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Understanding the ban on the cumul des mandats: The French legal regime prohibiting concurrent mandates as worker director and employee representative

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# Understanding the ban on the *cumul des mandats*

The French legal regime  
prohibiting concurrent  
mandates as worker director  
and employee representative

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## Foreword

Taking up a mandate in a multinational company can be a challenging experience for trade union and workers' representatives in countries across Europe. And when it comes to board-level representation, the challenge becomes even greater. These difficulties have largely gone under the radar of policymakers at the EU level, but the case of France explored in this report illustrates well how board-level employee representation, as regulated by national law, can be of great relevance to the EU level and should be addressed by European trade union action.

As in many other Member States, France's legal system grants employees the right to appoint one or two representatives to the boards of large companies and groups. However, a lesser-known characteristic of the French system obliges the newly appointed representatives to resign from the other workers' representative mandates they may have elsewhere in the company once they come onto the board. In practice, employers do not apply this law consistently: whereas some workers' representatives in French boardrooms are allowed to keep their other representative mandates, others are forced to resign not only from their mandates within the same company (e.g. on the European Works Council) but also in their "foreign" subsidiaries.

This is not a minor issue. One impacted group, for example, are non-French employee representatives, who have been elected to French company boards since a law in 2013 opened up the possibility for them to be appointed by European Works Councils as "second board-level employee representatives". This option has become increasingly available since the recent PACTE law, which made it compulsory to have two employee representatives on a board and accordingly lowered the thresholds.

The legal prohibition to accumulate mandates under French law substantially conflicts with the underlying logic of board-level employee representation in other European countries, where employee representatives sit on boards because their mandate is considered a right of their works councils or their trade union – at the very least, it is seen as the cherry on the cake of the employee representation system. It is of both practical and political relevance too, as non-French representatives often ground their legitimation on a parallel role in the (European) works council or the trade union delegation in their own company, which supports them in fulfilling their representative function on the board.

The issue is complex and multifaceted, and the diversity of national and trade union contexts must be taken into consideration. This report was commissioned



to cast some light onto this subject and to assess the reach, scope and legal implications of the rule prohibiting the accumulation of mandates on French company boards, both for French and non-French representatives. It unpacks the main inconsistencies and conflicts regarding the interpretation of this rule with regard to the French legal system and to EU and international law, and provides solid arguments to support trade union practitioners and employee representatives in the field when they face uninformed or non-compliant employers who force them to give up mandates without sound legal grounds.

The report also clearly demonstrates the European relevance of board-level employee representation practice at national level and calls upon trade unions to reflect on this matter from an EU perspective. This dimension is particularly important in light of ongoing discussions in the Court of Justice of the EU regarding the reach and scope of the "core element" of codetermination systems and to what extent historical trade union rights could be put at risk by EU rules (see request for preliminary ruling in Case C-677/20). The publication of this report is very timely, coming out only a few months after the European Parliament's "Report on democracy at work: a European framework for employees' participation rights and the revision of the European Works Council Directive" (2021/2005(INI)). Employee participation is back on the agenda of EU institutions, thanks to the efforts of the ETUC and progressive democratic forces to protect and promote national regulations on workers' participation, a core feature of the concepts of the European social model and democracy at work.

The following pages are sure to fulfil their purpose as a tool kit for trade unions and an invaluable contribution to the debate on what kind of employee representation rights we need to build a fairer social Europe.

**Isabelle Schömann**  
Confederal Secretary  
European Trade Union Confederation (ETUC)

# Introduction

## 1. French law on employee board participation

The French Constitution states that "All workers participate, through their representatives, in the collective determination of working conditions and in the management of companies" (Paragraph 8 of the Preamble to the Constitution of 27 October 1946<sup>1</sup>).

However, the legislator did not immediately enshrine a right for employees to participate actively (i.e. with voting rights) in company administrative or supervisory bodies.

As of 1946<sup>2</sup>, the law requires the presence of elected employee representatives (members of the social and economic committee<sup>3</sup>) on the board of directors. Elected by staff, these representatives are not directors and have no voting rights, attending only in an advisory capacity. They can thus express their position but cannot vote on board motions<sup>4</sup>.

A decisive step forward occurred in 1966. The 24 July 1966 law reforming company law<sup>5</sup> allowed employees to become directors and thus to combine an employment contract with a directorship. However, in such a case the worker director is elected by the shareholders. The main intention behind this mechanism was to promote some employees to board positions, but not to allow for employee interests to be represented at board level.

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1. The Preamble of the Constitution of 27 October 1946 has been a reference standard for the Constitutional Council when reviewing the constitutionality of measures, ever since Constitutional Council decision No. 71-44 DC of 16 July 1971. In other words, the Preamble of the 1946 Constitution continues to have constitutional value to this day.
  2. Law No. 46-1065 of 16 May 1946.
  3. The decrees of 22 September 2017 abolished the works council, the staff delegate and the health, safety and working conditions committee (known as the CHSCT, its acronym in French), and replaced these institutions representing staff in the company with the "social and economic committee" (CSE), which takes over their functions. Some of the legal texts referred to in this report have not yet been adapted to the new terminology; unless otherwise specified, "works council" and "social and economic committee" will be understood as equivalent in this report.
  4. Article L.2312-72 of the Labour Code: "In companies, two members of the staff delegation of the social and economic committee, one belonging to the category of managers and supervisors, the other to the category of employees and workers, shall attend all meetings of the administrative or supervisory board, as the case may be, in an advisory capacity."
  5. Law No. 66-538 of 24 July 1966 on commercial companies.

The presence of directors representing employees on boards is the result of several legal provisions, added successively over the years.

In 1983, the legislator, via a law democratising the public sector, imposed the presence of employee representatives with voting rights on the administrative and supervisory bodies of **public-sector** companies and their subsidiaries<sup>6</sup>.

In the private sector, the decree of 21 October 1986 provides the **option** for all public limited companies (*sociétés anonymes*), to allow, via an amendment to their articles of association, employee representatives with voting rights on administrative or supervisory boards<sup>7</sup>. This arrangement is not mandatory.

This system has since been supplemented by a mandatory mechanism for the board representation of **employee shareholders**. The law of 30 December 2006 provides for the mandatory representation of employee shareholders solely for listed companies in which more than 3% of the share capital is held by employees on a collective basis. These worker directors have voting rights.

The law of 14 June 2013 on securing employment went one step further, requiring the presence of one or two **employee representatives** on the administrative or supervisory board of public limited companies (*sociétés anonymes*) and partnerships partly limited by shares (*sociétés en commandite par action*). These worker directors have voting rights. Then, the law of 17 August 2015 on social dialogue and employment lowered the thresholds of permanent employees required to activate the obligation of board-level employee representation (from five thousand to one thousand employees in France; from ten thousand to five thousand employees worldwide).

Finally, the law of 22 May 2019 on the growth and transformation of companies (known as the "PACTE law") lowered the threshold above which two employee representatives must sit on the board from twelve to eight directors (excluding employee representatives).

## 2. The rights and obligations of worker directors on French boards of directors

Worker directors have **rights**, like any other director, in particular:

- a right to information<sup>8</sup>;

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6. Law No. 83-675 of 16 July 1983 on the democratisation of the public sector.

7. Decree No. 86-1135 of October 21, 1986 amending law No. 66-537 of 24 July 1966 on commercial companies in order to allow *sociétés anonymes* to include in their articles of association provisions providing for employee representatives to sit on the administrative or supervisory board with voting rights (Articles L.225-27 to L.225-34 and Articles L.225-79 to L.225-80 of the Commercial Code).

8. The chairman of the board is responsible for putting the directors in a position to fulfil their mission in full knowledge of the facts (Court of Cassation, Commercial Chamber, 2 July 1985, No. 83-16887).

- a right to have a question included in the agenda. However, a majority board vote is needed for it to be discussed;
- a right to speak at a board meeting. At least half of board members must be present for the board to deliberate validly (Article L225-37);
- a right to vote;
- a right to training on the role and functioning of the board, the rights and obligations of directors and their responsibilities, as well as on the organisation and activities of the company (Article R225-34-3).

Worker directors also have **specific rights**, such as:

- paid time-off for exercising their mandate. The time devoted to the exercise of their mandate is to be considered as working time and paid as such at the normal rate;
- their dismissal requires prior authorisation from the labour administration.

A worker director has the same **obligations** as other directors.

Like all directors, she/he has a duty of discretion with regard to information of a confidential nature and provided as such by the chairman of the board<sup>9</sup>.

In addition, a worker director may be held civilly liable in the event of misconduct committed in the course of his or her duties<sup>10</sup>.

### 3. French labour law: the classic incompatibility rules relating to employee representatives

The aim of the incompatibility rules laid down in labour law is to guarantee the independence of elected or trade union representatives, thereby ensuring the effectiveness of employee representation arrangements.

For instance, the French Court of Cassation has consistently ruled that "employees who either have a specific written delegation of authority allowing them to be put on the same footing as the head of a company, or who effectively represent

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9. Article L.225-37, paragraph 5, of the Commercial Code.

10. He/She may thus be condemned personally - and jointly and severally with the other members of the board of directors, if applicable - to pay compensation for the damage suffered by a victim. The director's wrongdoing, which must be demonstrated in order to engage her/his liability, may result from a breach of the law or of the articles of association, or may result from a management fault. According to the Court of Cassation, "Any member of the board of directors [...] of a public limited company commits a personal wrongdoing, when he, by his action or abstention, participates in the making of a faulty decision of this body, unless he can show that he behaved as a prudent and diligent director, in particular by opposing this decision". (Court of Cassation, Commercial Chamber, 30 March 2010, No. 08-17.841). A director not supporting a decision taken by the board of directors can only be exonerated from liability by proving that she/he opposed it.

the employer before employee representation institutions may not exercise a representation mandate"<sup>11</sup>.

Consequently, the following persons are not allowed to stand in elections for employee representatives<sup>12</sup> and may not be appointed as trade union representatives<sup>13</sup> :

- employees, managers, and executives and heads of establishments with a written delegation of authority allowing them to be considered as the head of a company;
- employees with an express delegation of powers to chair the CSE on a permanent basis<sup>14</sup> instead of the employer;
- employees who effectively represent the employer before the representative institutions<sup>15</sup>.

#### **4. French company law: the incompatibility rules governing the mandates of worker director and employee representative**

French law contains an incompatibility rule between the mandate of an administrative / supervisory board member and that of an employee representative. Unique in Europe, the rule has two different legislative transpositions:

##### **1. For public-sector companies**

The law of 26 July 1983 on the "democratisation of the public sector" provided for the first time a mechanism for the board representation of employees in public-sector companies. This mechanism is bound by a rule of incompatibility.

As stated in Article 23 of this law:

"An employee representative's mandate as a member of the company's administrative/supervisory board is incompatible with any other function representing staff interests within the company or its subsidiaries, in particular with the functions of trade union delegate, works council

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**11.** Court of Cassation, Social Chamber, 21 March 2018, Appeal No. 17-12.602.

**12.** In France, these are members of the staff delegation to the social and economic committee (CSE), a French representative body with information and consultation prerogatives.

**13.** In France, this is a trade union delegate, a representative of the trade union section or a trade union representative on the social and economic committee.

**14.** Conversely, in the absence of a written delegation of authority to an employee who did not represent the employer before the employee representative bodies and who had only exercised disciplinary power within the company once and only in a partial manner, a court was able to decide that there was no incompatibility: the employee in question could participate in the elections of the employee representatives, and in particular as a voter (Court of Cassation, Social Chamber, 16 December 2020, No. 19-20.587).

**15.** This was the case, for example, of a store manager who, although not having full staff management autonomy (hiring, discipline or dismissal), effectively represented the employer before the staff representatives (Court de Cassation, Social Chamber, 31 March 2021, n 19-25.233).

member, staff delegate or member of the health, safety and working conditions committee.

The above-mentioned mandate(s) and the protection thereof shall end on the date on which the new mandate is acquired.

An employee representative's mandate of director or member of the supervisory board is also incompatible with the exercise of the functions of a full-time union representative<sup>16</sup>, within the meaning of the second paragraph of Article 15 of this law. In the event of an employee performing full-time union duties being elected to the administrative or supervisory board, such duties shall be terminated and the person concerned shall be reinstated in his job”.

Thus, the incompatibility rule laid down by the 1983 law provides for the immediate, automatic and imperative termination of the first mandate and its protective status as soon as the employee acquires a second mandate which is incompatible with the first.

The 1983 law contains a dilemma: it allows trade unions to participate in boards of directors while depriving them of the possibility of retaining their representatives in elected employee representation bodies. As noted by the Centre for Research on Changes in Industrial Society (CRMSI), "this provision constituted a dilemma for trade unions with low levels of representation in certain companies: whether to nominate candidates with little credibility or to risk depriving the union of its most representative elements on the shopfloor"<sup>17</sup>.

## 2. For private-sector companies

The decree of **21 October 1986**<sup>18</sup> modifies the 24 July 1966 "grand law" governing commercial companies, introducing into the Commercial Code the possibility to

16. The notion of full-time union representative is used in the public or private sectors in the application of a collective agreement. It refers to trade union representatives who are granted a fixed-term leave of absence from a function in the public administration or local authority, or suspension of their employment contract in their company, in order to carry out trade union duties for the trade union organisation to which they belong. Full-time union representatives keep their remuneration though, which is paid by their employer.

