EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

12 May 2015

Case Document No. 1

***Confédération Générale du Travail Force Ouvrière* (CGT-FO) v. France**
Complaint No. 118/2015

COMPLAINT
(Translation)

Registered at the Secretariat on 29 April 2015

Paris, 28 April 2015

COMPLAINT

LODGED BY THE CONFEDERATION GENERALE DU TRAVAIL - FORCE OUVRIERE

AGAINST FRANCE

FOR THE INCORRECT APPLICATION OF ARTICLE 6§2 OF THE EUROPEAN SOCIAL CHARTER

The Confédération Générale du Travail - Force Ouvrière (CGT-FO) has the honour of presenting you with the following collective complaint, lodged on the ground that, in its view, French legislation fails to comply with the provisions of the European Social Charter.

The person responsible for this complaint in our union is its Secretary General, Mr Jean-Claude Mailly.

Article 6§2 of the European Social Charter provides as follows:

> *"With a view to ensuring the effective exercise of the **right to bargain collectively**, the Contracting Parties undertake:*
>
> *…2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".*

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1. ADMISSIBILITY OF THE COMPLAINT

1.1 Applicability to France of the revised European Social Charter and of the 1995 Protocol to the European Social Charter providing for a system of collective complaints

France signed the European Social Charter of 1961 on 18 October 1968 and deposited its instruments of ratification on 9 March 1973. It signed the Additional Protocol of 1995 providing for a system of collective complaints on 9 November 1995 and ratified that Protocol on 7 May 1999. It signed the revised European Social Charter on 3 May 1996 and ratified it on 7 May 1999.

1.2 Applicability to France of Article 6§2 of the revised European Social Charter

According to the declarations contained in the instrument of ratification of the revised European Social Charter of 1996 deposited by France on 7 May 1999, France considers itself bound by all the Articles in Part II of the revised European Social Charter.

1.3 Compliance by the CGT-FO with Article 1 (c) of the Additional Protocol

The CGT-FO is a representative national trade union within the jurisdiction of France, satisfying the requirements of Article 1.c. of the Additional Protocol of 1995.

Under Article 1 of its statutes, the purpose of the CGT-FO is *"to bring together, without any discrimination on grounds of political, philosophical or religious opinion, all organisations made up of employees aware of the action to be taken to combat all forms of exploitation by private entities and the state and to eliminate the worker and employer classes, and eager to defend their economic and occupational material and non-material interests".*

On 29 March 2013 the Ministry of Labour issued the results of the survey on trade union representativeness. The CGT-FO had gained 15.94% of the vote in the last workplace elections.

1.4 Compliance with Articles 23 and 25 of the Rules of the European Committee of Social Rights on the collective complaints procedure

In a decision of 20 April 2015 the trade union bureau, acting in accordance with Article 8 of the confederation's statutes, instructed its Secretary General, Jean-Claude Mailly, to lodge a complaint with the European Committee of Social Rights concerning the incorrect application by France of Article 6§2 of the European Social Charter.

2. THE SPECIFIC CONTEXT OF THE COMPLAINT

The CGT-FO requests the European Committee of Social Rights to hold that the conditions imposed by French legislation on supplementary social protection of employees through collective agreements and more specifically on the choice of an insurer to uphold the undertakings of employers towards their employees contained in such agreements with regard to supplementary social protection governed by Book IX of the French Labour Code do not comply with Article 6§2 of the European Social Charter.

2.1 The legislation on collective bargaining in France

2.1.1 Historical background

In France, collective bargaining enables employers' and employees' representatives to agree on the rules which will apply to labour relations by means of collective agreements.

In essence, a collective agreement between trade union organisations and employer organisations is an infringement of the employer's contractual freedom and the freedom to conduct business. Such infringements have been authorised, however, since 1918(!) and they are enshrined in French law in particular through the principle of freedom to bargain collectively deriving from the 8th paragraph of the preamble to the 1946 Constitution. The supplementary social protection organised by the social partners is justified by the fundamental freedom to negotiate collective agreements.

Law No. 50-205 of 11 February 1950 on collective agreements and procedures for the settlement of labour disputes organised the right to collective bargaining, following on from the three previous laws of 1919, 1936 and 1946. Collective agreements, which are a type of group contract, could not be fully recognised by the Civil Code because of the principle of the limited effect of agreements (Article 1165 of the Civil Code), whereby contracts could only produce effects on the persons that had concluded them. As a result, collective bargaining had to be given its own separate legal framework and these rules were incorporated into the Labour Code.

In 1971, the right of workers to collective bargaining was recognised and in 1982, the obligation to negotiate was imposed on employers.

2.1.2 Collective bargaining at sectoral level

It is worth pointing out that bargaining can take place at various levels, namely company level, occupational level, sectoral level or national inter-occupational level.

With regard more specifically to the sectoral level to which this complaint relates, it is usually considered that agreements concluded at this level by employers' and employees' organisations serve as a kind of "social regulator of competition"[1].

