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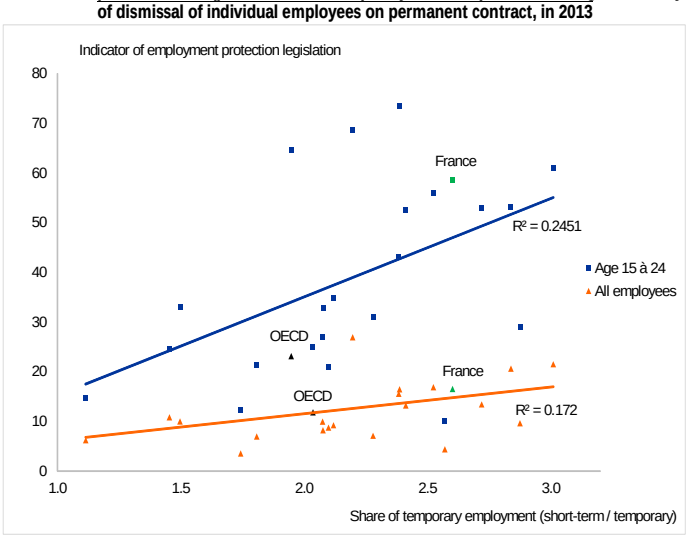
An economic perspective on dispute resolution in labour law

- Seen from an economic perspective, it has been shown that labour market rigidities can adversely impact productivity by reducing companies' capacity to adapt to macroeconomic change. In addition, overly complex and restrictive labour laws can affect employment rates and foster labour market segmentation.
- In international comparisons, France is characterised by relatively powerful rigidities in the case of individual dismissals, according to the OECD's Indicator of Employment Protection. This indicator considers legislation governing labour regulations and agreements, but pays very little attention to the actual way in which the law is applied (i.e. jurisprudence), and none at all to how employment tribunals handle disputes. Yet these factors too can affect the cost of dismissals for employee and employer alike.
- In France, the conseil des prud'hommes (employment tribunal) is competent to rule on individual employment disputes. Numerous reports have noted the dysfunctional nature of this system as a means of settling disputes. For instance, the employment tribunal reconciliation procedure, which is mandatory, resolved only 5.5% of disputes in 2013. Moreover, the percentage of employment tribunal decisions giving rise to appeals (around 60%) appears very high relative to other jurisdictions. Finally, the tribunal procedures appear to be particularly protracted, lasting more than 15 months on average in 2012, giving rise to repeated condemnations of France under the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- The foregoing suggests organisational or procedural adjustments that could improve and accelerate the resolution of employment disputes. In particular, more should be done to improve the effectiveness of the reconciliation phase. One could also consider developing alternative formulas for out-of-court settlement. Beyond that, it might be worth experimenting with a system combining professional and non-professional judges similar to ones existing elsewhere in Europe. These employment tribunals are more or less equivalent to the concept of *échevinage*.

Indicator of precariousness (permanent and temporary contracts) in % according to difficulty of dismissal of individual employees on permanent contract, in 2013



Source: OECD.

Interpretation: France provides workers on permanent / open-ended contracts with a high degree of protection from individual dismissal (2.6 according to the OECD Employment Protection Legislation indicator), and there is a high proportion of young people on short-term contracts (58.6%).

MINISTÈRE DES FINANCES ET DES COMPTES PUBLICS
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1. In France, individual disputes arising in connection with industrial relations are dealt with by the *conseil des prud'hommes* (employment tribunal)

1.1 Fewer than 30% of dismissals (individual or collective) are disputed

More than 50,000 employees were dismissed each month in France, in 2013. The Labour Code (Code du Travail[1]) provides for two types of dismissal:

- **Dismissal on personal grounds** (around 38,000 per month, on average, in 2013[2]): this can be for disciplinary reasons (employee error or misconduct) or non-disciplinary reasons (unsuitability for the job, refusal to accept a substantive modification of the employment contract[3], for example), and real and serious, precise and verifiable grounds must be given, ones sufficiently important to warrant termination of the employment contract.
- **Dismissal on economic grounds (redundancy)** (on the order of 16,000 per month in 2014[4], on average): this is carried out by an employer for causes unrelated to the specifics of the individual employee and results from the elimination or transformation of the job or from a substantive alteration to the employment contract subsequent to economic difficulties or technological change, notably. When at least 10 employees reject a proposal by their employer to modify an essential component of their employment contract on economic grounds, and when it is therefore proposed to make them redundant, this dismissal is subject to the law as it applies to group dismissals on economic grounds (the employer is obliged to propose a job protection plan (*plan de sauvegarde de l'emploi*).

In France, disputes arising from the execution or termination of employment contract between employer and employee in private law are dealt with by the *conseil des prud'hommes*, the French employment tribunal. On the other hand, competence to settle conflicts involving collective interests (such as challenges to a redundancy plan on economic grounds or a collective agreement between a trade union and an employer, etc.) lies with the District Court, or *Tribunal de Grande Instance-TGI*. However, employees wishing to challenge their dismissal under a redundancy plan individually must do so before the employment tribunal. The latter is competent to assess whether economic grounds for dismissal are "real and serious", whether the job protection plan applies to the individual concerned, proper application of the criteria for the classification of dismissals, as well as compensation for the dismissed employee should the administrative court overturn the decision to validate or confirm the job protection plan[5] .

The percentage of disputed individual dismissals in France does not appear to be particularly high: 25% of employees dismissed on personal grounds disputed the dismissal in 2001, according to the OECD[6], a rate comparable to that of Germany (23% on average for 1999-2002). According to Justice Ministry studies[7], recourse to the employment tribunals concerned around 40% of cases at the beginning of the 1990s, but then fell steadily to 20% before the crisis in 2008. The percentage is currently between 25% and 30%. According to a recent study[8] by the *Centre d'Études de l'emploi* (Centre for research on employment), the rate of recourse to employment tribunals in France was distinctly below the European average, with 7.8 applications per 1,000 employees, versus a European average of 10.6).