17. Centre de recherche sur les mutations de la société industrielle (CRMSI) "Une étape dans la démocratisation du secteur public. L'élection des représentants des salariés aux conseils d'administration", *Revue Travail et emploi* n°24, 06/1985, p. 48. In the opinion of the CRMSI, the constraints imposed by the incompatibility rule were "secondary to the maintenance of day-to-day union activity". More specifically, the rule would have given rise to differentiated practices dependent on the levels of implementation and the size of the trade union organisations. As regards the levels, "skill requirements seem to have prevailed at the level of the groups where we often find leading candidates who assumed responsibilities in the works councils", i.e. in elected employee representation bodies. Moreover, trade unions with a significant militant potential would not have suffered any major constraints linked to the incompatibility rule.

18. See Decree No. 86-1135 of 21 October 1986 amending Law No. 66-537 of July 24, 1966 on commercial companies in order to give public limited companies the option of including in their articles of association provisions for employee representatives to sit on the administrative or supervisory board with voting rights (see especially Article 97-4).

insert a clause in the articles of association establishing that the board of directors shall include directors elected by employees.

But it also introduced an incompatibility rule into Article L.225-30 of the French Commercial Code, within a sub-section devoted to the board of directors and the general management of public limited companies.

On its adoption in 1986, Article L.225-30 laid down the incompatibility of a mandate as worker director with "any mandate as a trade union delegate, works council member, staff delegate or member of the health, safety and working conditions committee of the company".

On drafting Law No. 2013-504 of 14 June 2013 on the securing of employment, which introduced mandatory employee board representation in large companies, the French legislator extended the scope of the incompatibility rule to European mandates, considering that representatives at the European level "perform functions similar" to those performed by the employee representatives referred to in 1986<sup>19</sup>. The law of 14 June 2013 states that the incompatibility rule applies to "any EWC mandate (where an EWC exists), or, for a European company (SE) within the meaning of Article L.2351-1 of the Labour Code, any member of the employee representation body mentioned in Article L.2352-16 of the same code or of a member of an SE works council as mentioned in Article L.2353-1 of said code".

## **5. The fuzziness of the incompatibility regime between the mandate of an administrative/supervisory board member and that of an employee representative**

In adopting its incompatibility regime, the French legislator's intention was to compartmentalise two representation mechanisms: worker representatives with elective or trade union legitimacy (elected employee representatives; trade union representatives) and worker directors.

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19. Opinion of J.-M. Clément, deputy, on behalf of the Law Commission, on Article 5 of the draft law on the securing of employment, specifically p. 35: "it appears that in terms of incompatibilities, Article 5 of the law takes no account of the existence of new employee representative bodies whose members perform functions similar to those assumed in the exercise of a mandate as a member of a works council, of a health, safety and working conditions committee, etc. It would therefore be a good idea to update the incompatibilities applicable to the mandate of a director elected or appointed by staff by including membership of a European works council (Article L.2343-5 of the Labour Code), of the employee representative body for European companies (within the meaning of Article L.2351-1 of the Labour Code), and an SE works council (Article L.2353-7 of the Labour Code). Also, on the initiative of your rapporteur, the Law Commission has adopted an amendment updating the scope of incompatibilities between, on the one hand, the mandate of a director elected or appointed by staff and, on the other hand, a mandate as a member of employee consultation bodies which, in European companies, can be seen as being on the same footing as employee representation institutions". (<https://www.assemblee-nationale.fr/14/pdf/rapports/ro839.pdf>)

This compartmentalisation reflects a simple idea: the interests defended by the employee representatives (union or elected representatives) would or at least could conflict with the interests represented on the board by the directors, even if they are worker directors.

Due to its fuzziness, the incompatibility regime raises many questions, with many worker representatives, whether at a French or European level, questioning its meaning.

Court decisions interpreting article L.225-30<sup>20</sup> or article 23 of the law of 26 July 1983<sup>21</sup> are rare. In the same vein, the texts have aroused little interest within the doctrine, at least within the French doctrine.

Leading to a struggle for meaning, this fuzziness explains why some company management boards adopt a broad interpretation of incompatibilities, allowing them to influence the choice of worker directors.

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**20.** On the interpretation of Article L.225-30 of the Commercial Code, see in particular the Court of Cassation of 30 September 2005 (Social Chamber, Appeal No. 04-10.490); Courbevoie District Court, 6 March 2017, General Repertoire No. 11-16-000911, Fédération CGT des sociétés d'études v. SAP France Holding SA.

**21.** See Court of Cassation, Social Chamber, 13 March 1985 - Appeal No.: 84-60.705, 84-60.706.



# **1. The mandates concerned by the incompatibility rule**

## **1.1 In private-sector companies**

### **1.1.1 Incompatible mandates**

#### **1.1.1.1 The mandate of a member of the administrative or supervisory board**

Within the private sector, several categories of worker directors exist in French joint-stock companies, with the legal incompatibility rule not applying to all worker directors.

**a) The incompatibility rule set forth in Article L.225-30 of the French Commercial Code does not apply to discretionary directors and directors representing employee shareholders**

- Discretionary directors are not affected by the incompatibility rule (Articles L.225-27 and L.225-79 of the French Commercial Code; Decree 86-1135, 21 Oct. 1986).

Public limited companies may stipulate in their articles of association that directors elected by employees will sit on the administrative or supervisory board with voting rights.

The articles of association may stipulate that these directors be elected either by the company's staff or by the staff of the company and its direct or indirect subsidiaries with a registered office located on French territory.

The articles of association shall specify the number of elected directors, the distribution of seats by college, the voting procedures not set by law and the duration of their mandates.

The number of administrative or supervisory board members elected by employees may not exceed four (five in listed companies) and may not exceed one third of the number of other administrative or supervisory board members.

- Worker directors representing employee shareholders (Article L.225-23 of the French Commercial Code; Law No. 94-640 of 25 July 1994).

Where employee shareholders represent more than 3% of the share capital, the shareholders of large public limited companies<sup>22</sup> must elect, at a general meeting, one or more directors from among the employee shareholders or, where applicable, from among the employee members of the supervisory board of a mutual fund holding shares in the company.

Article L.225-30 refers solely to directors appointed pursuant to Articles L.225-27-1 and L.225-79-2 (see below). Article L.225-30 cannot therefore be invoked against employees.

#### Articles of association and incompatibility rule

However, one might ask whether a company's articles of association can include a clause establishing an incompatibility. To date, there is no court decision indicating whether such a clause would be valid. In our opinion, the validity of this clause could be challenged for the following reasons:

- Articles L.225-27 and L.225-79 specify that the articles of association may provide for employee representatives on the administrative or supervisory board. They do not indicate that the articles of association may specify the conditions for exercising these employee mandates on administrative or supervisory boards.
- The conditions for exercising the mandates of trade union representatives or elected employee representatives, and in particular the incompatibility rules, are public policy and strictly interpreted in labour law<sup>23</sup>. For instance, in interpreting Article L.225-30 of the Commercial Code, a first-instance French court ruled that "a provision restricting the right to vote and to stand for election (...) can only be interpreted strictly"<sup>24</sup>.
- Adding a rule of incompatibility outside the situations exhaustively provided for by the law could be considered a restriction to trade union prerogatives or to trade union freedom to organise, which would constitute an offence of obstruction<sup>25</sup> or trade union discrimination<sup>26</sup>.
- The Commercial Code precisely determines the possible content of the articles of association in public limited companies and limited partnerships. Freedom in defining the articles of association is very limited in these companies, unlike in a simplified joint stock company.
- Only the law may provide for an incompatibility with a directorship (as is the case, for example, with civil servants<sup>27</sup> or members of parliament<sup>28</sup>) and in cases in which a directorship is terminated. The Legal Committee of the National Association of Joint Stock Companies (ANSA, for its acronym in French) confirms this analysis, stating that: "Similarly, one cannot lawfully introduce a clause into

**22.** Companies which, at the end of two consecutive financial years, employ at least 1,000 permanent employees in the company and its direct or indirect subsidiaries, when the registered office is located solely in France, or at least 5,000 permanent employees in the company and its direct or indirect subsidiaries, when the registered office is located in France and abroad.

**23.** See the introduction (the hypothesis of an employee with delegated powers or effectively representing the employer before employee representation bodies).

**24.** Courbevoie District Court, 6 March 2017, Case No. 11-16-000911, *Fédération CGT des sociétés d'études v. SAP France Holding SA*. This judgment rejects a request for the annulment of the election of a representative based on the fact that the employee was already a board member of an SE with its headquarters in Germany.

**25.** Article L.2146-1 of Labour Code.

**26.** Article L.2146-2 of Labour Code.

**27.** Article 25 (g) of Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants.

**28.** Article L.0146 of the Electoral Code.

the articles of association that would extend the scope of such incompatibility. Indeed, when the law sets out an incompatibility sanctioned by the resignation of the director *ipso jure*, the articles of association may not add an additional case of incompatibility not provided for by law<sup>29</sup>.

**b) The incompatibility rule set forth in Article L.225-30 of the French Commercial Code concerns worker directors in large companies (Articles L.225-27-1 and L.225-79-2 of the French Commercial Code; Law of 14 June 2013 on securing employment as amended by the Law of 22 May 2019 on the growth and restructuring of companies).**

These directors are the only ones concerned by the incompatibility rule set forth in Article L.225-30 of the French Commercial Code.

- **Headcount thresholds**

Worker directors are **mandatory** when certain headcount thresholds are reached.

The law (Articles L.225-27-1 and L.225-79-2 of the Commercial Code) applies to companies which employ, at the end of two consecutive financial years:

- at least 1,000 permanent employees in the company and its direct or indirect subsidiaries, when the registered office is located in France;
- or at least 5,000 permanent employees in the company and its direct or indirect subsidiaries, when the registered office is located in France and abroad.

The Commercial Code<sup>30</sup> states that a holding company whose main activity is to acquire and manage subsidiaries and shareholdings is exempted from the obligation to appoint employee administrative or supervisory board members when two conditions are met:

- it is not subject to the obligation to set up a social and economic committee (it has not reached the threshold of 11 employees for 12 consecutive months);
- and it owns one or more direct or indirect subsidiaries that are subject to the obligation to appoint employee administrative or supervisory board members.

- **Legal forms covered**

The appointment of worker directors, and the incompatibility rule set forth in Article L.225-30 of the Commercial Code, concern several legal forms:

- public limited companies with a board of directors<sup>31</sup>;

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**29.** Opinion of the ANSA Legal Committee, 4 December 2013.

**30.** Articles L.225-27-1 and L.225-79-2 of the Commercial Code.

**31.** Articles L.225-27-1 and L.225-30 of the Commercial Code.

- public limited companies with a supervisory board<sup>32</sup>;
- partnerships limited by shares (Article L.226-5-1 of the French Commercial Code referring to Article L.225-80 and thus to Article L.225-30 of the French Commercial Code<sup>33</sup>).

By contrast, a simplified joint stock company (*société par actions simplifiée* or SAS) – which may have an administrative board if the articles of association provide for such – is not required to set up mechanisms for employee board representation. The incompatibility rule set forth in Article L.225-30 of the French Commercial Code is therefore not applicable<sup>34</sup>. However, when the articles of association provide for such, an SAS may have an administrative board on which employee representatives sit.

In such a case, one may wonder whether, by virtue of the freedom to define the articles of association characterising an SAS, it is possible to provide for an incompatibility clause inspired by Article L.225-30 of the Commercial Code. Again, this issue has never been decided. Of course, the company could invoke the contractual freedom characterising an SAS and the possibility of setting the conditions in the articles of association for appointing the members of any body defined therein such as an administrative board. However, this argument could be countered, as in the case of limited partnerships with shares, by the argument that the conditions for exercising a mandate as a trade union representative or elected employee representative, and in particular the incompatibility rules, are a matter of public policy and are to be interpreted strictly, and that only the law can lay down incompatibility rules with a worker director mandate and the cases in which a director is deemed to have resigned<sup>35</sup>.

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32. Articles L.225-79-2 and L.225-80 of the Commercial Code. Article L.225-80 refers to Article L.225-30 of the French Commercial Code, stating that *sociétés anonymes* can be "dualistic", i.e. having a management board and a supervisory board (unlike "monistic" companies which have only a management board). Supervisory boards in France are subject to the same employee representation rules as those applicable to a management board. In particular, under Article L.225-79-2 of the French Commercial Code, the supervisory board includes one employee representative when the number of supervisory board members is less than or equal to eight, and two when the number exceeds eight. Article L.225-80 of the French Commercial Code specifies that the "conditions for exercising the mandate" are "set according to the rules defined in Articles L.225-28 to L.225-34". In other words, the incompatibility rule provided for in Article L.225-30 also applies to employee representatives belonging to the administrative board of French public limited companies.
33. Article L.226-5 -1 refers to the regime for public limited companies with a supervisory board. It stipulates that, in partnerships limited by shares" which meet the criteria set forth in I of Article L.225-79-2, employees are represented on the supervisory board under the conditions set forth in Articles L.225-79-2 and L.225-80". Thus, Article L.226-5-1 of the Commercial Code refers to Article L.225-79-2 (relating to employee representation on the supervisory boards of public limited companies) and to Article L.225-80 (which in turn refers to Article L.225-30, which lays down the incompatibility rule).
34. Under Article L.227-1 al. 2 of the Commercial Code relating to simplified joint stock companies, "the rules concerning public limited companies, with the exception (...) of Articles L.225-17 to L.225-102-2 (...) are applicable to simplified joint stock companies". The rules governing the appointment of worker directors (in particular Article L.225-27-1) and the incompatibility rule (in particular Article L.225-30) are therefore not applicable to simplified joint stock companies.
35. Cf. Opinion of the ANSA Legal Committee, 4 December 2013.

