de délégué syndical, le remplacement de tout ou partie du paiement des heures supplémentaires, ainsi que des majorations, par un repos compensateur équivalent peut être mis en place par l’employeur à condition que le comité d’entreprise ou, à défaut, les délégués du personnel, s’ils existent, ne s’y opposent pas.*

L’employeur peut également adapter à l’entreprise les conditions et les modalités d’attribution et de prise du repos compensateur de remplacement après avis du comité d’entreprise ou, à défaut, des délégués du personnel, s’ils existent.”

Art. L. 3121-38. – “A défaut d'accord, la contrepartie obligatoire sous forme de repos mentionnée à l'article L. 3121-30 est fixée à 50 % des heures supplémentaires accomplies au-delà du contingent annuel mentionné au même article L. 3121-30 pour les entreprises de vingt salariés au plus, et à 100 % de ces mêmes heures pour les entreprises de plus de vingt salariés.”

Art. L. 3121-39. – “A défaut d'accord, un décret détermine le contingent annuel défini à l'article L. 3121-30 ainsi que les caractéristiques et les conditions de prise de la contrepartie obligatoire sous forme de repos pour toute heure supplémentaire effectuée au-delà de ce contingent.”

Art. L. 3121-40. – “A défaut d'accord, les modalités d'utilisation du contingent annuel d'heures supplémentaires et de son éventuel dépassement donnent lieu au moins une fois par an à la consultation du comité d'entreprise ou, à défaut, des délégués du personnel, s'ils existent.”

To understand how these hours are counted, it's necessary to know that an extra hour is an hour completed beyond the legal duration, set at 35 hours per week.

On the specific issue of overtime beyond the 35 hours, branches will no longer prohibit companies to reduce, by agreement with the unions, the rate of increase at 10% .

Following the new text, overtime will be paid with an increase at least equal to 10%. The rate will be set by a company agreement, which will be majority, or, failing that, by the branch agreement.

The relevant point, as we've just said, is that the branch agreement can no longer prevent company agreements to set the rate, this is the clause of “verrouillage”. This allows companies to adapt the overhead rate depending on the economic situation or the size of the company. Indeed, within the same industry, companies can be in a very different economic and financial situation, which justify that they can set different rates of increase. Failing agreement, the applicable rate will be 25% for the first eight hours and 50% beyond.

Another important point is that the Labour Code provides that this countdown is made on the civil week, for example from Monday 00:00 to Sunday 24:00 .

A company agreement or, failing, a branch agreement may fix a period of seven consecutive days constituting the week to count overtime. For example, a week begins on Sunday and ends on Saturday (Art. L. 3121-32).

If nothing is specified by an agreement, the week starts on Monday at 00 hours and ends on Sunday at 24 hours (Art. L. 3121-35).

The compensation in terms of rest is not changed and remains fixed: 50% of overtime hours performed beyond the annual quota for firms with 20 employees at most and 100% of these same hours for companies of more than 20 employees (Art. L. 3121-38).

What has been much re-emphasized is essentially this emphasis on company agreements: in fact, the latter allow to stick to the best with the specificities and needs of the company. To conclude such an agreement, the employer and the stewards will negotiate, or failing that, the elected representatives of the staff at the works Council.

In addition, the company agreement may contain less favourable provisions than a branch agreement, for example. So, a priori, less security for employees, even if this type of agreement meets very specific conditions of validity.

Another topic to be discussed concern the working time on a period greater than one week. Below, the section IV , entitled: "*Aménagement du temps de travail sur une période supérieure à la semaine, horaires individualisés et récupération des heures perdues*".

Sub-section I

"Aménagement du temps de travail sur une période supérieure à la semaine"

Paragraph 1, public order

Art. L. 3121-41. – *"Lorsqu'est mis en place un dispositif d'aménagement du temps de travail sur une période de référence supérieure à la semaine, les heures supplémentaires sont décomptées à l'issue de cette période de référence.*

Cette période de référence ne peut dépasser trois ans en cas d'accord collectif et neuf semaines en cas de décision unilatérale de l'employeur.

Si la période de référence est annuelle, constituent des heures supplémentaires les heures effectuées au delà de 1 607 heures.