(1) The law on dismissals is governed by ILO Convention no. 158, ratified by France in 1989. Nine other European countries have ratified the convention: Cyprus, Finland, Latvia, Luxemburg, Portugal, Slovakia, Slovenia, Spain and Sweden. Belgium, Germany, Italy, the United Kingdom and the United States have not ratified it, however. The convention protects workers against dismissal (justification, advance notice, right of appeal, etc.) that are directly applicable in national law. This direct application is recognised by a decision of the *Cour de cassation* (France's supreme court in matters of legal process) of 29 March 2006. Convention no. 158 notably asserts as a fundamental principle that dismissals must be justified on "valid grounds", which may be connected with the "suitability or conduct of the worker" (in cases of personal dismissal) or "based on the operational needs of the enterprise" (in cases of redundancies).

(2) Source: Dares, monthly series corrected for seasonal and worktime variations of Jobs Centre enrolments following redundancy. This data series has been corrected to account for people signing up for a *Contrat de sécurisation professionnelle* (redundancy support contract), since the procedure known as "simplified re-enrolment" leads to double counting.

(3) The essential features of employment contracts are not legally defined, but contracts stipulate pay, qualifications, contractually stipulated working hours and, more generally, the role of the employee.

(4) Source: Dares, monthly series corrected for seasonal and worktime variations of Jobs Centre enrolments following redundancy, including persons signing up for either the *contrat de reclassment professionnel*, *contrat de transition professionnelle*, or the *contrat de sécurisation professionnelle*. This data series is restated for the reasons for signing up, to take account of persons signing up for a *contrat de sécurisation professionnelle*.

(5) By instituting an administrative for the approval or validation of job protection plans, the Loi de sécurisation de l'emploi (job security act) has shifted responsibility for hearing employment disputes onto the administrative courts, which are now the courts competent to hear disputed group redundancy claims.

(6) OECD Employment Outlook 2004, pp74-76. This figure is an approximation that compares the number of disputes that come before the competent tribunal with the number of dismissals, even if the latter did not take place in the same year.

(7) Munoz-Perez B., Serverin E. (2005), "Le droit du travail en perspective contentieuse, 1993-2004" (Employment law from the perspective of disputes), Ministry of Justice, Direction des affaires civiles et du sceau (Directorate of civil affairs), Research unit, November, and Guillonneau M., Serverin E. (2005), "*L'activité des conseils de prud'hommes de 2004 à 2012: continuité et changements*" (Report on the work of the employment tribunals, 2004-2012: continuity and change), Ministry of Justice, *Direction des affaires civiles et du sceau*, Centre for the evaluation of civil justice. The percentage of appeals expresses the relationship between the series of contract breaches referred in matters of substance to the employment tribunals and the series of jobseekers claiming they have been dismissed on economic or other grounds. This is a proximate indicator, the series being constructed from only partially overlapping sources and definitions.

(8) Schulze-Marmeling S. (2014), "*Les conseils de prud'hommes: un frein à l'embauche?*" (Are the employment tribunals an impediment to hiring?), *Connaissance de l'emploi* no. 111-March. This appeal rate compares the number of applications to the conseils de prud'hommes with the number of employees in the same year.

Concerning dismissals on economic grounds, for the entire period 2004-2012, the rate of recourse to the employment tribunals remains very low, below the 3% threshold (the rate of challenges to job protection plans before the District Court (TGI), meanwhile, was between 20% and 30% between 2007 and 2011[9] ; it has fallen 7% since the Job Security Act came into force)

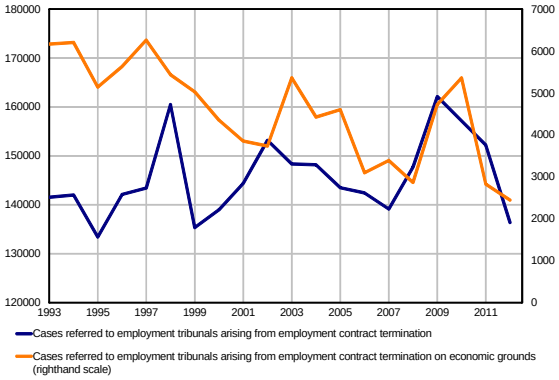
1.2 Fewer disputes go to the employment tribunals, and those that do centre on breach of employment contract

A typical case heard by the employment tribunal concerns an individual appeal by an "ordinary" (i.e. "unprotected") employee challenging a termination of employment contract on grounds pertaining to that individual. In 2012, this type of case concerned 79.6% of appeals by "unprotected" employees. Over the past twenty years, the number of appeals on grounds of termination of employment contract has varied between 130,000 and 160,000 (see Chart 1). After peaking in 2009 (162,105 appeals), the figure dropped sharply to 136,373 in 2012, close to its low point over the period. At the same time the number of appeals to the employment tribunals in connection with termination of employment on economic grounds has fallen steeply, from over 6,000 in 1993 to around 2,500 in 2012.

When we compare the trend in the number of applications to the employment tribunals with the trend in in job centre enrolments resulting from the termination of a permanent work contract, 2009 clearly marked a turning point. The number of job centre enrolments continued to rise, while the number of applications to the employment tribunals fell.

This divergent trend from 2009 onwards is not unconnected with the introduction of the procedure allowing employer and employee to terminate a contract by mutual consent (*rupture conventionnelle*) in 2008. This new format has been a considerable success, with 1,076,000 terminations by mutual consent receiving approval in France between August 2008 and the end of 2012, and more than 26,000 approved each month on average in 2013. By pacifying employment contract terminations through greater dialogue between the two parties, this new format has had a significant impact on the number of cases referred to the employment tribunals.

Chart 1: Change in the number of cases referred to the employment tribunals since 1993



Source: "Le droit du travail en perspective contentieuse, 1993-2004", "L'activité des conseils de prud'hommes de 2004 à 2012: continuité et changements - Évolution 2004-2012 et situation en 2012", Ministry of Justice (November 2005 and September 2013).

Box 1: French employment tribunal procedures

Article L511-1 of the French Labour Code states: "the *conseils des prud'hommes* (employment tribunals) are elective bodies on which the different parties are equally represented. They resolve by means of reconciliation disputes arising in connection with all employment contracts subject to the provisions of this Code between employers or their representatives and persons employed by them. They [the employment tribunals] hear disputes in regard to which the parties have not been reconciled."

The proceedings of the employment tribunals are adversarial and take place orally. The different parties are equally represented, cases being heard by four judges, two of which are representatives of salaried workers, and two representatives of employers, each being elected by their peers[a]; the proceedings at no cost to either party, except if one or both of the parties elects to be represented by a lawyer.