- **The number of employee representatives**

In these companies, the number of employee administrative or supervisory board members is at least equal to:

- one in companies with eight or fewer administrative or supervisory board members;
- two in companies with more than eight administrative or supervisory board members.

- **Worker directors in large companies can be designated by any of the following methods, which is decided by the General Meeting<sup>36</sup> :**

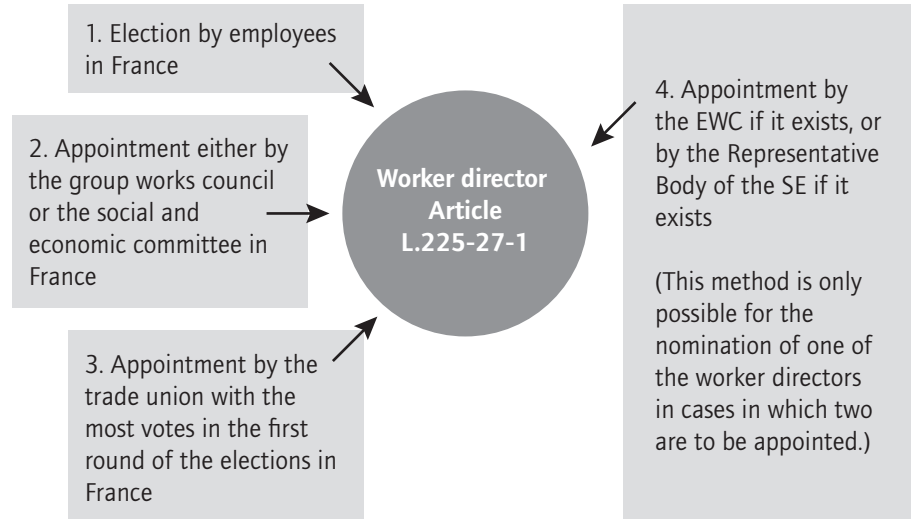
1. Via an election among group employees located in France.
2. Appointment, as the case may be, by the group works council or the social and economic committee (CSE) in France.
3. Appointment by the trade union organisation having obtained the most votes in the first round of social elections in France; if two worker directors are to be appointed, then by appointment by each of the two trade union organisations who obtained the most votes in the first round of social elections in France.
4. Only if two worker directors are to be appointed, then the General Meeting may also choose to have one of the worker directors appointed according to one of the three methods laid out above, while the other can be appointed by the European Works Council, if it exists, or, for European companies (SEs) within the meaning of article L.2351-1 of the Labour Code, by the employee Representative Body negotiated according to article L.2352-16 of the same code or established by applying the Standard Rules laid out in article L.2353-1 of said code<sup>37</sup>.

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<sup>36</sup>. When two worker directors are to be appointed, the General Meeting can always choose between these four appointment methods. Thus, even if a European Works Council or an SE-Works Council exists, the fourth method is not necessarily chosen. In other words, the second worker director does not necessarily have to be appointed by the European Works Council or the SE-Works Council; it is up to the General Meeting to decide whether this will be the case.

<sup>37</sup>. It should be noted that, when this method is chosen, the second worker director may be an employee employed abroad as well as an employee employed in France.

Figure 1 Appointment or election of a worker director

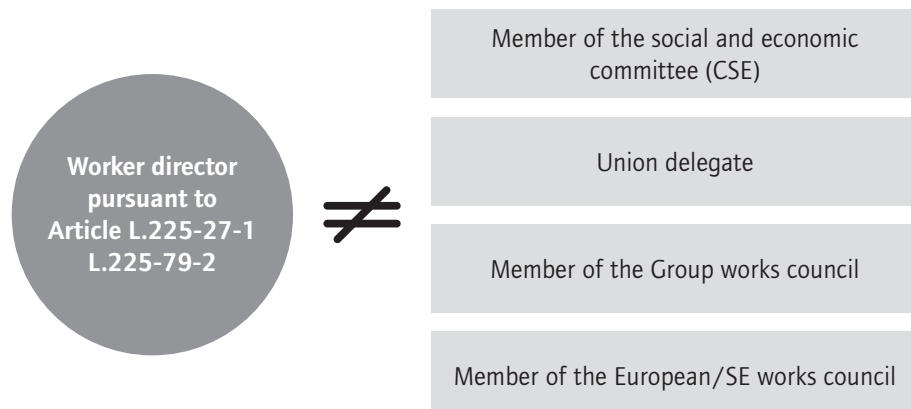


#### 1.1.1.2 The mandate of an elected or union representative

Under the terms of Article L.225-30 of the French Commercial Code, the mandate of a director elected by employees or appointed pursuant to Article L.225-27-1 is incompatible with any mandate:

- "as a union delegate;
- as a works council member;
- as a Group works council member;
- as an employee representative or member of the company's health, safety and working conditions committee (CHSCT);
- as a member of an EWC, if one exists, or for an SE in the sense of article L.2351-1 of the Labour Code, as a member of the employee representation body mentioned in article L.2352-16 of the same code or as a member of an SE works council as mentioned in article L.2353-1 of said code".

Figure 2 Incompatible mandates



- **Is the list of incompatible mandates exhaustive?**

There are at least two cases in which the incompatibility rule can be extended beyond the situations specifically covered by the text:

- First, Article L.225-30 of the French Commercial Code concerns all elected employee representatives.

Indeed, this text was not modified by the decrees of 22 September 2017 abolishing works councils, staff delegates and the health, safety and working conditions committee (CHSCT) and replacing them by the social and economic committee (CSE). Without doubt, to the extent that these different representative institutions have the same purpose, Article L.225-30 now **applies to the members of the social and economic committee**.

- Second, Article L.225-30 refers to "any trade union mandate".

According to a 2005 ruling handed down by the Court of Cassation: "any trade union mandate<sup>38</sup> exercised within the company and likely to create conflicts of interest with the functions of a board member is covered by the provisions of this text"<sup>39</sup>. It thus ruled that the mandate of a "full-time in-house union delegate" (a mandate resulting from a company collective agreement in this case) is a trade union mandate insofar as it allows the employee concerned to devote herself or himself to union activities. Consequently, union mandates created by collective agreement and having as their purpose the exercise of union activities are probably covered by the incompatibility rule. Similarly, one can deduce from this judgment that the mandate of "representative of the union section" (*représentant de la section syndicale* or RSS) referred to in Article L.2142-1-1 of the Labour Code is also targeted by Article L.225-30 of the Commercial Code<sup>40</sup>.

However, it will be shown below that only employee representative mandates exercised within a representative body established in France are the subject of the incompatibility rule set forth in Article L.225-30 of the Commercial Code.

### 1.1.2 The consequence of the incompatibility rule

- **The incompatibility rule does not prevent an employee representative from standing for election.**

This constellation has already been affirmed by the Court of Cassation with regard to worker directors covered by the law of 26 July 1983. In 1985, the Court ruled that when an employee was a director of the bank, he or she was not deemed

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38. See note 16.

39. Judgment of the Court of Cassation, Social Chamber, 30 September 2005 (Appeal No. 04-10.490) <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007048973?isSuggest=true>

40. In this sense, see G. Auzero, *La représentation obligatoire des salariés dans les conseils d'administration et de surveillance*, Droit social 2013, p. 740.

ineligible to serve as employee representative within a works council. Instead, his or her election as employee representative meant the automatic termination of his/her functions as a board member<sup>41</sup>. Consequently, the incompatibility rule does not prevent a worker director from standing as a candidate for the election to the works council or for any other employee representative mandate. Similarly, the incompatibility rule does not prevent an elected member of the works council or any other employee representative from standing for the seat of worker director. The incompatibility rule only triggers the termination of a mandate deemed incompatible but does not affect the validity of a candidacy. It remains to be determined which mandate will cease, and how.

- **A director who, at the time of her/his election or appointment, holds one or more of these offices must resign within eight days according to article L-225-30. Failing this, he or she shall be deemed to have resigned from her/his administrative or supervisory board mandate.**

Conversely to the law of 26 July 1983 applicable to public companies, which provides that "the aforementioned mandate(s) and the(ir) related protection shall terminate on the date of acquisition of the new mandate", thus not providing for an eight-day period, article L.225-30 does not provide for the immediate termination of the first mandate considered incompatible with the second one.

Here, two cases must be distinguished in private sector companies, depending on the chronology of events:

- **Case n°1: An employee representative, whose mandate is covered by the incompatibility rule, becomes worker director:** Article L.225-30 provides that he/she must expressly resign from his/her incompatible employee representative mandate(s) within a period of 8 days as from the acquisition of the worker director mandate (Figure n°3). It is advisable to draft a written document (letter of resignation) and send it before the expiry of this 8-day period by any means providing a certain date (e.g. registered letter with acknowledgement of receipt) to the company in which the mandates are exercised and, if applicable, to the trade union organisation thanks to which these mandates are exercised.

If the employee does not express his or her wish to resign from the mandate within 8 days, he or she is deemed to have resigned as a worker director: the worker director's mandate automatically ceases on the 9<sup>th</sup> day (Figure 4).

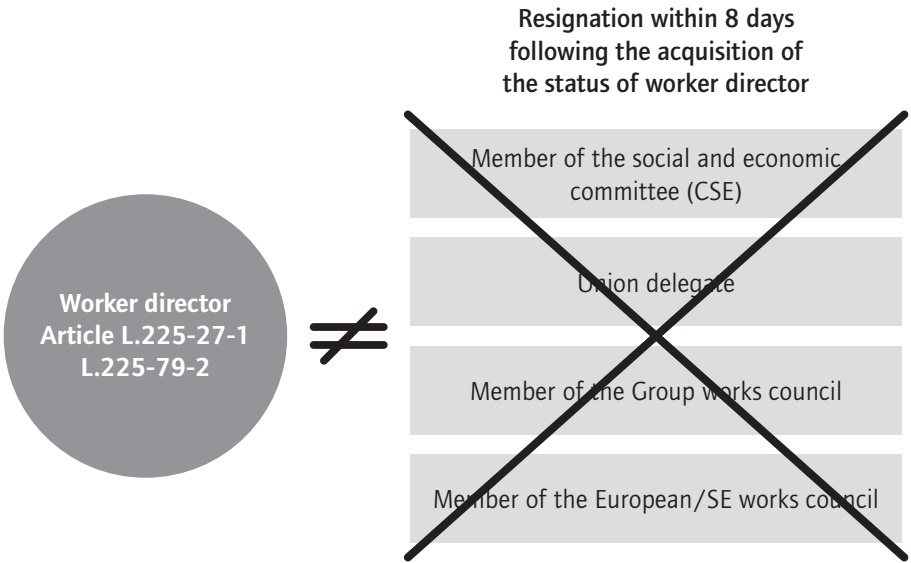
- **Case n°2: A worker director acquires an employee representative mandate that is incompatible with his or her board mandate:** this case is not expressly provided for by the last

41. Court of Cassation, Social Chamber, 13 March 1985 (Appeal No. 84-60.705, 84-60.706) [https://www.legifrance.gouv.fr/juri/id/JURITEXT000007015240?init=true&page=1&query=84-60705&searchField=ALL&tab\\_selection=all](https://www.legifrance.gouv.fr/juri/id/JURITEXT000007015240?init=true&page=1&query=84-60705&searchField=ALL&tab_selection=all)



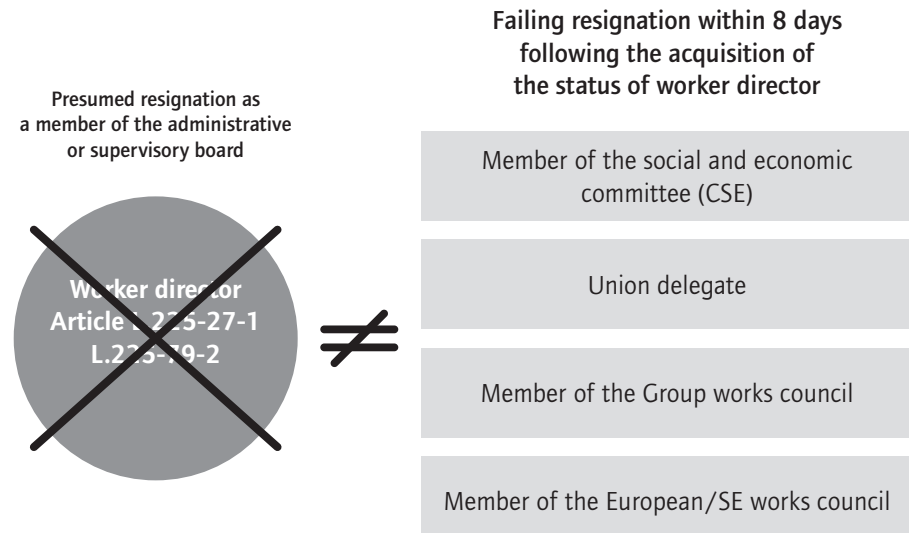
sentence of Article L.225-30. However, it can be deduced from the incompatibility rule, based on the model set out in the law of 26 July 1983, that acquiring an employee representative mandate entails the automatic and immediate termination of the first mandate, i.e. the termination of the board mandate.