Si la période de référence est inférieure ou supérieure à un an, constituent des heures supplémentaires les heures effectuées au delà d'une durée hebdomadaire moyenne de trente-cinq heures calculée sur la période de référence."

Art. L. 3121-42. – *"Dans les entreprises ayant mis en place un dispositif d'aménagement du temps de travail sur une période de référence supérieure à la semaine, les salariés sont informés dans un délai raisonnable de tout changement dans la répartition de leur durée de travail."*

Art. L. 3121-43. – *"La mise en place d'un dispositif d'aménagement du temps de travail sur une période supérieure à la semaine par accord collectif ne constitue pas une modification du contrat de travail pour les salariés à temps complet."*

Paragraph 2 , field of the collective bargaining

Art. L. 3121-44. – *"En application de l'article L. 3121-41, un accord d'entreprise ou d'établissement ou, à défaut, une convention ou un accord de branche peut définir les modalités d'aménagement du temps de travail et organiser la répartition de la durée du travail sur une période supérieure à la semaine. Il prévoit :*

1° La période de référence, qui ne peut excéder un an ou, si un accord de branche l'autorise, trois ans ;

2° Les conditions et délais de prévenance des changements de durée ou d'horaires de travail ;

3° Les conditions de prise en compte, pour la rémunération des salariés, des absences ainsi que des arrivées et des départs en cours de période de référence.

Lorsque l'accord s'applique aux salariés à temps partiel, il prévoit les modalités de communication et de modification de la répartition de la durée et des horaires de travail.

L'accord peut prévoir une limite annuelle inférieure à 1 607 heures pour le décompte des heures supplémentaires.

Si la période de référence est supérieure à un an, l'accord prévoit une limite hebdomadaire, supérieure à trente-cinq heures, au delà de laquelle les heures de travail effectuées au cours d'une même semaine constituent en tout état de cause des heures supplémentaires dont la rémunération est payée avec le salaire du mois considéré. Si la période de référence est inférieure ou égale à un an, l'accord peut prévoir cette même limite hebdomadaire. Les heures supplémentaires résultant de l'application du présent alinéa n'entrent pas dans le décompte des heures travaillées opéré à l'issue de la période de référence mentionnée au 1°. L'accord peut prévoir que la rémunération mensuelle des salariés est indépendante de l'horaire réel et détermine alors les conditions dans lesquelles cette rémunération est calculée, dans le respect de l'avant-dernier alinéa."

Paragraphe III, dispositions supplétives

Art. L. 3121-45. – "A défaut d'accord mentionné à l'article L. 3121-44, l'employeur peut, dans des conditions fixées par décret, mettre en place une répartition sur plusieurs semaines de la durée du travail, dans la limite de neuf semaines pour les entreprises employant moins de cinquante salariés et dans la limite de quatre semaines pour les entreprises de cinquante salariés et plus."

Art. L. 3121-46. – *“Par dérogation à l’article L. 3121-45, dans les entreprises qui fonctionnent en continu, l’employeur peut mettre en place une répartition de la durée du travail sur plusieurs semaines.”*

Art. L. 3121-47. – *“A défaut de stipulations dans l’accord mentionné à l’article L. 3121-44, le délai de prévenance des salariés en cas de changement de durée ou d’horaires de travail est fixé à sept jours.”*

In the case of the organisation of working time *“Aménagement du temps de travail”*, the supremacy of the company agreement had been already consecrated by the Loi n. 2008-789.

In general, the new law provides that the reference period of the modulation can exceed one year and up to 3 years.

With the implantation of a system of organisation of working time over a period of more than the week, overtime are counted at the end of this reference period.

This reference period cannot exceed three years in the case of collective agreement and nine weeks in case of a unilateral decision of the employer.

If the reference period is annual, the overtime hours are the hours beyond 1 607 hours.

If the reference period is more than one year or less, are overtime hours the hours worked beyond a weekly average 35 hours calculated over the period of reference.

The modulation of working time can go up to 3 years if a majority agreement is obtained within the company, and provided that an agreement of branch has provided this possibility. This will be very special cases, for example the projects of investment and industrial cycles of production extending over several years. Employees will be protected because, on the one hand, this modulation will have no impact on the maximum periods of work, which have to be respected and, on the other hand, the agreement must provide for a weekly “high limit” beyond which overtime will be paid the salary of the month considered, without waiting for the end of the reference period. It may also set rewards for employees.