Companies belonging to the same sector operate in the same markets or compete with one another.

Consequently, sectoral agreements make it possible to ensure that this competition does not stand in the way of improvements to employees' working conditions or that it is not based solely on labour costs or working conditions.

[1] Pélissier J., Auzero G., Dockès E., *Droit du travail* – Précis Dalloz, 25th edition, p. 1234

This public interest role of sectoral agreements accounts for the fact that in France, the Ministry of Labour may extend the standard-setting effect of such agreements to all companies to which they relate, even if they were not represented by the signatories.
This process is known as the extension procedure, and is provided for by Article L.2261-15 of the Labour Code:

> *"The provisions of a sectoral agreement or an occupational or inter-occupational agreement meeting the specific conditions outlined in sub-section 2 may be made compulsory for all employees and employers falling within the scope of the agreement by an order of the Ministry of Labour, following the reasoned opinion of the National Collective Bargaining Commission.*
>
> *The extension of the effects of the agreement and the penalties stipulated therein shall apply for the time and under the conditions provided for by the agreement in question".*

2.2 The specific legislation on collective bargaining in France with regard to social guarantees

Social insurance, which is understood to mean the "*range of processes by which a company may provide guarantees for its staff against certain risks*", is characterised by its private, collective nature. [2]

In France, the social partners may draw up a collective labour agreement to set up a "system" of guarantees, setting out the benefits and contributions designed to cover a social risk or a series of social risks for a certain group of employees, comprising systems of solidarity.

The supplementary social protection systems set up and managed by the social partners in the occupational sectors are based on a complex array of legal instruments:

- a general legal framework;
- a body of law based solely on collective agreements;
- law on the private management of a social protection system intended to serve the public interest.

2.2.1 Historical background

Article 18, paragraph 1 of Order No. 45-2250 of 4 October 1945 on the organisation of the social security system provides the basis for the possibility for the social partners to set up supplementary social protection mechanisms, which was subsequently codified in Article L.4 of the Social Security Code, establishing the principle that:

> *"Social insurance or social security bodies of any nature other than those which manage the special schemes and mutual aid societies established by one or more companies for the benefit of employees and persons treated as such may only be kept in operation or established with the authorisation of the Ministry of Labour and Social Security and with a view only to granting advantages in addition to those deriving from the social security system".*

Through this article, the lawmakers sought to pave the way for the emergence of social guarantees based on collective agreements complementing the basic legal schemes of the social security scheme.

[2] Lyon-Caen G., *La prévoyance*, Dalloz, 1994

As a result the social partners set up mutual support systems based on collective agreements, which they called "*régimes conventionnels*" ("collective schemes").

These schemes were managed by supplementary pension funds, which were also run jointly by employers and employees and became jointly run non-profit-making social insurance bodies because traditional insurance companies did not cover certain risks. This system is referred to as "*prévoyance complémentaire conventionnelle*" ("collective supplementary social insurance") and establishes collective guarantees.

In the Labour Code, this activity was reflected by the term "social guarantees" in Article L. 2221-1.

2.2.2 The legal bases of collective bargaining on supplementary social protection

Under Article 18 of the Order of 4 October 1945, which established the modern model for the organisation of social security in France, the general social security scheme may be complemented by collective agreements.

The legal basis for the involvement of the social partners in the supplementary social protection of employees is now provided by Article L. 2221-1 of the Labour Code and Articles L. 911-1 and L.911-2 of the Social Security Code.

Article L. 2221-1 of the Labour Code defines the purpose of collective bargaining:

> *"This book shall relate to the way in which collective relationships between employers and employees are determined. It shall define the rules under which the right of employees to the collective negotiation of all their employment, vocational training and working conditions and of their social guarantees is exercised".*

It is generally accepted that the term "social guarantees" refers primarily to supplementary social protection measures.

On the subject of supplementary social protection for employees, Article L.2221-3 of the Labour Code refers to the provisions of Title I of Book IX of the Social Security Code, which includes the following two articles.

Article L. 911-1 of the Social Security Code governs the right to collective bargaining in this area:

> *"Unless they are established by legislation or regulations, the collective guarantees enjoyed by employees, former employees and their dependants in addition to those arising from the social security system shall be determined by collective agreements, the ratification by the majority of the persons concerned of a draft agreement proposed by the company manager or a unilateral decision by the company manager contained in a document handed by the manager to everyone concerned".*

Article L. 911-2 of the Code contains a non-exhaustive list of the risks that may be covered in this way:

> *"One of the main purposes of the collective guarantees mentioned in Article L.911-1 shall be to provide insurance for employees, former employees and their dependants covering death, bodily harm, maternity, unfitness for work, disability, incapacity or unemployment and benefits in the form of old-age pensions and allowances or premiums on retirement or at the end of careers".*

One of the goals of collective bargaining therefore is to secure the social guarantees constituting the legal category to which social insurance guarantees belong.