Figure 3 Finding herself or himself in an incompatible situation, a worker director has 8 days to resign from her or his other mandates



Failing this, the mandate of worker director automatically ends at the end of this 8-day period.

Figure 4 After 8 days, a worker director is deemed to have resigned his or her mandate



### 1.1.3 The objectives of the incompatibility rule

Article L.225-30 of the Commercial Code reflects the legislator's intention to prevent a worker director from holding another position as an employee representative because of the risk of "conflicts of interest", the expression used by the Court of Cassation<sup>42</sup>.

The French legislator considers that the following interests are in conflict:

- On the one hand, the elected or trade union representative defends, through his or her activities, the interests of the workers, putting their claims and demands to the employing company.
- On the other hand, the worker director exercises a corporate mandate in the name and on behalf of the company. Indeed, the Commercial Code provides that "the board of directors sets the orientations of the company's operations and ensures their implementation" (Article L225-35 of the Commercial Code).

This objective can be interpreted as colliding with other norms of French, European and international law, as explained later in this report.

<sup>42</sup>. Judgment of the Court of Cassation, Social Chamber, 30 September 2005 (Appeal No. 04-10.490). <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007048973?isSuggest=true>

## 1.2 In public-sector companies

The presence of worker directors in public-sector companies is enshrined in the law of 26 July 1983 democratising the public sector, and in privatised companies by the law on the terms and conditions of privatisation (the Law of 6 August 1986 and the Law of 25 July 1994). A Decree issued on 20 August 2014 restricts the scope of the rules laid down by the 1983 Law to public companies with the status of public establishments (*établissement public*)<sup>43</sup>.

In these companies, the administrative or supervisory board must include two members representing the employees and one member representing the employee shareholders (if the board of directors has less than 15 members), or three members representing the employees and always one member representing the employee shareholders (if the board of directors has 15 members or more).

The 1983 Law also established an incompatibility rule (Article 23), still in force. Under it, "an employee representative's mandate as a member of the administrative or supervisory board is incompatible **with any other function representing employee interests within the company or its subsidiaries**, and in particular with the functions of union delegate, works council member, staff delegate or member of the health, safety and working conditions committee. The above-mentioned mandate(s) and the protection thereof shall end on the date on which the new mandate is acquired".

The 1983 Law creates a specific mandate of "full-time union representative" in public-sector companies. Article 23 thus adds that: "An employee representative's mandate as a member of the administrative or supervisory board is also incompatible with the exercise of the functions of a full-time union representative, within the meaning of the second paragraph of Article 15 of this Law. In the event of an employee performing full-time union duties being elected to the administrative or supervisory board, such duties shall be terminated and the person concerned shall be reinstated in his job".

Contrary to the regime applicable to private-sector companies, the 1983 law applying to the public sector<sup>44</sup> sets no deadline for terminating one's mandate as an employee representative, and, in the event of inaction, no deadline at the end of which the director is deemed to have resigned from her/his board mandate. Article 23 merely states only that "the above-mentioned mandate(s) and the protection thereof shall end on the date on which the new mandate is

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43. Under Article 1 of the Law of 26 July 1983 (amended in 1994), the provisions of this Law apply to state-run industrial and commercial establishments other than those whose staff are subject to public law, and to other state-run establishments which provide both a public administrative service and a public industrial and commercial service, where the majority of their staff are subject to private law.

44. Decree 2014-948 of 20 August 2014 on the governance and capital transactions of companies with participation of state-owned companies is applicable to commercial companies in which the state or its public establishments hold a capital stake, directly or indirectly. In these companies, worker directors are also subject to the incompatibility rule provided for in Article 23 of the 1983 Law (see Article 8, I of the Decree of 20 August 2014).

acquired". Interpreting this text, the Court of Cassation thus affirmed that "the aforementioned provisions of Article 23 of the Law of 26 July 1983 do not create any ineligibility for the director they refer to, solely stipulating that the election of a director to a 'new mandate' puts an end to his functions as a director and to the associated protection"<sup>45</sup>. The Court of Cassation therefore ruled that the automatic revocation was specifically aimed at the mandate of director. Conversely, the mandate of an employee representative does not end automatically. An employee representative must expressly resign from his or her mandate without delay, as soon as she or he becomes a director.

Table 1 Implementation of the incompatibility rule (public and private sector)

		Public sector (Law of 26 July 1983)	Private sector (Article L.225-30 Commercial Code)
Employee representative	An employee representative stands as worker director	Valid candidacy	Valid candidacy
Worker director	An employee representative becomes a worker director	Automatic termination of employee representative's mandate	<ul style="list-style-type: none"> <li>– 8-day period to resign from employee representative's mandate.</li> <li>– Failing this: automatic termination of worker director's mandate as of day 9.</li> </ul>
Worker director	A worker director stands for elections as employee representative	Valid candidacy	Valid candidacy
Employee representative	A worker director becomes an employee representative	Automatic termination of worker director's mandate	Automatic termination of worker director's mandate

45. Court of Cassation, Social Chamber, 13 March 1985 (Appeal No. 84-60.705, 84-60.706) [https://www.legifrance.gouv.fr/juri/id/JURITEXT000007015240?init=true&page=1&query=84-60705&searchField=ALL&tab\\_selection=all](https://www.legifrance.gouv.fr/juri/id/JURITEXT000007015240?init=true&page=1&query=84-60705&searchField=ALL&tab_selection=all)

## 2. Scope of the incompatibility rule

### 2.1 In private-sector companies

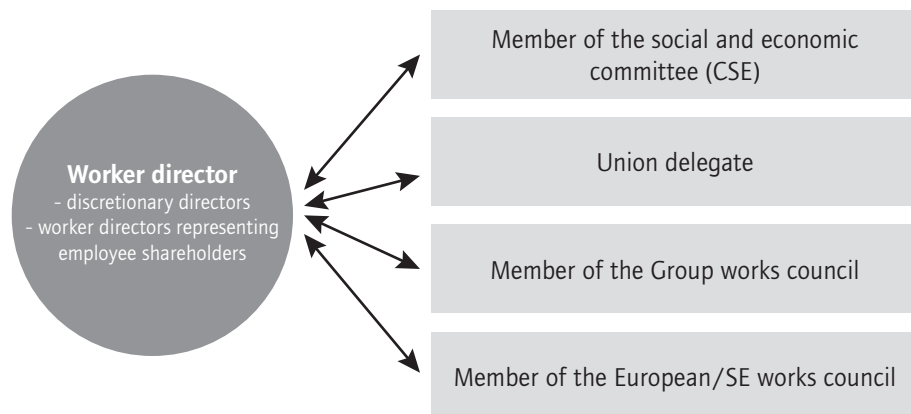
#### 2.1.1 Material scope

- **Only directors appointed pursuant to Article L225-27-1 are covered by the incompatibility rule.**

The incompatibility rule set forth in Article L.225-30 of the French Commercial Code does not apply to:

- discretionary directors;
- worker directors representing employee shareholders.

Figure 5 Worker directors not covered by the incompatibility rule

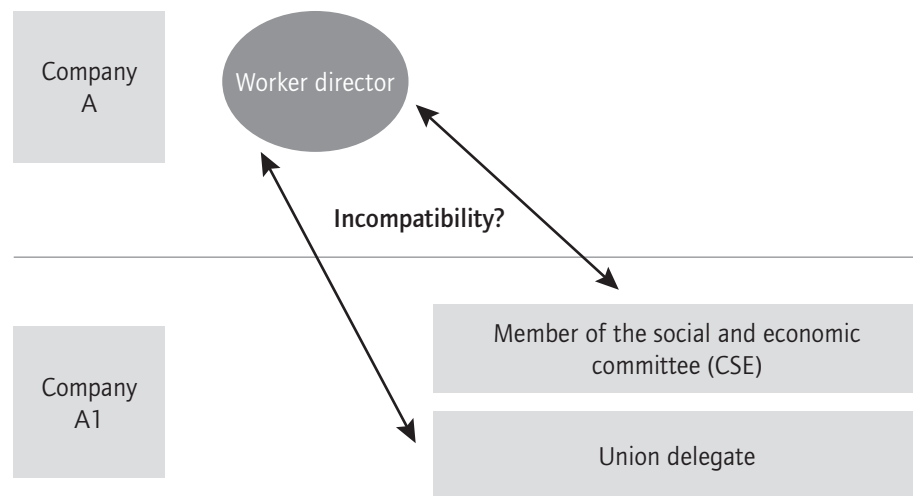


- **In groups of companies, the incompatibility rule is limited to mandates held within the same company.**

Given the absence of established case law regarding the scope of the incompatibility rule, many companies belonging to a group take a broad view of incompatibility. For example, they sometimes invoke the rule under which a worker director mandate in a subsidiary is incompatible with a mandate as an elected or union representative in another group company.

It is true that the group could be seen as being on the same footing as an individual "enterprise" in which the companies pursue a common interest. The conflicts of interest that Article L.225-30 of the Commercial Code seeks to prevent could therefore concern the situation in which a worker director's mandate in **Company A** cannot be combined with the mandate of a member of the social and economic committee (formerly works council) or trade union delegate in **Company A1** belonging to the same group as company A.

Figure 6 Application of the incompatibility rule within companies belonging to the same group



In favour of the argument that mandates within separate companies of the same group are incompatible, it should be noted that Article L.225-30 concerns an incompatibility with mandates held within the employee representation bodies of the group of companies (a mandate as a member of a group social and economic committee in France, a member of a European works council, a member of the employee representation body within an SE, or a member of an SE works council).

However, there are several arguments against extending the incompatibility rule to mandates held in separate companies, even when they belong to the same group<sup>46</sup>:

- The terms of Article L.225-30 of the Commercial Code are clear: "The mandate of a director elected by the employees or appointed pursuant to Article L.225-27-1 is incompatible with any mandate as a trade union delegate, a works council member, a group works council member, an employee delegate or a member of the health, safety and working conditions committee of **the company**". The text therefore targets the incompatibility between the mandate of a worker director

46. It should be noted, however, that no court decision seems to have settled this debate to date.

and any mandate held within "**the company**". Any application of the text beyond "the company" aimed at extending the incompatibility rule to companies belonging to the same group would therefore appear to violate the law (a "*contra legem*" interpretation).

- In the opinion of the Legal Committee of the National Association of Joint Stock Companies (ANSA), "one cannot extend the scope of the incompatibility set by the text of the law, which is clearly limited to the mandates exercised in the employee representation institutions "of the company", i.e. of the company required to appoint an employee representative to its board under the new regime of the law of 14 June 2013. Only employee representation bodies of the company subject to the obligation to appoint representatives to the administrative or supervisory board are therefore covered by the incompatibilities foreseen in the text, i.e. excluding such bodies in subsidiaries"<sup>47</sup>.
- The ruling of the Social Chamber of the Court of Cassation handed down on 30 September 2005<sup>48</sup>, which equates a permanent union representative with a union mandate within the meaning of Article L.225-30 of the Commercial Code, admittedly extends the scope of the text, but only with regard to the list of mandates covered by the text, within a **single company**. Conversely, this ruling does not justify extending the scope of application of the incompatibility rule in Article L.225-30 to all companies within the same group.
- Article L.225-30 of the Commercial Code does not refer to mandates held within the company or in subsidiaries, contrary to the wording used by the legislator in Article 23 of the Law of 26 July 1983 on democratising the public sector. The latter text expressly provides for the case of mandates held within the company "**or its subsidiaries**"<sup>49</sup>. The legislator did not take care to specify this in Article L.225-30 of the Commercial Code, as she/he did not intend to have the incompatibility rule applied beyond the company. Where the law does not distinguish, there is no need to distinguish.
- The risk of "**conflicts of interest**"<sup>50</sup> between a mandate as a worker director and another mandate exercised "**in the company**"<sup>51</sup>, which Article L.225-30 of the Commercial Code is specifically designed to

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47. Opinion of the ANSA Legal Committee, 4 December 2013.

48. Judgment of the Court of Cassation, Social Chamber, 30 September 2005 (Appeal No. 04-10.490). <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007048973?isSuggest=true>.

49. Article 23 of the Law of July 26, 1983 on democratising the public sector stipulates that "The mandate of director or member of the supervisory board of an employee representative is incompatible with any other function representing staff interests within the company or its subsidiaries, and in particular with the functions of a union delegate, a works council member, an employee delegate or a member of the health, safety and working conditions committee".

50. Judgment of the Court of Cassation, Social Chamber, 30 September 2005 (Appeal No. 04-10.490). <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007048973?isSuggest=true>

51. Same judgment.

prevent, is questionable when the mandates are exercised in separate companies, even if belonging to the same group. Indeed, the elected or union representative addresses his/her claims and complaints to the employer, company A1 (cf. Figure 6). She/He may however hold a mandate as a worker director within company A (cf. Figure 6), a separate legal entity which is not his/her employer and in respect of which she/he does not address any claims or complaints in his/her capacity as an elected or union representative.

## 2.1.2 Geographic scope

### **1<sup>st</sup> case: the company in which the worker director is appointed or elected has its registered office in a State other than France.**

The incompatibility rule set forth in Article L.225-30 of the Commercial Code concerns the operation of boards of directors of companies with their registered office in France.

By virtue of the law's territoriality principle<sup>52</sup> and according to EU Court of Justice case law<sup>53</sup>, French commercial legislation regarding the board of directors does not apply to companies not based in France. It is the law of the company's registered office, *Lex societatis*, which governs the form of the company, the appointment and powers of the company's representation bodies and the conditions for exercising the mandates of their members.