The new legislation also establishes the possibility for the employer to unilaterally establish an organization of working hours over a reference period of maximum 9 weeks (Art. L. 3121-45). The extension of the reference period leads to unfavourable consequence for workers, because the payment of overtime hours can be postponed of 3 years.²⁰

²⁰ The prediction of a reference period exceeding one year poses problems of compatibility with the Community Law and in particular with the Art. 19 of Directive 2003/88/EC of November 4, 2003. That article, in fact, says: "*the right to derogate from article 16, point b), referred to in article 17, paragraph 3, and article 18, may not result in the establishment of a reference period exceeding six months. However the Member States may, while respecting the General principles of protecting the safety and health of workers, of allowing, for objective reasons, techniques or inherent in the organisation of work, collective agreements or agreements concluded between the social partners to set reference periods in no event exceeding 12 months.*"

Another susceptible aspect touched by the reform concerns the “*conventions de forfait*” , which define the duration of the work by fixing a number of working hours per week, per month or per year (*forfait en heures*) or a number of days worked per year (*forfait jours*). The topic is included in the section V of the Chapter and it’s entitled “*Conventions de forfait*” .

Sub-section I, public order

Paragraph I, Common dispositions

Art. L. 3121-53. – “*La durée du travail peut être forfaitisée en heures ou en jours dans les conditions prévues aux sous-sections 2 et 3 de la présente section.*”

Art. L. 3121-54. – “*Le forfait en heures est hebdomadaire, mensuel ou annuel. Le forfait en jours est annuel.*”

Art. L. 3121-55. – “*La forfaitisation de la durée du travail doit faire l’objet de l’accord du salarié et d’une convention individuelle de forfait établie par écrit.*”

Paragraph 2, *Forfaits* in hours

Art. L. 3121-56. – “*Tout salarié peut conclure une convention individuelle de forfait en heures sur la semaine ou sur le mois.*

Peuvent conclure une convention individuelle de forfait en heures sur l’année, dans la limite du nombre d’heures fixé en application du 3° du I de l’article L. 3121-64 :

1° Les cadres dont la nature des fonctions ne les conduit pas à suivre l’horaire collectif applicable au sein de l’atelier, du service ou de l’équipe auquel ils sont intégrés ;

2° Les salariés qui disposent d’une réelle autonomie dans l’organisation de leur emploi du temps.”

Art. L. 3121-57. – *“La rémunération du salarié ayant conclu une convention individuelle de forfait en heures est au moins égale à la rémunération minimale applicable dans l’entreprise pour le nombre d’heures correspondant à son forfait, augmentée, le cas échéant, si le forfait inclut des heures supplémentaires, des majorations prévues aux articles L. 3121-28, L. 3121-33 et L. 3121-36.”*

Paragraphe 3, *Forfaits in days*

Art. L. 3121-58. – *“Peuvent conclure une convention individuelle de forfait en jours sur l’année, dans la limite du nombre de jours fixé en application du 3° du I de l’article L. 3121-64 :*

1° Les cadres qui disposent d’une autonomie dans l’organisation de leur emploi du temps et dont la nature des fonctions ne les conduit pas à suivre l’horaire collectif applicable au sein de l’atelier, du service ou de l’équipe auquel ils sont intégrés ;

2° Les salariés dont la durée du temps de travail ne peut être prédéterminée et qui disposent d’une réelle autonomie dans l’organisation de leur emploi du temps pour l’exercice des responsabilités qui leur sont confiées.”

Art. L. 3121-59. – *“Le salarié qui le souhaite peut, en accord avec son employeur, renoncer à une partie de ses jours de repos en contrepartie d’une majoration de son salaire. L’accord entre le salarié et l’employeur est établi par écrit.*

Un avenant à la convention de forfait conclue entre le salarié et l’employeur détermine le taux de la majoration applicable à la rémunération de ce temps de travail supplémentaire, sans qu’il puisse être inférieur à 10 %. Cet avenant est valable pour l’année en cours. Il ne peut être reconduit de manière tacite.”