However, neither Article L. 2221-1 of the Labour Code nor Article L. 911-1 of the Social Security Code set out the legal rules for the various means of setting up a social insurance scheme.

As a result rules which depart from the ordinary law have been applied.

2.2.3 The special law on collective bargaining with regard to social protection

Out of a desire to respect the decision-making autonomy of the social partners in the management of these schemes, the French authorities intervened very little to set up a specific legal framework.

The only involvement by lawmakers was to regulate the system of designation clauses, to set up a procedure for the extension of collective agreements and to impose a specific rule on the hierarchy of norms.

2.2.3.1 Designation and transfer clauses warranted by the special rules on risk pooling

When the partners in a sector wished to pool the risks in that sector, they negotiated agreements which contained a precise description of the benefits and the amount of contributions, along with a clause designating one or more insurers with which companies were required to insure their employees.

In exchange for this exclusive right, insurers were required to cover all the employees in the sector concerned on the basis of a single rate.

The system of guarantees set up by the social partners in an occupational sector was therefore often complemented by:

- **a designation clause,** the purpose of which was to determine which insurer would implement the system;

- in some cases, a **transfer clause,** which specified that the binding nature of the affiliation to the designated insurer also applied to companies which had already subscribed to a supplementary contract covering social risks and urged them to insure their employees with the designated insurer within a certain time limit. These were also called "*designation and transfer clauses*".

These collective clauses are the product of collective bargaining in France over the last sixty years.

They are the result of a particular type of mechanism for the pooling of risks which reflects the solidarity of both employers and employees. Through collective agreements, the social partners designated insurers to operate the pooling schemes which these social partners themselves wished to set up.

On 8 August 1994, Law No. 94-678 on the supplementary social protection of employees recognised this practice and codified it in Article L. 912-1 of the Social Security Code.[3]

[3] In Book 9 "Provisions on the supplementary and additional social protection of salaried and non-salaried employees and on joint employer/employee institutions", Title 1 "General provisions on supplementary social protection of employees", Chapter 2 "Mandatory clauses".

This article provided as follows:

> *"Where the occupational or inter-occupational agreements referred to in Article L.911-1 provide for the pooling of risks for which they arrange for cover with one or more of the bodies mentioned in Article 1 of Law No. 89-1009 of 31 December 1989 strengthening the guarantees offered to persons insured against certain risks [or with one or more of the institutions mentioned in Article L.370-1 of the Insurance Code][4], with which therefore the companies falling within the scope of these agreements are bound to affiliate, these agreements shall comprise a clause laying down under what conditions and at what interval the arrangements for the pooling of risks may be reviewed. The period between reviews shall not exceed five years.*
>
> *Where the agreements referred to above apply to a company which, prior to the date on which they came into effect, took out or signed a contract with a different body to that provided for by the agreements to guarantee the same risks at an equivalent level, the provisions of the second paragraph of Article L. 132-33 of the Labour Code shall apply."*

The legislative requirement therefore was for there to be a clause in the agreement which laid down the conditions under which and the interval at which the arrangements for the pooling of risks could be reviewed. It was also stipulated that such reviews had to take place every five years at least.

In other words, the social partners were relatively free to negotiate and were not covered by binding provisions.

2.2.3.2 The special extension procedure

As with collective labour agreements (see above), provision is made for a system of extension by the administrative authorities. However, in view of the purpose of collective agreements on social guarantees, a special procedure for the extension of social insurance agreements was devised by the lawmakers.

As explained above, the aim of the extension is to make the provisions of an agreement binding on all employers and employees falling within its scope.

This procedure, which is specific to collective agreements on supplementary social protection, is provided for in Article L. 911-3 of the Social Security Code:

> *"The provisions of Title III of Book I of the Labour Code shall apply to the collective agreements referred to in Article L. 911-1. However, where the exclusive purpose of agreements is to determine the guarantees referred to in Article L. 911-2, their extension to the employees, former employees, dependants and employers within their scope shall be decided on by an order of the minister responsible for social security and the minister responsible for the budget, following the reasoned opinion of a committee whose membership shall be set by decree."*

Under this article, there is a special extension procedure, which is decided on by order of the minister responsible for social security and the minister responsible for the budget following a reasoned opinion by an ad hoc committee, namely the Committee on Retirement and Social Insurance Agreements (COMAREP).

[4] Addition which came into force on 24 June 2006

2.2.3.3 The special hierarchy of norms

The special nature of these legal instruments means that some concepts which permeate standard collective agreements can be set aside and this is the case with the hierarchy of norms.

As a result, a company-level agreement may not depart, even more advantageously, from a collective social insurance agreement.