Proceedings before the employment tribunals require an initial mandatory phase of reconciliation, during which the parties seek an amicable arrangement in the presence of two judges (*juges prud'homaux*-one from the employers', the other from the employees' college). If no agreement can be reached, the case is referred to the *bureau de jugement* (judgment board) consisting of four *juges prud'homaux* who must rule on it. If no majority can be found, a départage (casting-vote) procedure takes place in the presence of a judge from the tribunal d'instance (*juge départiteur* or deciding judge).

A party that is dissatisfied with the decision in first instance can refer the matter to the Appeal Court, and that ruling can in turn be taken before the *Cour de cassation*.

For certain urgent situations, there is a *procédure de référé* (interim court order) that serves to obtain a decision rapidly.

a. A bill now before Parliament seeks to abolish elections to the employment tribunals and to base the designation of *conseillers prud'homaux* (members of the employment tribunals) on the results of a measurement of representativeness, as part of the reform of trade union and employers' representation. Since the terms of office of the current *conseillers prud'homaux* expire in 2015, the Bill provided for a transitional regime for the designation of the employers' college pending the first hearing concerning the representativeness of employers in 2017 (an initial hearing concerning employees' representativeness was held in 2013). However, given the complexity of implementing this transitory regime, the government has decided to postpone this new mode of designation until 2017 and to extend the current terms of office of both employers' and employees' colleges for a further two years in order to obtain a comprehensive measurement of representativeness in 2017. The Employment Minister presented a letter amending the bill on the designation of *conseillers prud'hommes* to the Council of Ministers on July 16, 2014. The bill has been laid before the Senate and will be discussed under an accelerated procedure.

(9) Share of job preservation plans of solvent companies giving rise to disputes before the District Court (TGI) according to an impact assessment of the job security act. The authors have no knowledge of statistics on the number of employees concerned by these disputes.

2. Individual dismissal procedures in France are relatively rigid, according to the OECD Indicator of Employment Protection

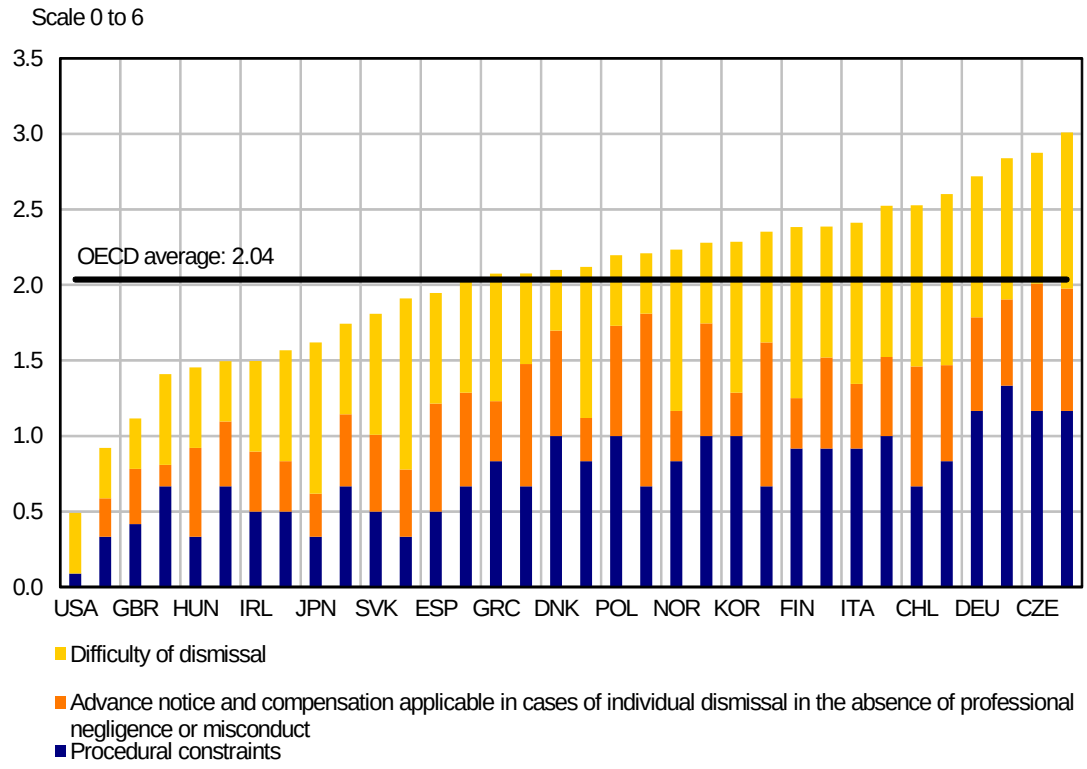
The dismissal of an employee undeniably has an economic cost, starting with loss of income for the employee, together with impairment of human capital and potential damage to health from unemployment (especially long-term unemployment). Some of these costs are borne by society via unemployment benefits, welfare payments or the public employment services.

Employment protection law, i.e. the body of rules governing hiring and firing, is justified by the need to induce employers to internalise some of the social costs incurred by employee turnover and to protect employees from arbitrary decisions by their employer.

This legislation entails monetary costs in terms of compensation for dismissal, and non-monetary costs in terms of procedural obligations and the uncertainty surrounding the decisions of the different dispute settlement bodies.

The OECD Indicator of Employment Protection provides international comparisons of these costs (see Box 2). These show that France has one of the most heavily protective legislations among the OECD countries, after Portugal, the Czech Republic, the Netherlands and Germany (see Chart 2).

Chart 2: Protection from individual dismissal of workers on permanent contract



Source: OECD (2013), "Protecting jobs, enhancing flexibility: A new look at employment protection legislation", Chapter 2 of the 2013 Edition of the OECD Employment Outlook 2013.

Note: Data for the OECD countries and Latvia concern 2013, and for the other countries they concern 2012. The chart presents the contribution of the different sub-components of the indicator relative to the protection of regular workers from individual dismissal. The height of the bar represents the value of this indicator.

Economic analysis has demonstrated the adverse effects of these rigidities on productivity and the workings of the labour market. Its impact on employment is harder to measure, but studies nevertheless conclude that excessively high or excessively low levels of job protection tend to have a negative impact (see Box 3). Beyond the legislative aspects governing dismissals, the dispute settlement process and in particular the existence of pre-dispute settlement mechanisms influences the determination of monetary and non-monetary costs for employer and employee alike.