Art. L. 3121-60. – *“L’employeur s’assure régulièrement que la charge de travail du salarié est raisonnable et permet une bonne répartition dans le temps de son travail.”*

Art. L. 3121-61. – *“Lorsqu’un salarié ayant conclu une convention de forfait en jours perçoit une rémunération manifestement sans rapport avec les sujétions qui lui sont imposées, il peut, nonobstant toute clause conventionnelle ou contractuelle contraire, saisir le juge judiciaire afin que lui soit allouée une indemnité calculée en fonction du préjudice*

subi, eu égard notamment au niveau du salaire pratiqué dans l'entreprise, et correspondant à sa qualification."

Art. L. 3121-62. – *"Les salariés ayant conclu une convention de forfait en jours ne sont pas soumis aux dispositions relatives :*

- 1° A la durée quotidienne maximale de travail effectif prévue à l'article L. 3121-18 ;*
- 2° Aux durées hebdomadaires maximales de travail prévues aux articles L. 3121-20 et L. 3121-22 ;*
- 3° A la durée légale hebdomadaire prévue à l'article L. 3121-27."*

Sub-section II, field of the collective bargaining

Art. L. 3121-63. – *"Les forfaits annuels en heures ou en jours sur l'année sont mis en place par un accord collectif d'entreprise ou d'établissement ou, à défaut, par une convention ou un accord de branche."*

Art. L. 3121-64. - I. – *"L'accord prévoyant la conclusion de conventions individuelles de forfait en heures ou en jours sur l'année détermine :*

- 1° Les catégories de salariés susceptibles de conclure une convention individuelle de forfait, dans le respect des articles L. 3121-56 et L. 3121-58 ;*
- 2° La période de référence du forfait, qui peut être l'année civile ou toute autre période de douze mois consécutifs ;*
- 3° Le nombre d'heures ou de jours compris dans le forfait, dans la limite de deux cent dix-huit jours s'agissant du forfait en jours ;*
- 4° Les conditions de prise en compte, pour la rémunération des salariés, des absences ainsi que des arrivées et départs en cours de période ;*
- 5° Les caractéristiques principales des conventions individuelles, qui doivent notamment fixer le nombre d'heures ou de jours compris dans le forfait.*

Art. L. 3121-64. - II. - *L'accord autorisant la conclusion de conventions individuelles de forfait en jours détermine :*

- 1° Les modalités selon lesquelles l'employeur assure l'évaluation et le suivi régulier de la charge de travail du salarié ;*
- 2° Les modalités selon lesquelles l'employeur et le salarié communiquent périodiquement sur la charge de travail du salarié, sur l'articulation entre son activité professionnelle et sa vie personnelle, sur sa rémunération ainsi que sur l'organisation du travail dans l'entreprise ;*
- 3° Les modalités selon lesquelles le salarié peut exercer son droit à la déconnexion prévu au 7° de l'article L. 2242-8.*

L'accord peut fixer le nombre maximal de jours travaillés dans l'année lorsque le salarié renonce à une partie de ses jours de repos en application de l'article L. 3121-59. Ce nombre de jours doit être compatible avec les dispositions du titre III du présent livre relatives au repos quotidien, au repos hebdomadaire et aux jours fériés chômés dans l'entreprise et avec celles du titre IV relatives aux congés payés."

Sub-section III, Disposition suppléatives

Art. L. 3121-65. - I. – "A défaut de stipulations conventionnelles prévues aux 1° et 2° du II de l'article L. 3121-64, une convention individuelle de forfait en jours peut être valablement conclue sous réserve du respect des dispositions suivantes :

- 1° L'employeur établit un document de contrôle faisant apparaître le nombre et la date des journées ou demi-journées travaillées. Sous la responsabilité de l'employeur, ce document peut être renseigné par le salarié ;*
- 2° L'employeur s'assure que la charge de travail du salarié est compatible avec le respect des temps de repos quotidiens et hebdomadaires ;*
- 3° L'employeur organise une fois par an un entretien avec le salarié pour évoquer sa charge de travail, qui doit être raisonnable, l'organisation de son travail, l'articulation entre son activité professionnelle et sa vie personnelle ainsi que sa rémunération.*

Art. L. 3121-65. - II. - A défaut de stipulations conventionnelles prévues au 3° du II de l'article L. 3121-64, les modalités d'exercice par le salarié de son droit à la déconnexion

sont définies par l'employeur et communiquées par tout moyen aux salariés concernés. Dans les entreprises d'au moins cinquante salariés, ces modalités sont conformes à la charte mentionnée au 7° de l'article L. 2242-8."