Article L.2253-3 of the Labour Code provides:

> *"On the subject of the minimum wages, classifications and collective guarantees referred to in Article L. 912-1 of the Social Security Code and the pooling of vocational training funds, a company-level or staff-level agreement may not contain clauses departing from those of sectoral agreements or occupational or inter-occupational agreements".*

The rule that company- or staff-level agreements may not contain clauses departing from sectoral or occupational or inter-occupational agreements was adopted so as to make it possible to pool risks within a sector.

To allow any exception in the area of social insurance would have rendered the pooling of risks or, in other words, the solidarity created through designation clauses selecting insurers at sectoral level ineffective.

2.2.4 The special mechanisms for the management of supplementary social protection schemes ("joint management")

This general term covers all the legal measures taken by the social partners in a given sector to manage a sectoral collective scheme.

Out of a desire to respect the decision-making autonomy of the social partners in the management of these schemes, the French authorities have intervened very little to set up a specific legal framework. Collective practices have therefore shaped the tools which the social partners need.

As the central management body of any sectoral collective scheme, the joint committee (made up of representatives of the social partners authorised to negotiate at the level of the occupational sector concerned) does not have any legal personality as such and therefore does not have its own staff or operating budget. This collective social insurance scheme is governed by the principle of non-selection of individuals. According to this principle, regardless of the way the collective scheme was set up, when employees enjoy collective social insurance protection, "the body which guarantees this shall deal with the consequences of pathological conditions which arose before the contract or agreement was signed or entered into, subject to the penalties provided for in the event of false statements" (Article 2 of the Law of 31 December 1989).

When the partners in a given sector wished to pool risks within that sector as fully as possible, they negotiated agreements containing a precise definition of the benefits, the amounts of contributions and a clause designating one or more insurers with which the companies concerned were required to insure their employees.

2.3 The legal nature of supplementary social protection

In addition, the activity of providing supplementary insurance against social risks carried out by the social partners is not an activity like any other.

The rates (and hence the contributions or premiums) are not just the result of competition between operators but are linked mainly to the characteristics of the people to be insured.

It is also necessary to bear in mind that insurance is based on calculations of probability. Its raw application results in differences in charges between companies and employees according to the size of companies and the age and gender of employees. These principles are not applied at individual level in schemes set up by means of collective agreements. Solidarity is the rule and so contributions are evened out.

In this context, the possibility for the social partners to designate a single operator (or several operators) per occupational sector:

- provides increased protection for employees;

- avoids the distortions caused by competition between companies in the same sector resulting from differences in the size of companies and the characteristics of the group of employees to be insured (age and gender variables are largely smoothed out);

- results in the management of these schemes by those concerned through their representative organisations, which is a powerful expression of the idea of social democracy;

- makes it possible to provide social assistance for the most disadvantaged people;

- is consistent with a freely negotiated meeting of minds between employers and employees through their respective representatives.

2.3.1 Services of general economic interest

French social insurance schemes are services of general economic interest.

The main features of such services are summarised as follows: "*services of an economic nature that the public authorities in the Member States … subject to specific public service obligations through an act of entrustment … on the basis of a general-interest criterion and in order to ensure that the services are provided under conditions which are not necessarily the same as prevailing market conditions*".

In France, there is indeed a link between the obligations by which the company managing the service of general economic interest is bound on the one hand and the purpose pursued by that service on the other.

2.3.2 A tool to promote solidarity: the designation clause

2.3.2.1 The validity of designation clauses under Community law

In the Albany decision of 21 September 1999, the Court of Justice of the European Communities found that by virtue of its nature and purpose, a collective agreement including a designation clause did not constitute a prohibited agreement between companies.[5]

Firstly, by nature, it formed part of the fundamental right to collective bargaining.

[5] CJEU, Albany, 21 September 1999, Case C-67/96

Secondly, its purpose was to achieve the highest degree of social protection possible.

> *"It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.*
>
> *... It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty."*

The CJEU only dismisses the charge of abuse of a dominant position within the meaning of Article 102 TFEU if the goal of solidarity is being pursued.

Yet, one of the prerequisites for solidarity is the pooling of risks and hence the designation of a single operator for employees in accordance with the arrangements provided for by the social partners.

It follows from this that in the CJEU's view the aim of achieving a high level of solidarity means that operators cannot be considered to be in an abusive dominant position in such cases because on the one hand they would not otherwise be able to collect contributions from all the companies in the sector and on the other they would only insure bad risks and therefore they would be unable to fulfil the general economic interest task assigned to them by the social partners in conjunction with the goal of solidarity and the policy of prevention.

Consequently the competition rules established by Articles 101 and 102 of the TFEU are not infringed if the method chosen is that of an agreement between the social partners in conjunction with the right to collective bargaining, especially where the aim is to promote a general interest.

Therefore, the purpose of agreements between social partners is to improve working conditions and contribute to social progress, which is raised to the status of one of the goals of European construction. Accordingly, social insurance agreements foster the improvements in social protection advocated by the European Commission, in the name in particular of completing the internal market.

The Court of Justice of the European Union understood very early on that prohibiting designation clauses would be tantamount to flouting the fundamental right to collective bargaining, as guaranteed by the European Union.