Any incompatibility is therefore limited to employees appointed as worker directors on the board of a French company (i.e. with its registered office in France).

In a 2017 ruling, the Courbevoie District Court rejected a request to annul the election of a works council member based on the fact that the employee was already a member of the board of directors of a European company based in

52. The basis for this principle remains debated. Article 3 of the Civil Code is often cited, where paragraph 1 states that "Police and security laws are binding on all living in the territory". With regard to company law, case law admits that it is the law of the company's headquarters (*Lex societatis*) which governs the company (Notably Court of Cassation, Civil Chamber, 17 October 1972, Appeal No. 70-13.817, "Royal Dutch" case; cf. Michel Menjucq, *International and European company law*, édition Montchrestien, 2018, specifically No. 110).

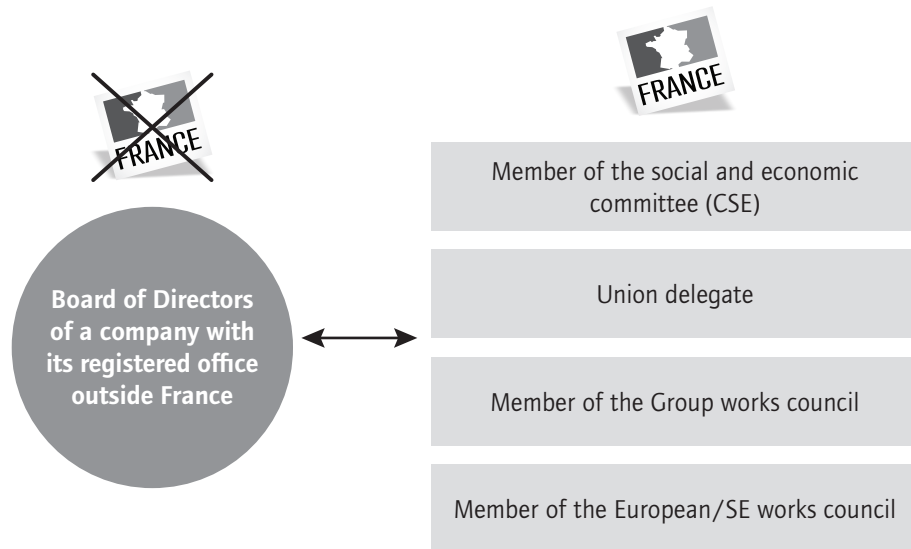
53. As regards whether a company comes under the legal system of a Member State, see ECJ 9 March 1999, Centros, C 212/97, EU:C:1999:126, paragraph 20: "The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person" (see, to that effect, Segers, paragraph 13, Case 270/83 Commission v France [1986] ECR 273, paragraph 18, Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13, and Case C-264/96 ICI [1998] I-4695, paragraph 20; 5 November 2002, Überseering (C 208/00, EU:C:2002:632, paragraph 57); 30 September 2003, Inspire Art (C 167/01, EU:C:2003:512, paragraph 97); 12 December 2006, Test Claimants in Class IV of the ACT Group Litigation (C 374/04, EU:C:2006:773, paragraph 43).



Germany. According to the court, “Article L.225-30 of the French Commercial Code, which provides for the incompatibility of the mandate of a director elected by the employees or appointed pursuant to Article L.225-27-1 with any mandate as a works council member, cannot be applied by analogy to the mandate of an employee representative appointed in a European company with its registered office in Germany, since this is a provision restricting the right to vote and to stand for election, which can only be interpreted *stricto sensu*”<sup>54</sup>.

Consequently, a worker director on the board of a foreign company is eligible for election to an employee representative body in France and could assume a mandate there, without having to give up his or her mandate as a worker director abroad. As the incompatibility rule does not apply, he/she is not ineligible and retains his/her mandate as an employee representative in France. In the same vein, there is no automatic termination of his/her mandate as a worker director on a foreign board.

Figure 7 Exercising a mandate as a worker director in a company with its registered office outside France



**2<sup>nd</sup> case: The worker holds an employee representation mandate within a national employee representation body (other than a European or SE works council) subject to foreign law.**

Members of national employee representation bodies elected or appointed in a subsidiary or establishment governed by foreign law (for example, a works council member of an establishment in Germany and therefore elected under German law) are not subject to French law, which only covers members of French

54. Courbevoie District Court, 6 March 2017, Case No. 11-16-000911, Fédération CGT des sociétés d’études v. SAP France Holding SA.

representation bodies. Here again, there is no need to distinguish where the law does not distinguish.

Indeed, the incompatibility rule set forth in Article L.225-30 of the French Commercial Code applies solely to employee representation mandates under French law: i.e. any mandate:

- as a union delegate;
- as a member of the social and economic committee, works council, staff delegate or member of the company's health, safety and working conditions committee (CHSCT);
- as a member of the Group works council.

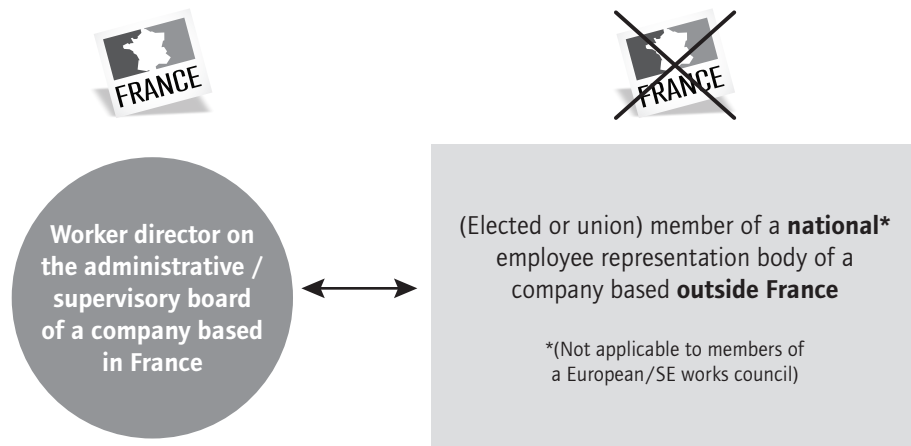
Consequently, Article L.225-30 does not apply to members of national employee representation bodies, elected or appointed outside France, in the territory in which they usually perform their work. This is the case when these employees work:

- within a foreign subsidiary (belonging to the same group as the French company in which the employee is appointed a member of the administrative or supervisory board);
- within an establishment or branch established outside French territory (belonging to the French company in which the employee is appointed a member of the administrative or supervisory board).

Moreover, foreign representation bodies are difficult to compare with French representation bodies. For example, a French social and economic committee (CSE) has mainly information and consultation rights, while a works council in Germany also has a negotiating right. There is even a requirement for prior agreement on certain matters. The extension of the incompatibility rule to foreign employee representation bodies would imply that a French judge:

- rejects the literal interpretation of French law (Article L.225-30 refers only to mandates under French law); and
- performs an assessment of the functional equivalence of the employee representation bodies, in order to know whether for instance a Norwegian union delegate – who plays a key role in informing and consulting employees and in local negotiations – is equivalent to a French union delegate, or whether a German works council is equivalent to a French social and economic committee. As such a comparative assessment seems quite complex and uncertain, it is therefore unlikely that a French judge would risk doing so.

Figure 8 The exercise of a mandate as worker director in France by an employee representative subject to the law of a State other than France



Finally, it should be noted that a French company cannot invoke the non-discrimination principle under the rules on the free movement of workers (Article 45(2) TFEU) to extend the incompatibility rule to worker representatives employed outside French territory. The differentiated effects resulting from the existence of an incompatibility for employee representatives from France and a compatibility for non-French mandates would thus not constitute a discrimination in the sense of EU law.

Indeed, the EU Court of Justice, interpreting Article 45(2) TFEU (which contains a specific rule of non-discrimination on grounds of nationality in relation to the conditions of employment), considered **that a Member State may apply limitations to worker participation in a national body solely to those employed on its national territory**. In the case *Konrad Erzberger v. TUI AG*<sup>55</sup>, the Court of Justice affirmed that: "In that context, EU law does not, in the field of representation and collective defence of the interests of workers in the administrative or supervisory bodies of a company established under national law, a field which, to date, has not been harmonised or even coordinated at Union level, prevent a Member State from providing that the legislation it has adopted be applicable only to workers employed by establishments located in its national territory, **just as it is open to another Member State to rely on a different linking factor for the purposes of the application of its own national legislation**"<sup>56</sup>. The Court thus accepts that a Member State may, in the field of the representation and collective defence of interests of workers, for the purposes of applying a national rule providing for an incompatibility of mandates, have recourse to a further limiting factor, such as the exercise of a mandate as an employee representative in its national territory within a company established in its territory and in which she/he cannot be appointed as a member of the

55. CJEU 18 July 2017, Case C- 566/15, *Konrad Erzberger v. TUI AG*.

56. CJEU 18 July 2017, *supra*, point No. 37.

administrative or supervisory board. A French employer can therefore not use alleged discrimination as a pretext for extending the incompatibility rule under Article L.225-30 of the French Commercial Code to all employee representatives, even those located outside France.

Furthermore, the fact that a French employing company controls one or more foreign subsidiaries is irrelevant. By analogy, the Advocate General's opinion in the *Erzberger* case confirm this analysis: "By way of example, I consider that the situation of an employee employed by the French subsidiary of the TUI group is purely internal to the French Republic. That employee is thus employed in France by a French company formed under French law, the law which also generally governs his contract of employment and, more generally, his conditions of employment. In that regard, the location of the ownership or control of the company by which that employee is employed has no impact on his employment situation, which de facto can be fully assimilated to that of other employees employed in France. In those circumstances, I consider that the fact that the company which employs the employee is owned or controlled by a company established in another Member State is not in itself sufficient to constitute a connection with either of the situations contemplated by Article 45 TFEU. In other words, freedom of movement for workers cannot be affected by the fact that the employer is acquired by a company established in another Member State: from the point of view of the employee's situation, that acquisition constitutes an external factor unconnected with the acts of the employee"<sup>57</sup>

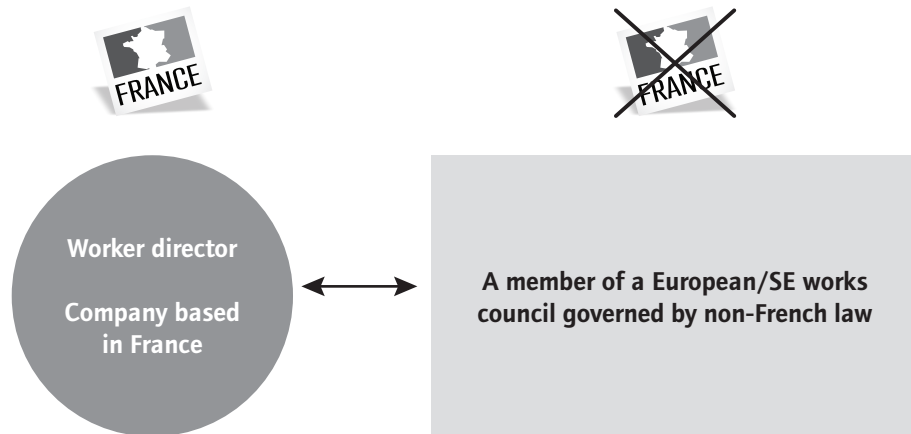
**3<sup>rd</sup> case: A worker director of a French company is also a member of a European works council governed by a foreign law or of a works council of an SE established outside France.**

The case is as follows: a member of a European works council of a company established outside France, or of the works council of an SE with its registered office outside France wishes to be appointed a member of the board of directors of a company under French law.

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57. Opinion of Advocate General Henrik Saugmandsgaard delivered on 4 May 2017, Case C-566/15, *Konrad Erzberger v. TUI AG*.

Figure 9 The exercise of a mandate as a worker director in France by a European employee representative (EWC/SE) subject to the law of a State other than France



Firstly, one needs to identify the law applicable to the European or SE works council or to the employee representation body set up within the SE before defining, in a second step, the scope of the incompatibility rule.

- a) Which law is applicable to the European/SE works council?
- **In the case of a European works council:** The French rules<sup>58</sup> governing a European works council or the procedure for informing and consulting employees apply<sup>59</sup>:
    - when the registered office of the Community-scale company or group of companies or that of the controlling company is located in France;
    - when the controlling company is located outside the European Union, and the establishment with the largest number of employees in the Member States is located in France (provided that no other representative agent has been designated in another Member State other than France for the purposes of fulfilling the requirements of the Directive 2009/38/CE, following article 4.2 of the Directive).

<sup>58</sup>. Articles L.2341-1 to L.2346-1 of the Labour Code.

<sup>59</sup>. Cf. Article L.2341-3 of the Labour Code. See also Directive 2009/38: "The law applicable in order to determine whether an undertaking is a controlling undertaking shall be the law of the Member State which governs that undertaking. Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated." (Article 3 §6 of Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees).

- **In the case of SE works council:** French law<sup>60</sup> governs an SE works council<sup>61</sup> (or an employee representation body<sup>62</sup>) established within an SE with its registered office in France. French law applies to SEs with their registered office in France<sup>63</sup>, i.e. whose registered office is located in France in accordance with Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and with French law<sup>64</sup>.
- b) Does the incompatibility rule laid down in Article L.225-30 of the Commercial Code apply to members of an EWC/SE works council (or the representation body set up by the SE) when those bodies are established under the law of a Member State other than France?