Art. L. 3121-66. – *"En cas de renonciation, par le salarié, à des jours de repos en application de l'article L. 3121-59 et à défaut de précision dans l'accord collectif mentionné à l'article L. 3121-64, le nombre maximal de jours travaillés dans l'année est de deux cent trente-cinq."*

Before analysing the changes mentioned in the text, we have to know that in 2014, according to a study the Direction of the Animation of the research, studies and statistics (DARES), 25% of workers would be in *forfait jours*.

In this context, the device of the day package is particularly attractive to an employer: it allows you to count down the hours of work of an employee in days on a year and so to escape the rules related to the overtime.

Since 2000 and since the creation by the legislature of the *forfait jours*, many legislative and jurisprudential developments operated in this matter in order to better manage this device.

The *Loi Travail* No. 2016-1088 from August 8, 2016 slightly amends the provisions on the *forfait jours*. However, the legal risks associated related to them exist and include especially the payment of overtime in case of nullity of the day package.

A prior reminder: the *forfait jours* may not be applied to fields subjected to predetermined schedules (Cass. Soc. December 15, 2016).

The new Article L. 3121-58 of the Labour Code states that can conclude an individual agreement of *forfait jours* on the year:

- Executives who have autonomy in organizing their schedule and the nature of the duties doesn't lead them to follow the collective schedule applicable in the service or the team to which they are integrated.

- Employees, whose duration of working time cannot be predetermined and which have a real autonomy in organizing their schedule for the exercise of the responsibilities entrusted to them.

The new French reform makes several changes to the rules applicable to the *convention de forfait en jours*.

Taking into consideration the *Forfait jours* and the *Droit à la déconnexion* from the January 1, 2017 , the collective agreement which implements the *Forfait jours* must determine the terms according to which the employee can exercise this right:

“(...) 3° Les modalités selon lesquelles le salarié peut exercer son droit à la déconnexion prévu au 7° de l’article L. 2242-8.”

In companies of 50 employees or more, negotiations on professional equality between women and men and the quality of working life, this right should be set up by a collective agreement or by a Charter.

The law of August 8, 2016 doesn't provide anything about the *droit à la déconnexion* in companies with fewer than 50 employees.

Concerning the obligation of monitoring of the employees' charge of work during the *Forfait jours* (failing, invalidity of the day package), the law requires the employer to ensure that the charge of work of the employee is reasonable and allows a good distribution in his working time (Article L.3121 - 60) .

In fact, the jurisprudence strictly controls the provisions relating to the monitoring of the work of the employee (Cass. Soc. 17 December 2014, no. 13 - 22.890) as well as his concrete implementation.

If there is no monitoring , the *Forfait jours* can be null and the employee can get the payment of overtime if he is able to prove the latter (November 9, 2016, no. 15 - 15064).

About the waiver of a part of the days of rest by the employee in *Forfait jours*: first of all, the provisions of Article L.3121 - 59 of the Labour Code provide for the possibility for the employee to renounce a part of his rest days in return for an increase in his salary.

The reform now adds that the amendment providing for this waiver is valid for the current year and that it “cannot be renewed tacitly” (Article L.3121 - 59, paragraph 2 of the Labour Code).

This provision helps better manage the waiver of the employees of a part of their days off, and thus avoid abuses of employers who wish to improperly use this mechanism, without the consent of the employee.

The real novelty provided by the law of August 8, 2016 is the change of the content of the collective agreements implementing the *conventions de forfait en jours* .

Notably, article L.3121 - 64 I of the Labour Code provides that the agreement governing the conclusion of *conventions de forfait en jours* determine:

- The categories of employees liable to conclude an individual *convention individuelle de forfait en jours*, in accordance with articles L. 3121-56 and L. 3121-58
- The reference period of the *Forfait*, which may be the calendar year or any other period of 12 consecutive months
- The number of hours or days included in the package, in the limit of two hundred and eighteen days
- The conditions for taking into account, for the remuneration of employees, the absences as well as arrivals and departures during the period
- The main features of individual agreements, which include the number of hours or days in the package.