Box 2: **Methodology used to construct the OECD Indicator of Employment Protection legislation and specific aspects of the 2013 update**[a]

These indicators focus primarily on employment legislation and on sectoral collective agreements when these constitute an important source of law. They are established on the basis of 21 components that quantify the costs to employers, and procedures connected with the different aspects of the employment protection legislation, depending on the rules in force on 21 January of the year in question:

- **The regulations on the individual dismissal of workers holding regular employment contracts:** this sub-indicator looks at three aspects of protection in the event of dismissal: (i) procedural constraints confronting employers contemplating dismissal, e.g. obligations to notify and consult; (ii) notice period and redundancy compensation, which generally vary according to the employee's seniority; and (iii) the difficulty of firing an employee, which raises the issue of the conditions governing dismissal of an employee and the consequences for the employer if the dismissal is deemed unfair (e.g. the obligation to compensate and re-hire the employee).
- **Additional constraints in cases of group redundancy:** most countries impose a more extended period of time, extra costs or increased obligations to notify on employers planning to dismiss a large number of employees in a single operation. This sub-indicator considers only the extra costs borne by an employer as compared with an individual dismissal.
- **The regulation concerning temporary employment contracts:** this sub-indicator considers the regulation concerning fixed-term contracts and temporary employment contracts, when this type of contract is authorised, and the duration of these contracts. This metric also comprises the regulation governing the creations and workings of temporary employment agencies. In particular it takes into account the agency's obligation to offer the people it employs the same terms of pay and/or working conditions as those enjoyed by equivalent workers in the company that uses them.

Each country is given a score of 0 to 6 on each of these criteria, a high score corresponding to strict legislation.

Formerly, the OECD secretariat also used to calculate a synthetic indicator of the overall rigour of employment protection legislation in light of the foregoing. This indicator was a weighted average of the indicators of (i) individual and group redundancy of workers employed on regular, permanent contracts, and (ii) the regulations on temporary work contracts, weighted 7/12 and 5/12 respectively.

Despite their grounding in objective facts, a number of criticisms are frequently levelled at these indicators:

- On the one hand, the relevance of aggregating the different metrics into a single overall synthetic indicator is questionable, since the weightings necessarily imply value judgements;
- On the other, jurisprudence and the way the courts interpret the law, in other words how the law is applied, have not yet been taken into account, due to the difficulty of capturing certain qualitative aspects in the indicators.

The OECD sought to address these criticisms in its 2013 update of the indicator. The chapter on employment protection legislation in the OECD's Employment Outlook 2013 focuses more on detailed indicators than on the overall synthetic indicator. Moreover, the OECD has modified its customary data collection method, relying more on a direct reading and interpretation of the legislation, and more systematically taking account of collective agreements and case law.

a. OECD, Employment Outlook 2013, "Protecting jobs, enhancing flexibility: A new look at employment protection legislation".

Box 3: **The economic impact of different degrees of employment protection**

Employment protection legislation is designed to induce employers to internalise the social cost of dismissal. But it can entail implicit and explicit costs liable to have an adverse impact on productivity and the labour market equilibrium[a]. The abundant economic literature devoted to analysing these effects draws for the most part on the OECD indicators of employment production.

If the labour market is too rigid, companies use resources less efficiently, human resources in particular. Levels of employment will adjust more slowly, ultimately affecting productivity. In addition, by constricting companies' capacity to adapt, restrictions on dismissal make them more risk averse and may hinder innovation and investment in new technologies. Bassanini et al (2009)[b] find that labour market rigidities-especially rigidities affecting the dismissal of persons on permanent employment contracts-have very distinctly adverse effects on the labour market, and in particular on growth in total factor productivity. Moreover, for countries close to the frontiers of technology, Aghion et al (2009)[c] highlight the powerful impact on total factor productivity growth of levels of higher education and rigidities, as well as an interaction between rigidities affecting the markets in goods and services. This impact appears to reflect both a direct and an indirect impact operating via the dissemination of the information and communication technologies (ICT).

Regarding the labour market equilibrium, unduly restrictive legislation has an adverse effect on the employment rate[d]. On the supply side, excessively strict regulation limits or discourages certain categories of worker from working. According to the OECD[e], several recent studies have highlighted the positive impact on the employment rate of certain categories of economically active persons in certain European countries that have eased the cost of dismissal for these categories (e.g. for young people and older workers in Spain). On the demand side, regulatory rigidities act as a brake on hiring and may reduce the gross flow of jobs and more generally labour market fluidity. Based on individual data on applications to the employment tribunals recorded for each French department between 1990 and 2004, Fraisse, Kramarz and Prost (2011)[f] show that more court hearings and a high rate of employee victories destroys more jobs. Conversely, more reconciliation, appeals and lawyers representing employees lessen job destruction. Even so, it is hard to measure the impact on total employment due to possible substitution effects between categories of worker.

According to a 2012 study by the ILO[g], the relationship between level of employment protection and employment is nevertheless an "inverse U". When the degree of employment protection is minimal, an increase in it encourages people more to enter the labour market. However, beyond a certain level, employment protection becomes excessive relative to the need to adjust the labour force to economic conditions. Consequently, it argues, there is a right balance to be struck between too much employment protection and not enough. The authors thus estimate an empirical relationship that rises at first, then stabilises starting from an employment protection legislation level of 2 (on a scale of 0 to 6). Beyond that, the relationship becomes weakly negative.