Article L.225-30 stipulates that a worker director mandate is incompatible with “any mandate” as a member of one of these bodies, possibly suggesting that it also includes mandates held in bodies governed by the laws of other Member States.

However, the incompatibility rule is limited to the case where the EWC/SE works council (or the representative body established by the SE) is governed by French law.

Firstly, the wording of Article L.225-30 of the Commercial Code refers, for SEs, to the French rules governing SEs, stating that the mandate of a worker director “is also incompatible with any mandate of a member of a European works council, if it exists, or, for an SE within the meaning of Article L.2351-1 of the Labour Code, of a member of the employee representation body mentioned in Article L.2352-16 of the same code or of a member of an SE works council as mentioned in Article L.2353-1 of said code. However, these various provisions only apply to European companies with their registered office in France<sup>65</sup>. By analogy, it could be accepted that, when Article L.225-30 refers to the mandate exercised within a “European works council”, it is a European works council within the meaning of the French Labour Code, and therefore governed by French law (Article L.2341-3 of the Labour Code). Article L.225-30 therefore does not apply to mandates exercised within

<sup>60</sup>. Articles L.2353-1 to L.2353-27-1 of the Labour Code.

<sup>61</sup>. The SE works council (Article L.2353-13 of the Labour Code) and the Special Negotiating Body (Article L.2352-1 of the Labour Code) are expressly endowed with legal personality under French law.

<sup>62</sup>. Articles L.2353-1 ff of the Labour Code.

<sup>63</sup>. See especially Article L.2351-1 of the Labour Code.

<sup>64</sup>. Article L.229-1 of the Commercial Code. To prevent any abuse, the text specifies that “the registered office and the corporate management of a European Company may not be separated”.

<sup>65</sup>. Article L.2351-1 of the Labour Code specifies that “The provisions of this title (*devoted to the representation of employees in a European Company*) shall apply to: 1. European Companies with their registered office in France, constituted in accordance with Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE); 2. To companies participating in the constitution of a European Company and having their registered office in France; 3. To subsidiaries and establishments located in France of a European company located in another Member State of the European Community or the European Economic Area”. While the third point refers to European companies with their registered office abroad, the incompatibility rule refers to the notion of a European company as defined by domestic French law.

European/SE works councils (or SE representation bodies) when these bodies are governed by the laws of other Member States.

As already stated, the fact that a French company controls or is controlled by a foreign company has no impact on any extension to the scope of application of French rules affecting the working conditions of employees of foreign companies. The incompatibility rule is a purely national situation in French law. In the same vein, the location of the ownership of a subsidiary outside French territory has no impact on the situation of employees employed in another State.

Secondly, the incompatibility rule is intended to prevent any **conflict of interest** between a worker employee representative who addresses demands and complaints to the management of the (controlling) company. The incompatibility rule is therefore without purpose when an employee is a member of a European/SE works council in another Member State. Indeed, since in this case the corporate management of the European-scale company is not located in France, this worker representative is not subjected to a conflict of interest through being a member of the administrative or supervisory board of a subsidiary governed by French law.

Thirdly, it is questionable whether the obligation to resign under French law does not, in some respects, conflict with European law. Could this be considered as a reduction of rights in the sense of the EWC and SE Directives? (see point 3.2)

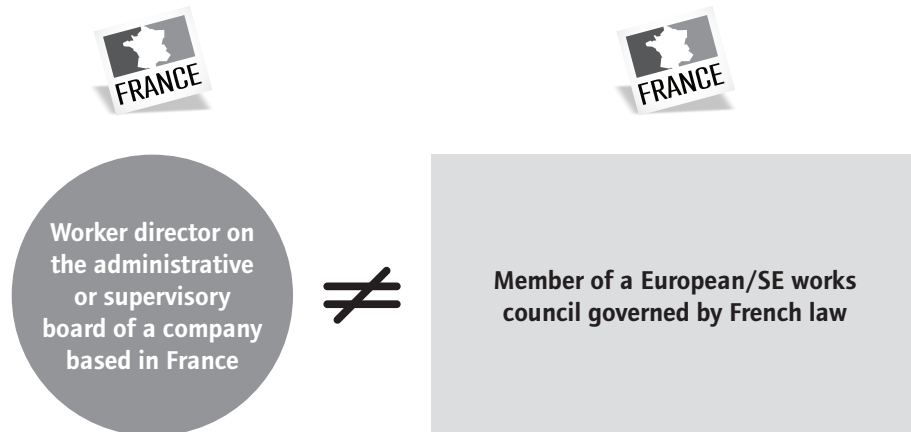
Whatever the case, any stipulation of an agreement relating to the mandates of members of a European/SE works council governed by a foreign law cannot extend the incompatibility rule laid down by Article L.225-30 of the Commercial Code to a hypothesis not provided for by this legal provision. Indeed, the regime relating to the incompatibility of the director's mandate is a matter of public policy, as explained previously<sup>66</sup>. The same reasoning can be followed with regard to a clause stipulated in an agreement under foreign law relating to the mandates of members of a European/SE works council.

**4<sup>th</sup> case: A worker director of a French company is also a member of a European/SE works council established in France.**

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66. Cf. Opinion of the ANSA Legal Committee, 4 December 2013.

Figure 10 The exercise of a worker director mandate in France by a European employee representative (European/SE works council) subject to French law



Article L.225-30 states that the mandate of a worker director “is also incompatible with any mandate as a member of a European works council, if it exists, or, **for SEs within the meaning of Article L.2351-1 of the Labour Code**, as a member of the employee representation body mentioned in Article L.2352-16 of the same code or as a member of an SE works council as mentioned in Article L.2353-1 of said code”. As pointed out in Case 3, the wording of Article L.225-30 refers, for SEs, to the French rules governing them. However, these various provisions only apply to SEs with their registered office in France<sup>67</sup>. By analogy, it could be accepted that, when Article L.225-30 refers to the mandate exercised within a “European works council”, it is a European works council within the meaning of the French Labour Code, and therefore governed by French law (Article L2341-3 of the Labour Code).

No account is to be taken of the nationality of the employee representative or to consider that only the law applicable to her or his employment contract governs his mandate, for two reasons:

- On the one hand, only the law applicable to the representation body (European/SE works council, or the employee representation body within the SE) is important. This is the law applicable to the representative body which determines the system for appointing its

67. Article L.2351-1 of the Labour Code specifies that “The provisions of this title (devoted to the representation of workers in a European Company) shall apply: 1. European Companies with their registered office in France, constituted in accordance with Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE); 2. To companies participating in the constitution of a European Company and having their registered office in France; 3. To subsidiaries and establishments located in France of a European company located in another Member State of the European Community or the European Economic Area”. While the third point refers to European companies with their registered office abroad, the incompatibility rule refers to the notion of a European company as defined by domestic French law for the establishment of an employee representation body governed by French law.



members, irrespective of the State in which the latter habitually perform their work.

- On the other hand, and in any case, the French law on incompatibility does not limit the prerogatives of the members of a European/SE works council or of a member of the employee representation body within the SE). Article L.225-30 is without consequences for such mandates (no ineligibility; no revocation or resignation imposed), solely limiting the employee's right to be appointed in France as a worker director.

## 2.2 In public-sector companies

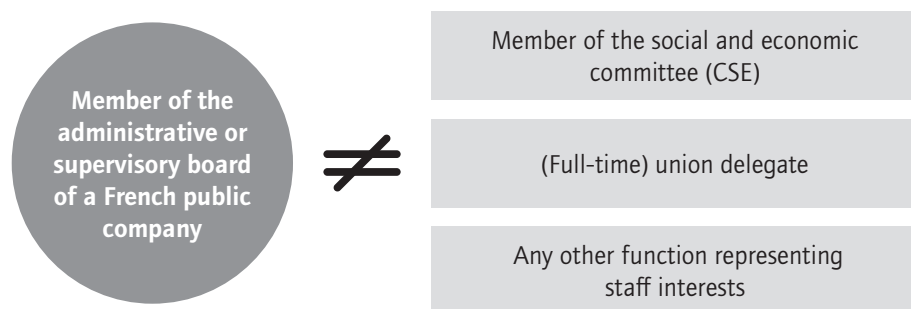
Article 23 of the Act of 26 July 1983, which is still in force, lays down an incompatibility rule whereby : "An employee representative's mandate of director or member of the supervisory board is incompatible with any other function representing employee interests within the company or its subsidiaries, in particular with the functions of union delegate, works council member, staff delegate or member of the health, safety and working conditions committee. The above-mentioned mandate(s) and the protection thereof shall end on the date on which the new mandate is acquired".

Article 23 adds that: "An employee representative's mandate as a member of the administrative or supervisory board is also incompatible with the exercise of the functions of a full-time union representative, within the meaning of the second paragraph of Article 15 of this Law. In the event of an employee performing full-time union duties being elected to the administrative or supervisory board, such duties shall be terminated and the person concerned shall be reinstated in his job"<sup>68</sup>

### 2.2.1 Material scope

- **The mandates concerned**

Figure 11 Mandates covered by the incompatibility rule for mandates in public-sector companies (according to the 1983 law)



**68.** For example, for La Poste, while Article 11 of Decree 90-1111 of 12 December 1990 on the status of La Poste specified this incompatibility rule, this provision was repealed by a decree of 26 February 2010 setting out the initial La Poste articles of association. La Poste was transformed in 2010 (it is no longer a public establishment, but a public limited company with public capital).

It should be noted that this incompatibility rule only concerns **employee representation bodies**:

- union delegates;
- members of the works council, staff delegates or member of the health, safety and working conditions committee (now the social and economic committee).

The text does not expressly refer to the mandates of:

- a member of a Group works council;
- a member of a European works council;
- a member of the SE works council or of the representative body set up by the SE.

However, the adverb "in particular" (*notamment*) is to be noted, as it leaves a judge a margin of discretion to extend the incompatibility rule. The law also specifies that incompatibility concerns "any other function representing employee interests within the company or its subsidiaries". A French judge could thus easily accept that a mandate as a member of a Group/European/SE works council or a representation body established in an SE constitutes a "function representing employee interests within the company or its subsidiaries" covered by the incompatibility rule.

- **In groups of companies, the incompatibility rule is extended to all subsidiaries.**

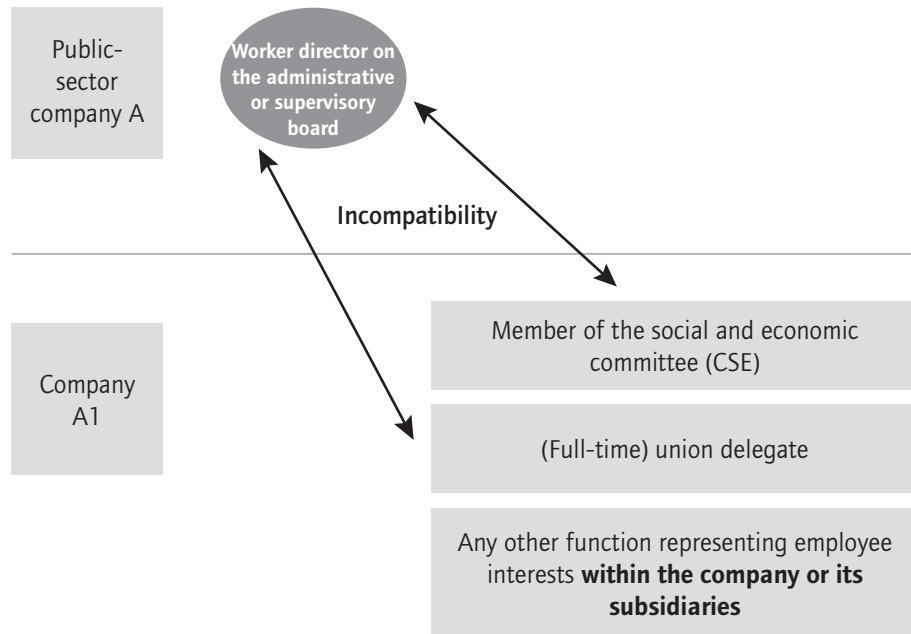
According to article 23 of the 1983 law, "an employee representative's mandate as a member of a company's administrative or supervisory board is incompatible with any other function representing employee interests within the company or its subsidiaries".

It should be noted that the incompatibility rule applies within the employing company or its direct or indirect "subsidiaries"<sup>69</sup>, but cannot be extended to companies controlling the employing company. In this sense, any representative mandate (either French or non-French) on the board of a French subsidiary would therefore be compatible with a representative mandate in the European Works Council of the parent company of the same group in France.

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**69.** The notion of a subsidiary presupposes the existence of a controlling relationship (cf. Articles L.233-1 to L.233-5-1 of the Commercial Code).