This position was confirmed in the Court's Van der Woude judgment of 21 September 2000[6]:

> *"It should be noted that, in Albany, Brentjens' and Drijvende Bokken, the Court held that agreements entered into in the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 85(1) of the Treaty."*
>
> *"In that regard, it is sufficient to note that it does not appear from either the papers provided by the national court or from the written and oral observations that the system laid down in the Collective Labour Agreement has induced the undertaking responsible for managing the*

[6] CJEU, Van der Woude, 21 September 2000, Case C-222/98

insurance scheme at issue in the main proceedings to abuse any dominant position it might have or that the services provided by the undertaking do not meet the needs of the employees concerned."

Lastly, in its judgment on AG2R Prévoyance v. Beaudout Père et fils SARL of 3 March 2011, on a transfer clause, the Court considered the sectoral healthcare scheme to equate to a company responsible for the management of a service of general economic interest. [7]

"It must, however, be held that, if the transfer clause and, as a result, the exclusive right of AG2R to manage the scheme for supplementary reimbursement of healthcare costs for all undertakings in the French traditional bakery sector were to be set aside, that body, although required under Addendum No 83 to offer cover to the employees of those undertakings on the conditions laid down in that addendum, would run the risk of suffering the defection of low-risk insured parties, who would have recourse to undertakings offering them comparable or better cover in return for lower contributions. In those circumstances, the increasing share of 'bad risks' which AG2R would have to cover would bring about a rise in the cost of cover, with the result that that body would no longer be able to offer cover of the same quality at an acceptable price.

That would a fortiori be the position in the case of a scheme which, like that at issue in the main proceedings, is characterised by a high degree of solidarity by reason of, inter alia, the fixed nature of the contributions and the obligation to accept all risks.

Such constraints, which render the service provided by the body concerned less competitive than a comparable service provided by insurance companies not subject to those constraints, argue in justification of the exclusive right of that body to manage such a scheme, without there being any possibility of exemption from affiliation. "

The Court no longer confined itself to endorsing the designation clause included in the sectoral collective agreement but went so far as to validate the transfer clause, which requires affiliation to a designated body, with no possibility of exemption.

In his opinion of 11 November 2010 on the AG2R case, Advocate General Paolo Mengozzi considered that the designation and transfer clause were justified by a need to implement the principle of solidarity:

"On the one hand, that scheme has introduced a high degree of solidarity, which has the characteristics already referred to at points 70 to 72 of this Opinion and thus allows cover of the health costs for a specific occupational category in which low incomes could constitute an obstacle to access to healthcare, in particular because of the growing phenomenon, underlined by the Commission, of treatment fees exceeding the tariffs subject to reimbursement by the basic compulsory scheme.

On the other hand, particular constraints imposed by the law affect a provident society such as AG2R. Thus, as the French Government has pointed out, and subject to verification by the referring court, such a society can neither suspend cover nor terminate an undertaking's membership for failure to pay the contributions pursuant to Article L. 932-9, fifth paragraph, of the Social Security Code. Furthermore, the cover continues to exist, pursuant to Article L. 932-10 of that Code, in the event of safeguard, insolvency-protection or liquidation proceedings in respect of an undertaking within the sector concerned."

[7] CJEU, AG2R Prévoyance v. Beaudout Père et fils SARL, 3 March 2011, Case C-437/09

A question that has to be addressed is how to reconcile the demands linked with the realisation of the social goal pursued by the social partners with the other freedoms to be guaranteed.

A proper balance must be struck when catering for the interests at stake, namely, on the one hand, solidarity, which is secured through designation clauses and, on the other, the realisation of the freedom to conduct business and freedom of competition.

2.3.2.2 The validity of designation clauses under national French law

In a judgment of 10 March 1994, the Court of Cassation accepted the validity of designation clauses in the light of competition rules. [8]

> *"Whereas, however, supplementary social security schemes which are based, like basic social security schemes, on compulsory affiliation mechanisms for employers and employees falling within their scope, and which impose particular constraints on the establishments collecting contributions and distributing benefits, irrespective of their legal nature, to prompt them to fulfil the social tasks assigned to them, are not covered by the provisions of Articles 7 and 8 of the Order of 1 December 1986 on the freedom of pricing and competition or by Articles 85 and 86 of the Treaty establishing the European Economic Community".*

In France therefore, the principle has been established that:

> *"This goal of solidarity could not be achieved if some baking companies were allowed not to take part in the pooling of the scheme for fear that they would undermine its financial equilibrium". [9]*

Or that:

> *"It is clear that the goal of solidarity could not be achieved if some of the companies did not take part in the pooling of the scheme;"[10]*

The Court of Cassation has had occasion to rule again very recently on designation and transfer clauses.