Further, employment protection legislation may also foster labour market segmentation, with some people enjoying stable jobs while others alternate between short-term contracts and periods of joblessness. Thus the existence of highly protective rules for permanent employment contracts and more flexible ones for fixed-term contracts limits the transition of temporary workers into stable employment (Boeri, 2011) and increases the pressure on wages and unemployment (Bentolila and Dolado, 1994). Moreover, according to the OECD[h], strict employment protection legislation restricts the flow of entries into unemployment but at the same time lengthens the duration of unemployment. That compromises the jobs prospects of those groups experiencing the greatest difficulty in entering the labour market, such as young people, women and the long-term unemployed.

a. Barthélémy J., Cette G. (2013), *"Refonder le droit social - Mieux concilier protection du travailleur et efficacité économique*", (Redesigning labour law-more effectively reconciling employee protection with economic efficiency), La Documentation Française, p20.
b. Bassanini A., Nunziata L. and Venn D. (2009), "Job protection legislation and productivity growth in OECD countries", *Economic Policy.*
c. Aghion P., Askenazy P., Bourlès R., Cette G., Dromel N. (2009), "D*istance à la frontière technologique, rigidités de marché, éducation et croissance*" (Distance to the technological frontier, market rigidities, education and growth), *Économie et Statistique*, no. 419-420, August.
d. . For a review of the literature on these effects, see Aghion P., Cette G., Cohen E. and Pisani-Ferry J. (2007) "*Les leviers de la croissance française*" (The levers of French growth), Rapport du CAE (report of the Conseil d'analyse economique), no. 72, La Documentation Française.
e. OECD (2013), "Protecting jobs, enhancing flexibility: A new look at employment protection legislation", *Employment Outlook* 2013, p74.
f. Fraisse H., Kramarz F., Prost C. (2011), "Labor Disputes and Labor Flows" IZA DP No. 5677, April.
g. Cazes S., Khatiwada S., Malo M. (2012), "Employment Protection and Collective Bargaining: Beyond the deregulation agenda", ILO *Working Paper.*
h. OECD, (2007), "Études économiques de l'OECD 5/ 2007" (n° 5), "*Chapitre 4. Faciliter l'entrée sur le marché du travail*", p. 95-95.

3. Shortcomings in employment law dispute settlement procedures can add to dismissal costs

3.1 The effectiveness of the employment tribunals' reconciliation phase appears to be limited

The law places special emphasis on the reconciliation function of the employment tribunals. Article L1411-1 of the French Labour Code states: "The *conseils des prud'hommes* resolve by means of reconciliation disputes arising in connection with all employment contracts subject to the provisions of this Code between employers or their representatives and persons employed by them. They [the *conseils des prud'hommes*] hear disputes in regard to which the parties have not been reconciled." Yet, as the Lacabarats report[10] emphasises, the reconciliation rate has been falling continuously, from 8.8% in 2000 to 5.5% in 2013.

Nevertheless, the official reconciliation rate before the *bureau de conciliation* (conciliation board) alone can in no way serve to gauge or reflect the quantity of disputes resolved by a settlement procedure not involving a judgment by the employment tribunals. Indeed the high rate of abandonment in mid-procedure (14.2% in 2009) suggests that the parties managed to reach an out of court settlement.

To enhance the effectiveness of the mandatory prior reconciliation procedure, several reports[11] recommend more training for judges in providing help and support to those seeking out of court solutions. The Lacabarats report proposes (proposal no. 28) that the parties be free to choose someone to represent them in order to remedy the frequent absence of one or both of the parties in person, and that the *bureau de conciliation* (conciliation board) be empowered to order a new reconciliation hearing, mediation or specialised court conciliators (see point 4.2 for a description of these modes of dispute resolution).

Another possibility is to include a reconciliation clause in the employment contract, whereby the parties undertake to negotiate before going to court, without being obliged to reach agreement. In no case can this clause preclude the possibility of resorting to the courts in case of failure.

3.2 High rates of recourse to casting votes and appeal

The casting-vote procedure (procédure de départage), an inherent part of equal representation in the employment tribunals, comes into play when the tribunal is unable to reach a majority decision (see Box 1). According to the Ministry of Justice, the rate of recourse to the casting-vote procedure averaged 20% in 2011, but varied widely from one jurisdiction to another, from 41% in Angers or 43% in Bobigny, down to 1% in Cherbourg and 3% in Aix-les-Bains.

Appeal rates appear to be very high, well above the figures for other types of dispute:

Table 1: Rates of appeal against judgment on the merits

	2011	2010
Employment tribunals in first instance	62.1%	60.8%
District Courts (TGI) in first instance	19.2%	19.7%
Courts of first instance (Tribunaux d'instance)	6.3%	6.6%
Commercial court in first instance	13%	12.3%

Source: Les chiffres clés de la Justice (French Justice systems, key facts and figures), 2013 and 2012 editions, Ministry of Justice

The high rate of appeals against employment tribunal decisions suggests a lack of confidence in their decisions. Moreover, as emphasised in the Lacabarats report, the "total rate of confirmation [on appeal] of all employment tribunal judgments (28.3% in 2012) is very clearly below the rate observed for the other jurisdictions (between 46 and 53.6%)". This leads to protracted employment dispute proceedings before the courts.

3.3 The average duration of proceedings is lengthening

Despite a fall in the number of cases brought before the employment tribunals, especially since 2009, the time it takes to resolve them has lengthened to over 15 months, on average, in 2012 (see Chart 3).

Here too, this could stem from the introduction of the termination by mutual consent procedure (*rupture conventionnelle*). By "capturing" the least conflictual terminations, this has led to an increase in the share of the most tricky cases handled by the employment tribunals, which in turn has led to more cases ending up before the *bureau de jugement* (judgment office) and/or recourse to the casting-vote procedure.

Indeed, recourse to the casting-vote procedure considerably lengthens the duration of proceedings, which averaged over 27 months in 2012 when decided by casting vote.

Noting a "shared finding of substantial difficulties currently affecting the resolution within a reasonable time frame of procedures before the employment tribunals, both at first instance and on appeal, and of the absence of lasting solutions capable of remedying the situation effectively and sustainably," the Marshall report[12] recommends "immediately formulating proposals in order rapidly to speed up these proceedings and thus meet citizens' legitimate expectations".

(10) Lacabarats A., *Division President at the Cour de Cassation*, "*L'avenir des juridictions du travail: vers un tribunal prud'homal du XXIème siècle*" (The future of employment jurisdictions: towards a tribunal prud'homal for the 21st century), Report to the Minister of Justice, July 2014.

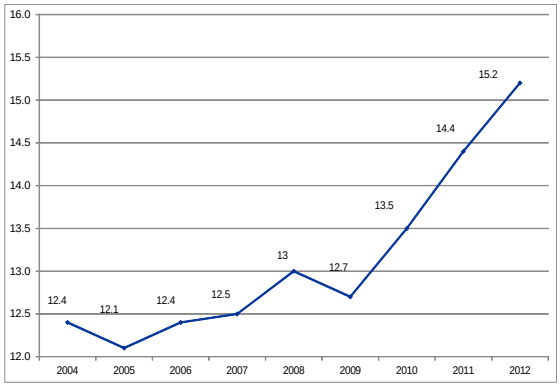
(11) Laurent M. (2012), "*Pour une justice prud'homale plus efficiente, Comment développer conciliation et médiation en matière sociale*?" (For a more efficient justice through the conseils des prud'hommes, How to promote reconciliation and mediation in labour disputes?), Paris Chamber of Commerce and Industry, October, 27 pages.