Under the terms of article L. 3121-64 II, the agreement must also determine:

- The terms according to which the employer provides assessment and regular monitoring of the work of the employee;
- The terms according to which the employer and the employee shall communicate periodically on the work of the employee, on the relationship between his work

and his personal life, on his compensation as well as on the organization of work in the company;

- The terms according to which the employee can exercise his right to logout (*droit à la déconnexion*)

The reform provides also additional provisions, in the absence of clause on annual maintenance and monitoring of the employee in the collective agreement.

Concerning the “*Congés payés et les jours fériés*”, the paid leaves and bank holidays.

Also the provisions relating to the paid leaves and bank holidays have been rewritten by following the new architecture on three levels: public order, scope of collective bargaining and additional provisions, in absence of agreement.

The legal duration of leaves is declared d' *ordre public*. It's therefore impossible to predict by agreement less than 2.5 working days per month of effective work for the same employer. On the other hand, it may be extended by collective agreement, or by employment contract. The Art. L-3141-10 of the Labour Code says:

“Sous réserve de modalités particulières fixées en application de l'article L. 3141-32, un accord d'entreprise ou d'établissement ou, à défaut, une convention un accord de branche peut :

1° Fixer le début de la période de référence pour l'acquisition des congés ;

2° Majorer la durée du congé en raison de l'âge, de l'ancienneté ou du handicap.”

The additional leaves for children in charge, are now given also to the fathers and not only to the mother, under the same conditions (older Article L 3141-9) .

The reference period for the acquisition of the rights to leave, which ran from June 1 to May 31 of the year following, can now be determined by company or, in absence, branch agreement.

The period of the leave, the order of departures during this period and the period that must respect the employer to change the dates and the order of the departure are within the scope of collective bargaining.

The period of one month minimum, except in exceptional circumstances, imposed to the employer to change the departure dates becomes residual. This means that an agreement may provide for a shorter period.

The Bill has basically taken into consideration the previous discipline, and making some changes particularly with regard to the conventions *forfait en jours*.

First, it's now expected that the employee may waive, explicitly and only in relation to the current year, a portion of his days off to get a wage increase. In that case, if the collective agreement doesn't stipulate anything about that, the maximum number of days worked in a year is about 235 days.

On the other hand it is established that the employer should ensure that the employee's workload is reasonable and allows an appropriate allocation of time of your work.

It's also expected that in the absence of a specific discipline of collective bargaining, the employer is required to compile a document that is marked the number of days actually worked. This measure has been implemented by the legislature between those indicated by the *Cour de Cassation* as appropriate to ensure compliance with the right to health and to the rest of the employees.²¹

The *Loi travail* amends also the definition of traceability, which is now described as the period during which the worker, without being at work and without being permanent and immediate disposal of the employer, must be able to step in to perform an assignment in the service of the company. A similar definition provides greater protection to the worker, to the extent that it is no longer expected that during the period of availability, the worker must remain in his home or in its immediate vicinity.

²¹ The existing discipline regarding conventions *forfait en jours* was subject to censure by numerous decisions of the European Committee of social rights as contrary to the European social Card. Against this background the *Cour de Cassation* has repeatedly pronounced in order to ensure the protection of the right to health and to the rest of the worker, helping to define, in a perspective of *de iure condendo*, the content that the conventions must have to be effective. In this respect, the agreements should provide for specific monitoring tools, including the registration document of the hours worked.

It's a principle of public policy the obligation to provide remuneration for the period of availability.

It's instead left to collective bargaining the organization of on-call period, the arrangements for informing workers and forms of compensation provided. These aspects can be established unilaterally by the employer, upon notice to the company or to the employees' representatives and upon notice to the Labour Inspectorate (and by Decree of the *Conseil d'Etat* in the case of the information modes), only if there is no agreement which additional rule.

As regards the equivalence regime between period of activity and inactivity, the new legislation has deferred its regulation entirely to the branch bargaining, which, however, should determine the remuneration of periods of inactivity.