In several decisions of 21 November 2012, the Court of Cassation took up the reasoning adopted by the Court of Justice of the European Union in the judgment of 3 March 2011, cited above.[11]

> *"The CJEU held in the same judgment that Articles 102 and 106 of the Treaty on the Functioning of the European Union did not prohibit the authorities, in circumstances such as those in this case, from assigning the exclusive right to manage this scheme to a social insurance body, without any possibility for the companies in the sector of activity concerned to be exempted from affiliating to this scheme;".*

[8] Court of Cassation, Social Division, 10 March 1994, No. 91-11.516
[9] Agen Court of Appeal, 8 March 2011, No. 09/01757
[10] Lyon Court of Appeal, 17 March 2011, No. 10/02311
[11] Court of Cassation, Social Division, 21 November 2012, No. 10-21.254, No. 10-21.255, No. 10-21.256, No. 10-21.257

Then in its decisions of 27 November 2012[12] and 5 December 2012[13]:

> *"On the other hand, under Article L. 2251-1 of the Labour Code, an agreement may not depart from provisions pursuing a public interest. According to Article L. 2253-3 of the Labour Code, on the subject of the collective guarantees referred to in Article L. 912-1 of the Social Security Code, a company- or establishment-level agreement may not include clauses departing from those of sectoral, occupational or inter-occupational agreements. It follows from these texts that the obligation to affiliate to the body designated by an addendum to manage the supplementary scheme for the reimbursement of healthcare serves the public interest and, as it does not provide for any exemption, rules out the application of the favourability principle;*
>
> *The Court of Appeal has inferred precisely from this that Article 14 of Addendum No. 83 of 24 April 2006, extended, could legitimately require companies falling within the scope of the collective agreement between craft companies in the baking and pastry sector to subscribe to the guarantees contained in this addendum and agreed with the social insurance body designated in Article 13 of the addendum by 1 January 2007 at the latest, irrespective of the level of the guarantee subscribed to previously".*

In a decision of 7 July 2000, the Conseil d'Etat held that an agreement could designate social insurance bodies provided that it did not affect a substantial part of the common market.[14]

> *"Even given that the exclusive right conferred by the disputed agreement on the bodies managing the collective guarantees which it sets up places these bodies in a position to abuse their dominant position, particularly as a result of the requirement imposed on all companies in the sector to cancel all social insurance contracts concluded previously with other management bodies by a specified deadline, it is clear from the case documents that, in view of the very small share of the national supplementary social insurance market covered by the impugned agreement, the appellant federation cannot reasonably argue that any such abuse would affect a substantial part of the common market within the meaning of Article 86 of the Treaty of Rome, cited above."*

The Fair Competition Board gave a view on this subject in its opinion of 21 January 1992[15]:

> *"When they instruct a body to manage the social insurance scheme they have set up or when they join a scheme set up by a specific social insurance body, the social partners are exercising the customary freedom of choice of clients with regard to service providers. The Board notes, however, that there would be nothing to prevent parties to the agreement from calling on different providers, either before adopting the clause on the providence scheme or when revising it, as the Paris Court of Appeal has noted (judgment of 5 December 1990,* Organisme de prévoyance d'étude et de gestion d'assurances [OPEGA] *v. Minister of Social Affairs and Employment and Others)."*
>
> *"The designation of a social insurance body, which reflects the choice made by the social partners, is not in breach of competition law in itself. Furthermore, the clause designating a social insurance body and the choice of the corresponding scheme are basic components of the organisation of the agreement."*

[12] Court of Cassation, Social Division, 27 November 2012, No. 11-18.554
[13] Court of Cassation, Social Division, 5 December 2012, No. 11-24.233
[14] Conseil d'Etat, 7 July 2000, No. 198564
[15] Fair Competition Board (*Conseil de la Concurrence*), 21 January 1992, No. 92-A-01

Consequently, whether in the case-law of the Court of Cassation, the *Conseil d'Etat* or the Fair Competition Board, designation clauses have been validated in France.

2.3.3 The goal of solidarity

The goal of solidarity is achieved when the pooling of risks is permitted. Risk-pooling is made possible through designation clauses, which are, in turn, the result of collective bargaining.

Insurance is not an activity like any other. Its rates (i.e. its contributions or premiums) are not just the result of competition between operators but derive mostly from the characteristics of the persons to be covered. It also has to be borne in mind that as insurance is based on a calculation of probability, its raw application results in disparities in rates between companies according to their size and between employees according to their age and sex.

Similarly, small businesses will inevitably be disadvantaged compared to larger ones when the service/price ratio is negotiated with the insurers, save in cases of dumping, which, by its very nature, will have adverse effects on the sustainability of the cost of guarantees.

2.3.3.1 Benefits for high-risk companies

The benefits of pooling risks at sectoral level are most obvious for companies which have special and/or major risks.

For instance, companies with extreme risks (such as a large proportion of elderly people or workers with disabilities) can benefit from health cover calculated on the basis of the average risk at sectoral level.