(12) Marshall D. (2013), "*Les juridictions du XXIème siècle*" (Jurisdictions for the 21st century), Report to the Minister of Justice, December, 128 pages.

The protracted nature of these proceedings has elicited repeated condemnations of the French State pursuant to the European Convention on the Protection of Human Rights and Fundamental Freedoms, article 6 of which states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Other factors too, of an institutional and legislative nature, can affect the frequency of disputes. Examples include the increasing complexity of labour law due to the proliferation of domestic rules (decrees, laws, jurisprudence, and collective norms both negotiated and unilaterally imposed) and superimposed external rules (laid down by the European and international communities).

Chart 3: Change in the time (in months) taken to process complaints on their merits since 2004



Source: DG Trésor based on data drawn from the French Ministry of Justices statistics website.

4. Suggestions for improving the handling of individual disputes

4.1 Recent legislation could improve the efficiency and/or speed dispute resolution

The 14 June 2013 Job Security Act introduced a reference scale for setting compensation in reconciliation cases before the employment tribunals. Employers and employees can agree, or the conciliation board can propose, to resolve a dispute by consent, providing for payment by the employer to the employee of a flat rate compensation, the amount being determined by reference to a scale set by decree, depending on the number of years the employee has worked in the company. The flat rate compensation agreed through reconciliation includes all of the indemnities due in respect of the contract termination (non-compliance with procedure; absence of real and serious grounds). On the other hand, it does not include compensation provided for in law, conventions or contracts (e.g. compensation for dismissal, retirement payments, or compensation due in respect of termination by mutual consent), all forms of compensation connected with execution of the employment contract (such as compensation for non-competition clauses), and compensation for dismissal on grounds of unsuitability for the job. This scale was introduced only very recently, and there is consequently insufficient hindsight to assess how far it acts as an incentive.

Further, in cases where an employee states his intention to terminate the employment contract (i.e. if an employee takes the initiative in terminating the contract on grounds of alleged discrimination, harassment or violence on the part of the employer vis-à-vis the employee, non-payment of wages, or a unilateral change in the terms of the contract), the employee concerned might find himself deprived of his income for several months, given the time taken for the employment tribunal to settle the case. To allow the courts to rule rapidly on the justification or otherwise of the statement of intention[13], the 1 July 2014 Act[14] (Law no. 2014-743) dispenses with the reconciliation phase in this specific case, and reduces the time provided for the proceedings to 1 month.

4.2 Developing alternative dispute resolution mechanisms

There is no general mechanism under French law to allow the parties to seek reconciliation out of court. There are, however, certain reconciliation mechanisms applicable in a handful of specific cases such as workplace bullying or collective conflicts (see below).

Certain sectoral collective agreements[15] make provision for their own reconciliation and arbitration procedures and thus allow for the possibility of reconciliation before going to court. These pre-judicial agreement-based procedures are worthwhile provided they do not deprive employees of the possibility of directly applying to the employment tribunal. Employees can apply directly to the employment tribunal even if there exists a dispute-settlement mechanism under a sector agreement, as recalled by the *Cour de Cassation*[16].

Whether or not they form part of the employment tribunal procedure, alternative dispute resolution mechanisms can have the advantage of giving the parties are greater stake in, and a sense of responsibility for, the resolution outcome. In addition, the procedure is rapid and specialised[17].

Mediation is a mechanism for the out-of-court settlement of conflicts that consists in inviting a qualified impartial third party, a "mediator", with no power to decide on the merits of the case, to hear the conflicting parties and confront their

(13) If the alleged facts justify the statement of intention, this has the same effects as a dismissal without real and serious cause.

(14) 1 July 2014 Act (Law no. 2014-743) on the procedure to be applied before the employment tribunal in the case of a statement of intention to terminate a contract by an employee.

(15) For example article 13 of the ironmongers' national agreement states that "any individual dispute arising from the application and interpretation of this agreement may, prior to any ordinary law procedure, be submitted to the joint board consisting in equal proportions of employers and managers belonging to the professional bodies that are signatory to this agreement, and chaired alternately by employer and by a supervisory grade employee".

(16) **Cass.soc.**, 6 février 2001, n°98-42.679 (Judgment of the Labour Division of the *Cour de Cassation)*: "by reason of the existence, in matters pertaining to employment disputes, of a preliminary and obligatory reconciliation procedure, a clause in an employment contract that institutes a preliminary reconciliation procedure in the event of a dispute arising in respect of the said contract shall not prevent the parties from directly referring their dispute to the employment tribunal".

(17) See Deffains B. and Langlais E. (2009), "*Analyse économique du droit: principes, méthodes, résultats*" (The economics of law: principles, methods, results), éditions De Boeck, *collection ouvertures économiques*, 407 pages, chapter "A*nalyse économique de la résolution des litiges*" (The economics of dispute resolution).

points of view in the course of interviews, whether adversarial or not, in order to help them restore communications between them and arrive at a mutually acceptable arrangement of their own accord. Under French law, the mediator is remunerated by the parties, the remuneration being set by the courts[18]. Mediation is seldom used in labour law, even though it could apply[19]; the Labour Code also contains specific measures, such as article L1152-6, which provides for mediation in cases of workplace bullying or to resolve a collective conflict (see article L 2523-1 of the French Labour Code). Mediation does not preclude the possibility of resorting to the courts in case of failure (see the foreign experiences presented in Box 4). The employee must give his free and informed consent and must be fully aware of the consequences of recourse to this procedure.

Box 4: **Examples of foreign experience with mediation**

In the **United Kingdom** the Advisory, Conciliation and Arbitration Service (ACAS) is a publicly financed body that exists to promote conflict resolution through reconciliation or arbitration. An early-conciliation procedure, which was approved in 2013 and came into effect in April 2014, **requires potential complainants first to submit information to ACAS before resorting to the employment tribunal**. ACAS then offers the parties an opportunity to seek reconciliation. If the parties refuse, or if reconciliation fails, the dispute can be referred to the employment tribunal. The tribunal pays no heed whatever to the reconciliation procedure, except to ensure that the obligation to contact ACAS first has been complied with. An impact assessment by the UK Government considered that the introduction of this prior reconciliation procedure will cut the number of cases going to the employment tribunal by 18%.