It's no more necessary and required the intervention of a decree of the *Conseil d'Etat*, if not in the absence of a contract.

Concluding, we can safely say that the new architecture of the project of the *Loi travail*, promoting collective bargaining, especially company bargaining, carries out a system of labour regulation characterized by the 'proximity' and therefore flexible.

On the other hand, in a sensitive area such as the time and duration of work, workers' fundamental rights and values come into play like that to the rest, health and work-life balance, so it's normal that there's the risk that the delegation will lead to a levelling down of standards of protection of workers which is contrary to the principles laid down at the European level.

Final Reflexions and Perspectives

The Title 1 of the Law of August 8, 2016 is ambitious, in fact its purpose is to re-join the Labour Law and to give more weight to the collective bargaining.

The operation, we can say, is carried out in two times. There's a goal to be achieved in the medium term, under the title 'towards a reconstruction of Code du Travail' and a second more immediate project, in terms of duration of work and leaves, consisting in adopting quickly a new architecture of rules.

By analysing what's happened in France and what's currently happening with the approval of the *Loi Travail*, the law would operate a reversal of the hierarchy of standards and would cause a real revolution in the French legal system. The new text of the reform would result, in fact, in a reversal of the Pyramid (theorized by Kelsen) of the standards.

The articulation of standards, following the author, is based on a hierarchical organization where at the top there's the Constitution, at the centre the law, archetype of the intervention of the State. At lower levels the collective agreements, the goal of which would be improving the conditions of the workers with a predominance of the branch agreement on the decentralised ones. Starting from this structure, we've seen how this schema has been questioned, resulting in a new architecture of rules, where the summit becomes the basis, and viceversa.

By looking at all the most important labour reforms approved in France, in the past and still today, it should be evident how France is facing a constant struggle, choosing between 'breaking' and 'continuity'. It seems to have continuously jumps between past and future.

On the one hand, this labour reform wants to continue the historical evolution of the sources of the Labour Law, started around 35 years ago.

In this context, it's necessary to mention the reforms taking place in three important dates: 1982, 2004, 2008. In these cases, notions as delegation, derogation and *suppletivité* played a fundamental role in order to strengthen the decentralisation of the source toward the companies.

This is the reason why it can be said that the *Loi* represents a sort of continuity, it seems to be so far to make a break with the past.

On the other hand, it's reasonable to underline that the Title I of the *Loi* proposes however an ambitious agenda for the months and the coming years, operating a rewrite of the code in its entirety, while previously experimenting it in the field of the duration of work. In this sense, the French reform project tries to look, both in terms of techniques of adjustment and 'vision' of labour law and also in terms of new ways of protection, at the future.

In the climate that accompanies the reform is not easy to return a full and balanced picture of the change that is taking place, for the richness and complexity of the issues and of the debate, but it's certain that the negative signals are coming very clear from France.

This is confirmed also by the words of Antoine Lyon-Caen, pure member of the Robert Badinter Committee and author with him of the discussed book '*Le travail et la Loi*' (2015). They affirm how the Labour Law, today, "*est sorti de son lit*" with the last labour law, cheating the idea of the Report that had inspired the governmental action, with interventions that are considered modest in terms of new securities.

What's happening is not encouraging the social dialogue, instead one of the bad effects that brings the reform is the risk of social collapse and dumping, by putting more competition among companies and decreasing the level of employees conditions.

The believing that it's possible to rely on the only company negotiation and to give branch agreements just an accessory role could be seen as an 'error', since they are essential to ensure that competition doesn't draw down the working conditions or wages.

By making flexible the working time, the result is a brake to the employment, a risk to the health of the workers. In fact, supporting the idea that by facilitating the adjustment of the working hours at the activity level of the companies would increase the employment is not completely correct. There could be chances that such provisions allow to improve the productivity of employees and employers to dispense temporary contracts when dealing with peaks of activity, but however encouraging the modulation

of working hours further degrades the conditions of life and work of employees, would increase the risk of accident or burn out, and give only little time to family and social life.

So, privileging the collective company agreement at the expense of the other sources of law (law, branch agreements) could produce more legitimate and effective rules, but it could alter the bargaining power of employees.