As a result companies with high risks are able to benefit from better quality and less expensive cover than if they had taken it out individually.

The French government estimates the overall saving brought about by risk pooling to be between 5 and 10% of the cost of health cover.[16]

2.3.3.2 The benefits at the level of all the companies in the sector

The benefits of risk pooling at sectoral level also apply to all the companies in the sector.

The sectoral level makes it possible to take advantage of extensive technical expertise, which is of benefit to the social partners.

Acquisition and brokerage fees are reduced because they are no longer covered by the company alone.

The French Government has estimated that prohibiting designation clauses would massively increase management costs because insurers would have to engage in more marketing. [17]

With regard more specifically to contracts, pooling risks at sectoral level helps to limit exclusion clauses for contingencies such as pandemics, natural disasters, costs of accommodation in long-stay institutions, dangerous sports and disabilities.

[16] Comments by the Government on the appeals against the Law on the protection of employment, 16 June 2013
[17] Comments by the Government on the appeals against the Law on the protection of employment, 16 June 2013

Furthermore, besides financing portability, pooling risks at sectoral level can enable certain aspects of solidarity to be financed more efficiently. It can make it possible for example to cover the contributions of people on sick leave or vulnerable employees, prevention work or one-off or exceptional social assistance warranted by the circumstances of certain employees.

Pooling also enables companies to be insured by several bodies through a system of co-insurance, which allows designated insurers bound by a co-insurance agreement to share risks on the basis of identical rates. Insurers may then decide to set up joint coverage of the risk with the expense being distributed according to each insurer's share, or to spread the risk according to the geographical area in which the companies are located or according to the specific activity the companies are engaged in.

The point of designation clauses is to reduce costs, increase margins and promote employment. All of this makes them a means of promoting economic efficiency.

Furthermore, all sectoral agreements may be revised by the same means through which they were set up, meaning that there is no such thing as mandatory affiliation for all time.

2.3.3.3 The questioning of the principle of solidarity through the negotiation of collective agreements

Article 1 of the national inter-occupational agreement adopted on 11 January 2013 provided as follows, particularly in relation to the extension of supplementary cover for health costs to everyone:

> *"The social partners of the sector shall allow companies the freedom to adopt the insurer or insurers of their choice. However, they may, if they wish, recommend that companies contact one or more insurers or institutions able to provide this cover following the implementation of a transparent competitive bidding procedure."*

The bill on the protection of employment of 14 May 2013 provided for the amendment of Article L. 912-1 of the Social Security Code.

The wording of Article 1, paragraphs I. A, 2° and II, 2°, of the bill gave rise to some controversy:

> **Article 1:**
>
> ***I. – A.*** *– The negotiation shall relate in particular to:*
>
> ***2°*** *The arrangements for the selection of insurers. The negotiation shall focus in particular on the conditions, particularly in terms of rates, under which companies may adopt the insurer or insurers of their choice without disregarding the aim of providing effective cover for all the employees of the companies in the sector and universal access to healthcare;*
>
> ***II.*** *– Title I of Book IX of the Social Security Code shall be amended as follows:*
>
> ***2°*** *A paragraph worded as follows shall be added to Article L. 912-1:*
>
> *"When the occupational or inter-occupational agreements referred to in Article L. 911-1 provide for the pooling of risks pursuant to the first paragraph of this article or where they recommend, with no binding force, that companies should affiliate with one or more bodies for insurance of the risks for which they organise cover, a prior competitive bidding procedure shall be organised between the bodies referred to in Article 1 of Law No. 89-1009 of 31 December 1989 strengthening the guarantees offered to insured persons against certain risks. This competitive procedure shall be carried out in conditions of transparency, impartiality*

and equal treatment between the candidates in accordance with arrangements established by decree. This decree shall lay down, in particular, the rules designed to guarantee sufficient prior public notice, prevent conflicts of interest and determine the means by which the contract will be monitored. A competitive procedure shall also be organised whenever the contract is reviewed."

Despite the foregoing considerations, on 13 June 2013, when examining Article 1 of the bill of 14 May 2013 on the protection of employment, the Constitutional Council[18] found Article L. 912-1 of the Social Security Code to be unconstitutional, thus bringing an end to the practice of designation clauses:

"Considering however that, on the one hand, according to the provisions of the first subparagraph of Article L. 912-1 of the Social Security Code, all companies belonging to a single professional sector may be required to bear responsibility not only for the price and arrangements for complementary protection, but also the choice of the social insurance body entrusted with the provision of such protection amongst all companies regulated by the Insurance Code, the institutions falling under Title III of Book IX of the Social Security Code and the mutual insurance bodies falling under the Mutual Insurance Code; that, whilst the legislator may encroach upon the principles of freedom of enterprise and freedom of contract as part of a risk-pooling approach, in particular by providing that one single social insurance body be recommended at sectoral level and that this body proposes a reference contract including a specific insurance tariff or by granting the possibility for several social insurance bodies proposing at least those reference contracts to be designated at sectoral level, it cannot violate these freedoms in such a manner that the company will be bound to a contracting party which has already been designated under a contract negotiated at sectoral level and the contents of which have been entirely predetermined; that accordingly, the provisions of subparagraph one ***violate the principles of freedom of contract and freedom of enterprise****;"*

"Article L. 912-1 of the Social Security Code is unconstitutional".