Australia's 2009 Fair Work Act established the Fair Work Commission (FWC), which scrutinises appeals against dismissal. This is an independent body that acts as ombudsman, conciliator and arbitrator. Only if this procedure fails is the complainant permitted to apply to a tribunal within 14 days. The FWC has the power to review the grounds for dismissal and to determine whether it was justified. In practice, it is up to the complainant to demonstrate that their claim is well founded. However, when the employer alleges professional misconduct and this accusation is rejected, it is up to the employer to prove his allegation. The burden of proof is also incumbent on the employer in cases of illegal dismissal. According to the Annual Report of the FWC for 2012-2013, 81% of cases brought before it in the period considered were settled. The reconciliation procedure was extremely rapid, with half of applications being dealt with in less than 25 days and 90% in less than 40 days.

Certain French jurisdictions do practice mediation, such as the Grenoble Appeal Court, which has instituted mediation proposal hearings. Cases in which mediation is proposed are filtered according to criteria such as the length of time the employee has been with the company, dismissal of persons with family links or associates, managers, or parties with several other judicial disputes between them. Between 1996 and 2005, the Labour Division of the Grenoble Appeal Court ordered 700 mediations with a success rate of over 70%[20].

Arbitration is another possibility in case of dispute, with the parties agreeing to a clause stipulating recourse to arbitration in the event of dispute, or the parties agree to put the case to arbitration once the dispute has arisen. In arbitration, the two parties agree to submit to an exceptional conflict resolution mechanism and choose a judge tasked with delivering a court decision. The arbitration decision is binding and is usually definitive, unless the parties opt to appeal under national law, there being no possibility of appeal in international cases.

Arbitration is legally possible in France despite the exclusive competence of the employment tribunals (see article L 511-1 of the French Labour Code), though it is seldom resorted to[21]. Since 1999, there has been no obstacle under international conventions to the insertion of an arbitration clause in an international employment contract[22], but this clause cannot be enforced against the employee.

The *Cour de Cassation* has since extended this decision to national law (*Cass. Soc.*, 30 *novembre* 2011). Among other factors, the relatively high cost of arbitration[23] could explain why it is so little used to resolve labour conflicts.

4.3 The échevinage system (courts combining professional and non-professional judges)

Échevinage is a judicial system in which professional and non-professional judges sit together in court. The latter may be ordinary lay persons or persons fit to act as judges by virtue of their profession or expertise. All such courts specialise in a particular type of dispute. In France, several jurisdictions currently function according to this system, inclu-

(18) By way of indication, according to the occasional Bulletin of the *Cour de Cassation* on Mediation, mediation costs range between €200 and €700, the costs being split among the parties by the court, either equally or according to the means of each party. The parties to which costs are awarded qualify for legal aid to cover their costs.

(19) Court-ordered mediation, which was instituted by the 8 February 1995 Act (Law no. 95-125), was inserted by decree no. 96-652 of 22 July 1996 into the new French Code of Civil Procedure, whose article 131-1 states "the Court to which a dispute is referred may, with the consent of the parties, designate a third person to hear the parties and confront their points of view to assist them in finding a solution to conflict opposing them" and after.

(20) See Barthélémy J. and Cette G. (2010), "*Refondation du droit social: concilier protection des travailleurs et efficacité économique*" (Redesigning labour law-more effectively reconciling employee protection with economic efficiency), La Documentation Française, p20.), *Rapport au Conseil d'analyse économique*, La Documentation française, pp 148-149.

(21) Clay T. (2010), "*L'arbitrage en droit du travail: quel avenir après le rapport Barthélémy-Cette?*" (Arbitration in labour law: what future after the Barthélémy-Cette report?), Droit Social no. 9/10, September-October.

(22) **Cass. Soc.** (*Cour de Cassation, Social Division*), *16 février 1999 et 4 mai 1999*. p.10.

(23) According to the scale of fees set by the Association Française d'Arbitrage, the minimum Arbitration Tribunal fee is €6,000, to which is added an administration fee of €750 for cases involving less than €50,000 and if there is a single arbitrator.

ding the Social Security Court (*Tribunal des Affaires de Sécurité Sociale*)[24] or the Incapacity Disputes Court (Tribunal du Contentieux de l'Incapacité). The French employment tribunals, or *conseils des prud'hommes*, combine professional with non-professional judges to some extent, when employing the casting-vote procedure (*procédure de départage*). Belgium's employment tribunals feature the *échevinage* system, with two "social" (non-professional) judges sitting alongside a career judge. The first two are designated by the trade unions and employers' organisations, and their presence was called for by Parliament (in response to a trade union demand) in order to introduce a "social" and "bottom-up" outlook into this area of court proceedings[25]. Given the high rate of appeals against judgments rendered by the French employment tribunals, reflecting a lack of confidence in their decisions, the presence of a professional judge in first instance proceedings could strengthen the legal basis for decisions and improve the application of the rule of law. The low rate of full confirmation of employment tribunal judgments on appeal bears out this intuition. Consequently this could improve the acceptability of court decisions and cut the percentage of appeals.

Nevertheless, it would only be conceivable to introduce a system combining professional and non-professional judges (the échevinage system) in consultation with the existing prud'hommes judges and the labour and employers' organisations, both firmly attached to the equal employer/employee representation system.

Implementing this nationwide, moreover, would come at a cost to the budget. However, a series of experiments could be envisaged, on a voluntary basis or in those most heavily saturated jurisdictions.