Figure 12 Application of the incompatibility rule within companies belonging to the same group



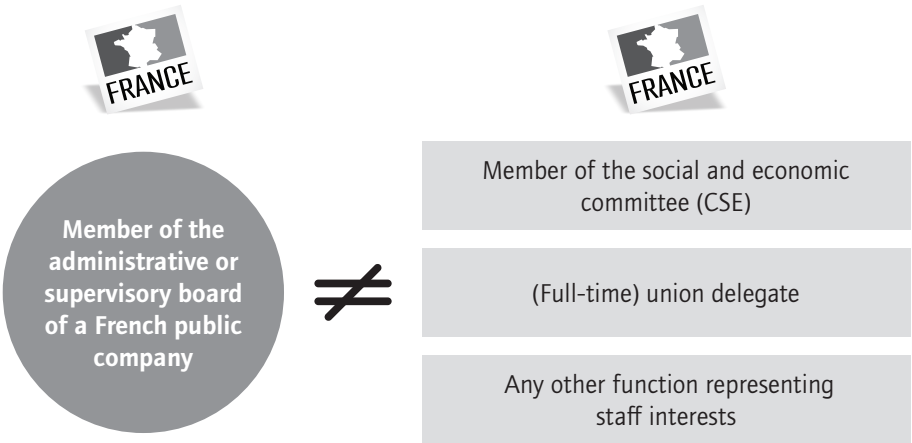
## 2.2.2 Geographic scope

For the same reasons as those set out for private-sector companies<sup>70</sup>, it may be accepted that members of national employee representation bodies elected or appointed in a subsidiary or establishment **governed by foreign law** (for example, a member of a works council in Germany, and thus elected under German law) are not subject to French law, which only covers members of French representation bodies. There is no need to distinguish where the law does not distinguish.

The incompatibility rule therefore seems to apply only to situations covered by French law.

<sup>70</sup>. See especially point 2.1.2 (1st and 2nd cases).

Figure 13 The exercise of a mandate as worker director in France by a European employee representative subject to French law



In the same vein, if we accept that mandates within European representation bodies are covered by the text, it seems to us that a worker director of a French company cannot be a member of a European works council established in France or of the works council of an SE governed by French law. On the other hand, a member of the administrative or supervisory board of a French public company may also be a member of a European works council governed by a foreign law or of the works council of an SE established outside France.

### 3. Relevance of the incompatibility rule

#### 3.1 Criticism of the incompatibility rule

- **A strict rule ...**

The strictness of the French law with regard to worker directors contrasts with the flexibility of the rules governing the plurality of mandates of traditional (non-worker) directors. Under French law, an individual may simultaneously hold up to five directorships in public limited companies with their registered office in France (Article L.225-21, paragraph 1 and of the French Commercial Code)<sup>71</sup>. And this limit of five directorships is not applicable in controlled companies (five directorships in controlled companies only count as one mandate, up to a limit of five per group. This basically allows a single person to hold up to twenty-five directorships in five groups).

- **An unclear objective ...**

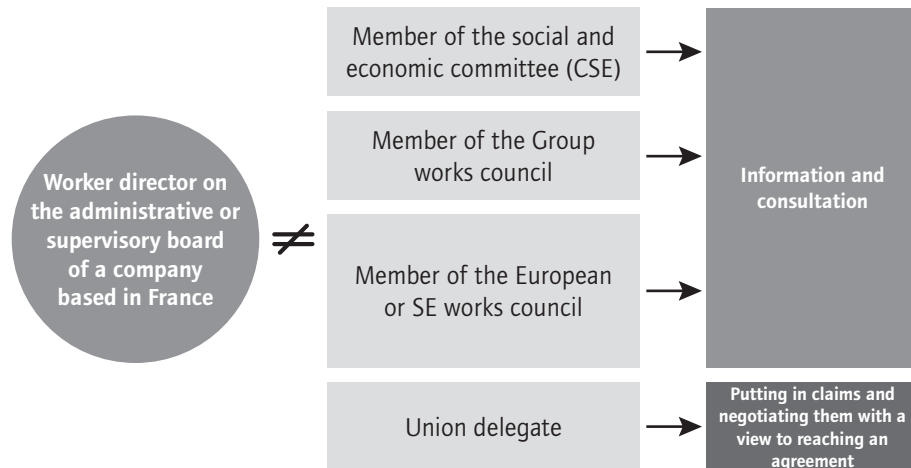
The incompatibility regime dictated by French law highlights the legislator's intention to prevent a worker director holding a further mandate "likely to create conflicts of interest"<sup>72</sup>. This objective seems confused, as the mandates covered by the incompatibility rule are so different.

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<sup>71</sup>. This limitation applies to: 1. natural persons; legal entities may therefore hold an unlimited number of directorships; 2. public limited companies with their registered office in France.

<sup>72</sup>. Judgment of the Court of Cassation, Social Chamber, 30 September 2005 (Appeal No. 04-10.490). <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007048973?isSuggest=true>

Figure 14 The heterogeneous tasks performed by worker representatives covered by the incompatibility rule



The tasks (consultation, negotiation, putting in claims) of the worker representatives covered by the incompatibility rule differ greatly, thereby weakening the justification given in Article L.225-30 of the Commercial Code, based on alleged<sup>73</sup> and systematic "conflicts of interest"<sup>74</sup>.

Moreover, the European Commission states in a Recommendation of 15 February 2005 that a worker director is independent when she/he "does not belong to senior management and has been elected to the (supervisory) board in the context of a system of workers' representation recognised by law and providing for adequate protection against abusive dismissal and other forms of unfair treatment"<sup>75</sup>. However, the fact that a worker director can keep her or his mandates in other employee representative bodies, whether elected or union mandates, could be a way of strengthening her/his independence vis-à-vis management with a view to achieving better governance within the board of directors.

73. See for example J.Y. Tronchon, *Conflits d'intérêts : aspects de gouvernance*, Cahiers de droit de l'entreprise n°2, mars 2016, dossier 14. According to the author (vice-president of the French Association of Company Lawyers), "one cannot at the same time claim to participate in a company's decision-making as a director and yet criticise these decisions outside the board of directors".

74. Moreover, this conflict of interest is not relevant for union delegates who can sit on the social and economic committee in France as union representatives (in an advisory capacity only, i.e. without voting rights). Under article L2143-9 of the Labour Code, "The functions of union delegate are compatible with those of a member of the staff delegation to the social and a economic committee or of trade union representative thereto". Moreover, the union delegates are *members by right* of the social and economic committee in companies with less than 300 employees (Article L2143-22 of the Labour Code).

75. Recommendation 2005/162/EC, Annex II, point 1.b.

### 3.2 Is the incompatibility rule in line with European law?

- **Reduced rights?**

To start with, according to Article 12 of Directive 2009/38/EC (EWC Directive), "Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies". Thus, the obligation for the members of a European works council to desist from becoming worker directors if they wish to remain members of the European Works Council, or to resign their mandates if they wish to join the board of a French company as a director could be considered as reducing the rights of members of a French EWC whose appointment is governed by foreign law.

Similarly, can membership of an SE works council justify a reduction of rights accorded by a home country? The status of worker director in France requires that a works council member of a French SE, whose employment contract is subject to foreign (non-French) law, resign her/his mandate as a member of the SE works council. However, Article 10 of Directive 2001/86 (involvement of employees in the European Company) specifies that members of the SE works council "shall, in the exercise of their functions, enjoy the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment". Therefore, if the country in which the SE works council member is employed does not provide for any incompatibility rule between employee representative mandates and directorships, it may be considered that French law, which requires that an SE works council member resigns her/his mandate if she/he wishes to be a director or member of the supervisory board in France, calls into question "the protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment".

In particular, according to Directive 2009/38/EC (EWC Directive) and Directive 2001/86/EC (SE), "employees' representatives acting within the framework of the Directive to enjoy, when exercising their functions, protection and guarantees which are similar to those provided to employees' representatives by the legislation and/or practice of the country of employment. They should not be subject to any discrimination as a result of the lawful exercise of their activities and should enjoy adequate protection as regards dismissal and other sanctions."<sup>76</sup>. They "enjoy protection and guarantees similar to those provided for employees' representatives by the national legislation and/or practice in force in their country of employment"<sup>77</sup>.

A reduction of rights, protections and guarantees may be observed in particular when an employee, employed in a State other than France, resigns her/his

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<sup>76</sup>. Cf. recital 34 of Directive 2009/38 and recital 12 of Directive 2001/86/EC.

<sup>77</sup>. Article 10 of Directive 2009/38 and Article 10 of Directive 2001/86/EC.

mandate as an EWC/SEWC in order to become a member of the administrative or supervisory board of a French company. The worker not only loses the mandate, but also the protections attached to it. Not all states guarantee protection for employee representatives holding a directorship representing employees, especially when this directorship is held in a company other than the employing company whose registered office is in another state (in this case France). A reduction of rights therefore appears to be a clear-cut case, subject to any clarifications that the CJEU may soon provide on the concept of reduction of rights in the event that a State provides for specific rules for appointing candidates to the supervisory board<sup>78</sup>.

- **Is the incompatibility rule in line with the agreement establishing the European Works Council?**

There are two separate issues here.

On the one hand, since the obligation to resign a European/SE works council mandate, when governed by French law, affects the duration of EWC mandates, should it not be foreseen in the stipulations of the agreement establishing these bodies? In other words, could implementation of the French incompatibility rule require a clause in the agreement governing the European/SE works council? The answer would seem to be negative. Indeed, the rules on the incompatibility of mandates do not *stricto sensu* govern the mandate of a member of a European employee representation body. Although French law provides for the possibility of resigning, this is not mandatory. If the representative wishes to keep her/his mandate (within the European/SE works council), it is her/his mandate as director which ends automatically.

On the other hand, can a clause in a European/SE works council agreement (in particular when the works council is governed by French law) authorise a plurality of mandates when the law prohibits it? The rules relating to the functioning, and in particular to the status of its members, of the board of directors, constitute public policy<sup>79</sup>. The wording of Article L.225-30 does not leave any room for derogation. A clause in a European/SE works council agreement cannot therefore take precedence over a mandatory legal provision, i.e. ruling out the application of the incompatibility rule. For the same reason, a European/SE works council agreement cannot prohibit a plurality of mandates where the law allows such.

<sup>78</sup>. Article 4(4) of Directive 2001/86/EC states that "in the case of an SE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SE." The Court of Justice received a question referred to it by the Bundesarbeitsgericht (Germany) for a preliminary ruling on 11 December 2020 (Case C-677/20): "Article 21(6) of the *Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft* (Law on the involvement of employees in a European company), from which it follows, in the event of the incorporation by means of transformation of a [European company] established in Germany, that a specific selection procedure must be ensured for a given proportion of the members of the supervisory board representing employees for candidates proposed by trade unions, consistent with Article 4(4) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees".

<sup>79</sup>. For example Court of Cassation, Commercial Chamber, 15 April 1964, Bull. civ. IV, n°191. <https://www.legifrance.gouv.fr/juri/id/JURITEXT000006965947>



- **A law producing discriminatory effects?**

Does not the French law cause corporate management bodies to **discriminate** against elected or union mandates?

The nationality of the representative is unrelated to the purpose of the incompatibility rule<sup>80</sup>, with French law not targeting specific nationalities. The incompatibility rule may thus apply equally to a French and non-French member of a European/SE works council.

If discrimination can be found, it is much more on account of a specific mandate being exercised.

Is the French law on incompatibility in line with the EWC and SE Directives? The EWC Directive specifies that "employees' representatives acting within the framework of this Directive ... must not be subject to any discrimination as a result of the lawful exercise of their activities"<sup>81</sup>. In the same vein, the SE Directive specifies that "employees' representatives acting within the framework of the Directive ... should not be subject to any discrimination as a result of the lawful exercise of their activities"<sup>82</sup>. It seems difficult to demonstrate that French law favours discrimination, to the extent that it leaves a workers' representative free to keep her/his mandate or to resign it. Moreover, in the case of **Konrad Erzberger v. TUI AG**<sup>83</sup>, the EU Court of Justice held that "EU law does not, in the field of representation and collective defence of the interests of workers in the management or supervisory bodies of a company established under national law, a field which, to date, has not been harmonised or even coordinated at Union level, prevent a Member State from providing that the legislation it has adopted be applicable only to workers employed by establishments located in its national territory, just as it is open to another Member State to rely on a different linking factor for the purposes of the application of its own national legislation"<sup>84</sup>. Furthermore, the Court refused to identify any infringement of workers' freedom of movement, ruling that "the Treaty rules governing freedom of movement for persons cannot be applied to activities which have no factor linking them with any of the situations governed by EU law. Therefore, those rules are not applicable to workers who have never exercised their freedom to move within the Union and who do not intend to do so"<sup>85</sup>.

On the other hand, the interference of certain corporate management bodies in the choice of a worker director cannot be considered as discrimination. There can be no doubt that French law does not allow a company's management to refuse to assign a mandate (worker director) when a representation mandate is exercised. This

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**80.** Unless indirect discrimination on the grounds of nationality is demonstrated.

**81.** Directive 2009/38/EC, recital 34.

**82.** Directive 2001/86/EC, recital 12.

**83.** CJEU 18 July 2017, Case C- 566/15, *Konrad Erzberger v. TUI AG*.

**84.** CJEU 18 July 2017, *supra*, paragraph 37.

**85.** CJEU 1 April 2008, Government of the French Community and Walloon Government, C-212/06, EU:C:2008:178, paragraphs 33, 37 and 38; See also *Konrad Erzberger v. TUI AG*, CJEU 18 July 2017, Case C- 566/15, specifically paragraph 28.

would constitute direct discrimination on the basis of the exercise of a mandate, sanctioned by Article L1132-1 of the Labour Code<sup>86</sup>. An employee representative must be free to stand for a directorship and consequently resign from her/his mandate as employee representative. Furthermore, indirect discrimination may be identified when an apparently neutral criterion or practice is liable to place persons at a particular disadvantage compared with other persons on account of one of the prohibited grounds (such as the exercise of a mandate as an employee representative), unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are necessary and appropriate<sup>87</sup>. A practice aimed at obliging employee representatives to resign their mandates is likely to discourage them from applying for a position of worker director and *in fine* to encourage more "neutral" candidates in terms of trade union action.