The new opportunities to negotiate the modalities of the working time of employees are legitimized by the fact that these exceptions to the law are subordinated to the conclusion of majority agreements with trade unions, but that is still a vision completely shifted from what is known as 'social dialogue' in France.

In large companies, the negotiation is totally disconnected from the places where economic decisions are in practice and union representatives are often submitted to what the French call '*chantage à l'emploi*'. Their margins are very narrow and the bargaining becomes only a way to push down the rights of employees. In the small institutions, where there're no unions, collective bargaining remains very limited and even more unbalanced. So, building on the principle of majority agreements will not change anything for the mass of workers whose basic rights are already not respected. And this can only further pull down its conditions.

It could be interesting looking at this situation from a different point of view, by taking into consideration many other aspects influencing labour law. In fact, by designating the labour code as responsible for the crisis of employment, it would hide its real causes. There're issues we have not to miss in the analysis: the erasure of trading borders, the computer revolution, dictatorship of the financial markets, difficult access to the credit, contraction in the demand of households and public investments, just to mention some of them. All these factors undermine the economic and territorial bases of the social state and introduce a competition among workers from around the world.

What it's important underline is that it's no more useful and productive taking into consideration only the stock of thirty years of failure of neoliberal 'reforms', including

those of the labour market, but it's time to take a different direction than that provided by the Bill.

What it's really necessary in France is the reinforcement of the protections to employees, the condition for an improvement in the quality of jobs. More than companies, who today needs to be secured is the figure of the worker. And on this point, the Bill doesn't say great things, apart the introduction of few symbolic measures.

The *Loi Travail*, in certain aspects, seems to miss the central node of the question, the true mean of competitiveness and the primary function of the Labour Law.

The reform clearly favours the negotiation of company at the expense of negotiating without any opening on new relevant levels of negotiations that would be territorial and branch or business networks, but originally the Labour Law was created to exert a different function: the function of social control on the dynamics of competition, in order to avoid the risk that economic competition would result in negative and bad consequences on people's lives. In other words, since the creation of the International Organization of Labour, a century ago, the primary function of the labour law is to ensure a social policy of competition.

The economic competition is a good thing if it helps improve the fate of the most people and a bad thing when it's based instead on the exploitation of the human resource. In order to produce its beneficial effects, it's needed a social policy that puts the protection of the status of workers outside competition: ensuring that the competition takes place on the quality of products and services and not on the deterioration of working conditions.

The instrument of this social policy, it's firstly the Law, by submitting companies to the same rules of the social game. But it's also the branch collective bargaining, which sets the rules to a given activity sector. The company agreement doesn't have these virtues of social harmonization of competition and it could serve just to improve the rights guaranteed by the law. Instead, with the reform, the company agreement becomes an instrument of social competition for workers, at the expenses of the destruction of the social conditions of family, social lives and so educational structures.

Moreover, the Labour Law should evolve taking into account all the technical, managerial and organizational forms of the economy in the world. It has to face with the new realities of the world today and so all these transformations.

If there are aspects on which could be really interesting to have an industry-wide bargaining or a company-wide bargaining, are the aspects related to the true sense of the Labour. What it's really interesting is to look at the Labour, not at the employment, and to put it at the heart of the reform processes. If we put at the centre of the processes the true sense of the Labour, if we look at it as the parameter on which measure the quality of reforms and to what extent they respond to the primary function of the *Droit du Travail*, a better result could be achieved in the future. Any initiative that exposes the risk of social dumping is accordingly contrary to the logic of the Labour Law.

The failure of the reforms of the last 20 years in many countries testifies as Labour Law has been attributed to improper functions, such as creating new employment. If Labour Law must evolve, instead, is to meet the organizational and economic changes by adapting the tools of protection.

This means, however, knowing how to read the change identifying tools that can increase the workers' freedom of choice, so that you maintain the balance between the interests of the parties, which is essential to the good and correct functioning of the French labour market.

Concluding, the words of Alain Supiot, the French Jurist specialized in *Droit du Travail* and an important inspiring source in writing this paper.

“Remettons le travail au centre de la réflexion et du droit du travail”

Alain Supiot (March 11, 2016)

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