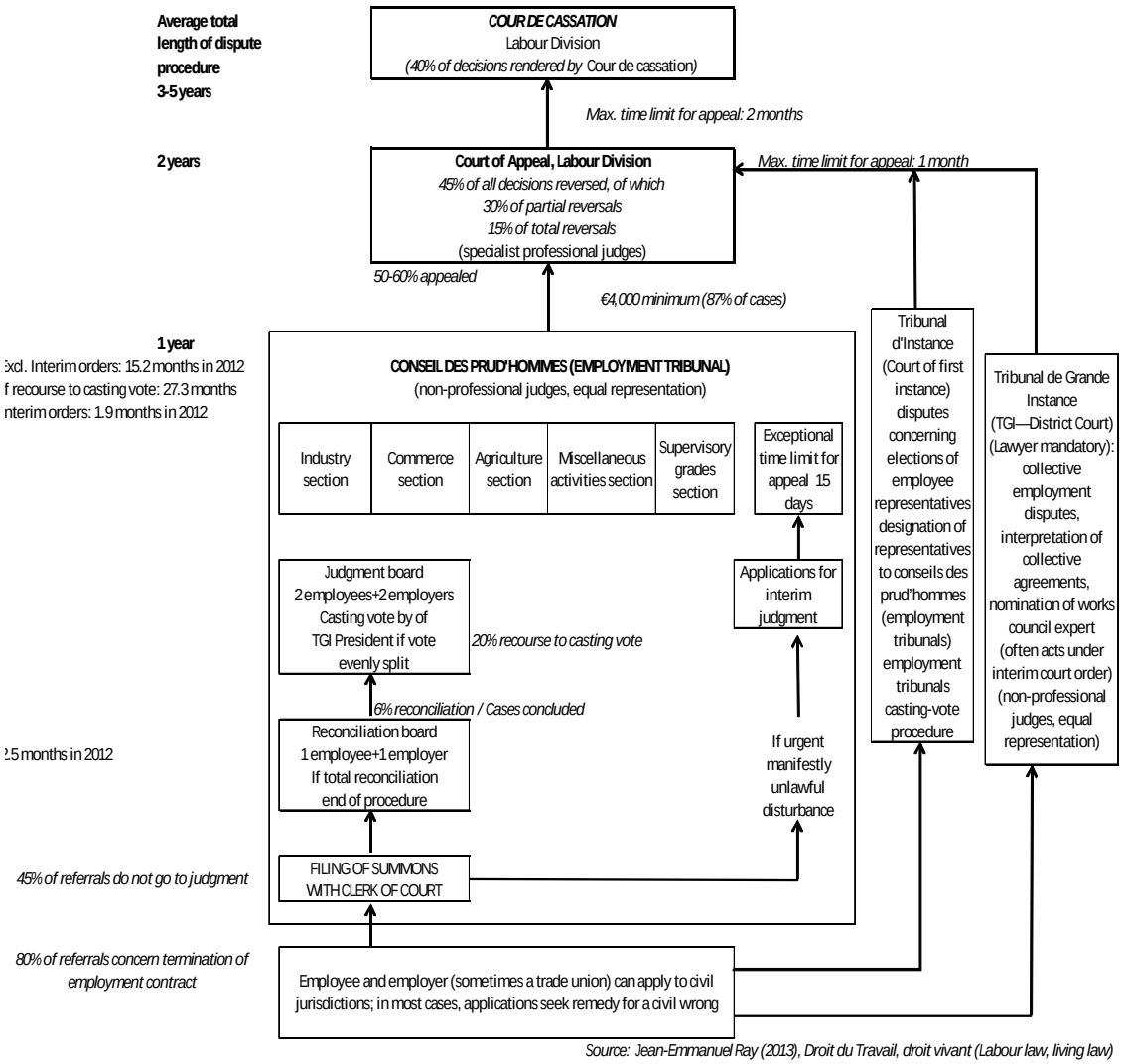
Kahina YAZIDI, Corinne DARMAILLACQ

Note: This issue of Trésor Economics draws on the discussions held on the occasion of the seminar on "Politiques de l'emploi - interaction du juridique et de l'économique" (Labour policies-how the law and economics interact) on 5 November 2013. All documents are available online at: http://www.tresor.economie.gouv.fr/8076_ameliorer-le-traitement-des-litiges-en-droit-du-travail-5-novembre-2013

(24) The Social Security Court comprises a judge from the Tribunal de Grande Instance who chairs sessions, and two non-professional associate judges designated for 3 years by the First President of the Court of Appeal (article 142-5 of the French Social Security Code).

(25) Alaluf M. (2000), "*Le droit est-il soluble dans le travail? Spécificité du droit social et juridictions du travail*" (Is the law soluble in work? The specific nature of labour law and labour jurisdictions), *Chronique de Droit Social*, p. 5-9 cited by Schoenaers F. (2005), "*Échevinage et prise de décision judiciaire: une délibération basée sur la négociation*" (*Échevinage* and judicial decision-making: a negotiation-based deliberation), Négociations, 2005/1 no. 3, éditions De Boeck.

Graphique 4 : Employment disputes (prud'homale) procedure flowchart



Source: Jean-Emmanuel Ray (2013), Droit du Travail, droit vivant (Labour law, living law)
Information updated 2012, DG Trésor

The view of...

Jacques Barthélémy and Gilbert Cette

An indispensable reform

This analysis of employment dispute resolution in France is both detailed and accurate. It clearly shows that very long, drawn out procedures and legally insecure decisions, many of them overturned on appeal, undermine the function of employment tribunals in protecting employees and render that function economically ineffectual. The various possible reforms discussed here coincide with our own view[a]*.*

In the first place, there is a need to make the reconciliation phase more effective, as this currently succeeds in fewer than 6% of cases. The success of the initiatives taken by the Grenoble Appeal Court shows that a mediation phase prior to the reconciliation phase proper could be one way forward. After that, the introduction of a professional judge into the prud'hommes employment tribunal could be an appropriate way to add greater legal security to the decisions of these tribunals. France, together with Mexico, is apparently one of only two OECD countries that lack the presence of at least one professional judge in jurisdictions dealing with individual labour disputes. Finally, arbitration could be an alternative to the employment tribunal. We have proposed that provision be made in sectoral collective agreements for the possibility of arbitration as an option.

But beyond the question of how disputes are resolved, what is needed is a more comprehensive redesign of French labour law. The extreme complexity of French labour law undermines its protective role while at the same time curbing companies' initiatives and economic activity. What is needed is the possibility, by collective agreement, of circumventing the entire body of the Labour Code, within the limits of classic public order, Community law and international law. By protecting employees more effectively and boosting economic efficiency, this sweeping and ambitious reform is critical to spurring growth and adapting French society to the need for flexibility and protection in an innovation-driven economy.

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a. Barthélémy J. and Cette G. (2013), "Refonder le droit social: mieux concilier protection du travailleur et efficacité économique" (Redesigning labour law-more effectively reconciling employee protection with economic efficiency), La Documentation Française, second edition.

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