### 3.3 Is the incompatibility rule in line with international law?

Does not the obligation to resign an employee representation mandate, and in particular a union mandate, constitute an **infringement of the freedom of association**?

Indeed, the French law could be considered as violating the freedom of association guaranteed by international conventions and treaties<sup>88</sup> if we consider that it:

- enables an arbitrary interference of the State<sup>89</sup> in the organisation of the trade union movement through forcing its members either to resign a union mandate or to give up a worker director mandate;
- does not protect employee representatives from interference by corporate management bodies in identifying employees able to serve as worker directors.

### 3.4 Is the incompatibility rule in line with the French Constitution?

The obligation to resign a staff representation mandate could be construed as an infringement of the principle of freedom of association (Paragraph 6 of the 1946 Preamble).

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**86.** Article L.1132-1 prohibits any discrimination on the grounds of "trade union activities (...) or the exercise of an elective office". The French Penal Code also prohibits such discrimination (art. L225-1 of the Penal Code).

**87.** Article 1 of Law No. 2008-496 of 27 May 2008 containing various provisions for adapting to Community law in the field of anti-discrimination.

**88.** See especially ILO Conventions Nos. 87, 98 and 135, Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 12 of the Charter of Fundamental Rights of the European Union.

**89.** See for example Court of Cassation, Social Chamber, 14 November 2013, No. 13-11.316.

French incompatibility legislation constitutes an infringement of the freedom of association, by preventing holders of union mandates within a company from sitting on its board of directors<sup>90</sup>.

The incompatibility rule may be interpreted as undermining the principle of workers' participation in the collective determination of working conditions (Paragraph 8 of the Preamble to the 1946 Constitution).

According to this text, "All workers participate, through their delegates, in the collective determination of working conditions and in the management of companies". This principle of participation is binding on the legislator when setting the fundamental principles of labour law and trade union law<sup>91</sup>. It may be argued that the legislator, in adopting Article L.225-30, disregarded this constitutional principle for at least two reasons:

First, the French Constitutional Council has specified that "it is up to the legislator, who is competent under Article 34 of the Constitution to determine the fundamental principles of labour law and trade union rights, to lay down the conditions for implementing the right of workers to participate through their delegates in the determination of working conditions and in the management of companies"<sup>92</sup>. However, the legislator has not determined the "implementing conditions" and the "guarantees necessary to ensure respect for the principle of participation"<sup>93</sup>. While it is true that it has granted a protective status to worker directors<sup>94</sup>, the Constitutional Council has laid down a requirement relating to "the necessary independence of the negotiator vis-à-vis the employer"<sup>95</sup>. If this requirement has been set for negotiating agreements, should it not also apply to worker directors? The incompatibility rule is not sufficient to ensure this independence vis-à-vis a company's management. It even allows management to guide the choice of the person to be appointed as worker director.

Second, the principle of participation necessarily implies the intervention of delegate(s). Paragraph 8 of the Preamble to the 1946 Constitution specifies **"through their delegates"**, and thus formulates not so much an observation as a requirement: workers can only participate in the collective determination of

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**90.** See Decision No. 2020-835 QPC of 30 April 2020: the Constitutional Council has decided that "by imposing an obligation of financial transparency on trade unions, the legislator intended to enable employees to ensure the independence, in particular the financial independence, of organisations likely to represent their interests". The incompatibility rule could be challenged precisely on the grounds of independence, as discussed above. Plurality of mandates is an element strengthening the independence of a worker director.

**91.** According to the Constitutional Council, "it is up to the legislator, who is competent under Article 34 of the Constitution to determine the fundamental principles of labour law and trade union rights, to lay down the conditions for implementing the right of workers to participate through their delegates in determining working conditions and in the management of companies" (No. 2017-652 QPC of 4 August 2017 and see also Decision No. 2017-664 QPC of 20 October 2017).

**92.** Constitutional Council Decision No. 2017-652 QPC of 4 August 2017; See also in this sense, the Constitutional Council's decision No. 2017-664 QPC of 20 October 2017.

**93.** Decision No. 2017-652 QPC of 4 August 2017, paragraph 12.

**94.** Article L2411-17 of the Labour Code; Article L225-32 of the Commercial Code.

**95.** Constitutional Council Decision No. 96-383 DC of 6 November 1996.

working conditions and in the management of companies through **delegates**. These delegates can be elected representatives, union representatives or worker directors. But can the legislator exclude certain delegates from participating in a company's management (on the administrative or supervisory board)? By preventing **certain** delegates from sitting on a company's governing body, does French law not contravene paragraph 8 of the Preamble to the 1946 Constitution? In particular, the Constitutional Council makes trade unions the natural player for implementing the participation principle, ruling as follows:

As to the eighth paragraph of same preamble: "Every worker participates, through his delegates, in the collective determination of working conditions and in the management of companies; **while these provisions give trade unions a natural vocation to ensure, in particular** through collective bargaining, the defence of the rights and interests of workers, they do not, however, give them a monopoly in representing employees in collective bargaining; employees designated by election or holding a mandate ensuring their representativeness may also participate in the collective determination of working conditions **as long as their intervention has neither the purpose nor the effect of hindering that of the representative trade union organisations**"<sup>96</sup>. In the absence of a trade union in a company, the legislator can give other stakeholders the right to negotiate collective agreements. On the other hand, when trade unions are present, they must be considered as having a "natural vocation to ensure (...) the defence of the rights and interests of workers". It should therefore be possible for a trade union representative to freely hold the position of a director "representing employees".

Consequently, a key constitutional question could be whether<sup>97</sup> Article L.225-30 of the Commercial Code complies with these rules of constitutional value.

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<sup>96</sup>. Decision No. 96-383 DC of 6 November 1996.

<sup>97</sup>. Since the French constitutional reform of 23 July 2008, the priority question of constitutionality (FR: *question prioritaire de constitutionnalité* or QPC) is a right recognised to any person party to a trial or proceedings to argue that a legislative provision infringes the rights and freedoms guaranteed by the Constitution (a practical guide to the QPC is available on the Constitutional Council website : <https://www.conseil-constitutionnel.fr/la-qpc/guide-pratique-de-la-question-prioritaire-de-constitutionnalite-qpc>).

## Summary and recommendations

### **It is recommended to ensure compliance with French incompatibility rules and their implementation by company management.**

- These rules do not have a transnational scope in that they only concern mandates held within representation bodies subject to French but not foreign laws.
- While the 1983 Law extends the incompatibility rule to subsidiaries, Article L.225-30 refers only to mandates held in the company (apart from the mandates on EWCs governed by French law or on the works councils of SEs established in France).
- These rules do not provide for the ineligibility of a worker representative and do not allow company management to interfere in the choice of worker directors, especially as this could be seen as discriminatory or an obstacle to freedom of association.

It is therefore recommended that a company's management be asked to clearly formulate, **in writing** (for instance, in the board's internal procedures), the interpretation it intends to give to the material and geographical scope of the incompatibility rule.

### **French incompatibility rules can be challenged.**

- They reduce the rights of the members of a European/SE works council subject to French law: to become worker directors, these representatives must not only give up their mandate in these bodies, but may lose the protections attached thereto (in particular when the country in which they are employed does not provide for protections for employees appointed as directors in a foreign company).
- They can be considered as an arbitrary, unjustified state interference in the organisation of the trade union movement and not protecting employee representatives against interference by company management in the identification of workers eligible to serve as worker directors (violation of international law).
- They may be regarded as infringing the French constitutional rules on freedom of association and the principle of employee participation in the collective determination of working conditions, in particular by preventing union representatives from defending the interests of employees within the administrative or supervisory board.

These arguments point to a very strict interpretation of the legal incompatibility rules.

## Annex

### Legal incompatibility rules

#### Article 23 of Law No. 83-675 of 26 July 1983 on democratising the public sector

An employee representative's mandate as a director or member of the supervisory board is incompatible with any other function representing staff interests within the company or its subsidiaries, in particular with the functions of trade union delegate, works council member, staff delegate or member of the health, safety and working conditions committee.

The above-mentioned mandate(s) and the protection thereof shall end on the date on which the new mandate is acquired.

An employee representative's mandate as a member of the administrative or supervisory board is also incompatible with the exercise of the functions of a full-time union representative, within the meaning of the second paragraph of Article 15 of this Law. In the event of an employee performing full-time union duties being elected to the administrative or supervisory board, such duties shall be terminated and the person concerned shall be reinstated in his job.

#### Article L225-30 of the Commercial Code

"The mandate of a director elected by the employees or appointed pursuant to Article L.225-27-1 is incompatible with any mandate of a trade union delegate, a works council member, a group works council member, an employee delegate or a member of the health, safety and working conditions committee of the company. It is also incompatible with any mandate as a member of an EWC, if it exists, or, for SEs within the meaning of Article L.2351-1 of the Labour Code, of as a member of the employee representation body mentioned in Article L.2352-16 of the same code or as a member of an SEWC mentioned in Article L.2353-1 of said code. A director who, at the time of his election or appointment pursuant to Article L.225-27-1 of this Code, holds one or more of these mandates must resign them within eight days. If he fails to do so, he shall be deemed to have resigned as a director."

## Resources

### 1. Constitution, Treaties, Directives

Preamble of the French Constitution of 27 October 1946.

Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) OJ, 2009, L122, 16.5.2009, p. 28-44.

Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22-32.

ILO Convention 87 on Freedom of Association and Protection of the Right to Organise, 1948.

ILO Convention 98 on the Right to Organise and Collective Bargaining, 1949.

ILO Convention 135 on Workers' Representatives, 1971.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14.

Charter of Fundamental Rights of the European Union (2000/C 364/01).

### 2. Laws and Decrees

Law No. 66-538 of 24 July 1966 on commercial companies.

Law No. 83-675 of 16 July 1983 on the democratisation of the public sector.

Decree No. 86-1135 of 21 October 1986 amending Law No. 66-537 of 24 July 1966 on commercial companies in order to allow public limited companies (*sociétés anonymes*) to include in their articles of association provisions providing for employee representatives to sit on the administrative or supervisory board with voting rights (Articles L.225-27 to L.225-34 and Articles L.225-79 to L.225-80 of the Commercial Code).

Law No. 2013-504 of 14 June 2013 on the securing of employment.

Decree 2014-948 of 20 August 2014 on the governance and capital transactions of companies with participation of state-owned companies.

Law No. 2015-994 of 17 August 2015 on social dialogue and employment.

Law No. 2019-486 of 22 May 2019 on growth and transformation of companies (called "PACTE law").

French Labour Code and Commercial Code.

(<https://www.legifrance.gouv.fr/>)

### 3. Court decisions

#### **Court of Justice of the European Union:**

ECJ 28 January 1986, *Commission v France*, 270/83.

ECJ 13 July 1993, *Commerzbank*, C-330/91.

ECJ 16 July 1998, *ICI*, C-264/96.

ECJ 9 March 1999, *Centros*, C 212/97.

CJEU 5 November 2002, *Überseering*, C 208/00.

CJEU 30 September 2003, *Inspire Art*, C 167/01.

CJEU 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation*, C 374/04.

CJEU 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06.

CJEU 18 July 2017, *Konrad Erzberger C/ TUI AG*, C- 566/15 (and Opinion of Advocate General Henrik Saugmandsgaard delivered on 4 May 2017).

CJEU, preliminary question, 11 December 2020, case C-677/20.

([https://curia.europa.eu/jcms/jcms/j\\_6/fr/](https://curia.europa.eu/jcms/jcms/j_6/fr/))

#### **French Constitutional Council:**

Decision No. 96-383 DC of 6 November 1996.

Decision No. 2017-652 QPC of 4 August 2017.

Decision No. 2017-664 QPC of 20 October 2017.

Decision No. 2020-835 QPC of 30 April 2020.

(<https://www.conseil-constitutionnel.fr/decisions>)

#### **French Court of Cassation:**

Court of Cassation, Commercial Chamber, 15 April 1964, Bull. civ. IV, No. 191.

Court of Cassation, Civil Chamber, 17 October 1972, Appeal No. 70-13.817, "Royal Dutch" case.

Court of Cassation, Social Chamber, 13 March 1985 (Appeal No. 84-60.705, 84-60.706).

Court of Cassation, Social Chamber, 30 September 2005, Appeal No. 04-10.49.

Court of Cassation, Commercial Chamber, 30 March 2010, Appeal No. 08-17.841.

Court of Cassation, Social Chamber, 14 November 2013, Appeal No. 13-11.316.

Court of Cassation, Social Chamber, 21 March 2018, Appeal No. 17-12.602.

Court of Cassation, Social Chamber, 16 December 2020, Appeal No. 19-20.587.

Court of Cassation, Social Chamber, 31 March 2021, Appeal No. 19-25.233.

(<https://www.legifrance.gouv.fr/>)

#### **Other French courts:**

Courbevoie District Court, 6 March 2017, Case No. 11-16-000911, *Fédération CGT des sociétés d'études v. SAP France Holding SA*.



#### 4. Reports and Opinions, Recommendations

European Commission Recommendation, 2005/162/EC, Annex II, point 1.b.

Opinion of J.-M. Clément, deputy, on behalf of the Law Commission, on Article 5 of the draft law on the securing of employment, 2013.

Opinion of the ANSA Legal Committee, 4 December 2013.

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