The finding of unconstitutionality of Article L. 912-1 of the Social Security Code has made it impossible, since 16 June 2013, for designation clauses to be negotiated at sectoral level on the ground that they violate the principles of freedom of contract and freedom of enterprise.

Consequently, the CGT-FO hereby lodges a complaint with the European Committee of Social Rights, requesting it to recognise that there has been a breach of Article 6§2 of the Charter on collective bargaining for the reasons which will be explained hereinafter.

[18] Constitutional Council, 13 June 2013, No. 2013-672

3. INTRODUCTION TO THE COMPLAINT

3.1 Reminder of the legal rules at issue

3.1.1 International law on social rights

Under Article 4 of ILO Convention No. 98 on the Right to Organise and Collective Bargaining:

> *"Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."*

3.1.2 European law on social rights

3.1.2.1 The European Social Charter

Article 6§2 of the European Social Charter provides:

> "*With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:*
> *…*
> *2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".*

3.1.2.2 Conclusions of the European Committee of Social Rights

On 16 June 2013, the French Government issued comments on the appeals against the Law on the protection of employment.[19]

Eliminating designation clauses would entail revising 80% of collective sectoral health contracts, and some two million employees covered by about fifty sectoral schemes would be affected by a renegotiation of this sort. In the social insurance sphere, renegotiation could cover up to 250 sectoral schemes, a large number of which are the result of designation clause procedures.

Yet, the European Committee of Social Rights has consistently found a breach of Article 6§2 of the European Social Charter when the number of collective agreements concluded declines.

For example in its conclusions of 30 June 2007, the European Committee of Social Rights noted that in Latvia:

- 2 035 company-level agreements covering 187 674 employees had been signed in 2002;
- 2 040 company-level agreements covering 170 955 employees had been signed in 2004;
- 32 sectoral-level agreements had been signed in 2002;
- 21 sectoral-level agreements had been signed in 2004.

Consequently, it noted that the number of agreements had fallen during the reference period.[20]

[19] Comments by the Government on the appeals against the Law on the protection of employment, 16 June 2013

On 30 June 2004, the Committee pointed out that the obligation entered into by states under this provision was supposed to go further than the enactment of a legal framework permitting free collective bargaining and therefore states were also required to take necessary and appropriate steps to promote collective bargaining. [21]

In this respect the Committee has pointed out that if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. Whatever the procedures put in place are, collective bargaining should remain free and voluntary.

Similarly, on 3 December 2010 the Committee concluded that in Latvia, the number of collective agreements had declined during the reference period, falling from 2033 in 2005 to 1921 in 2008.[22]

In the instant case, in France, according to the figures communicated by the Ministry of Labour, Employment, Vocational Training and Social Dialogue [23]:

- in 2012, 96 social insurance agreements were extended;
- in 2013, 77 social insurance agreements were extended;
- in 2014, 45 social insurance agreements were extended.

It should be added that these figures also show that:

- in 2013, 59 social insurance agreements were concluded without any request for extension;
- in 2014, 48 social insurance agreements were concluded without any request for extension.

It is clear from these figures that the number of extended and non-extended social insurance agreements has been declining since 2013, in other words since the Constitutional Council's decision of 14 June 2013 censuring designation clauses.

The social partners can no longer easily designate one or more bodies to manage the supplementary social protection scheme set up in an occupational sector.

According to a review by the Directorate General for Labour (DGT) on inter-occupational and sectoral negotiation in 2013 [24]:

> *"Since the censure of designation clauses by the Constitutional Council, risk-pooling at occupational-sector level has been more difficult to implement because companies are under no obligation to affiliate with the insurer or insurers chosen by the sector."*

Consequently, the censure of designation clauses has caused the spontaneous development of collective bargaining in the area of social insurance to be held back and undermined.

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[20] European Committee of Social Rights, Conclusions XVIII-2 - Latvia
[21] European Committee of Social Rights, Conclusions XVI-2 – Hungary
[22] European Committee of Social Rights, Conclusions XIX-3 - Latvia
[23] Number of agreements dealing with the matter of social insurance (whether exclusively or with other subjects as a side issue) and number of extended agreements (whatever the year in which the extension order was issued).
[24] DGT review - inter-occupational and sectoral negotiation: general data for 2013, p. 566.

Positive measures need therefore to be taken to encourage and facilitate the conclusion of agreements, while ensuring that bargaining remains free and voluntary.

Consequently, the European Committee of Social Rights should find that there is a breach of Article 6§2 of the European Social Charter.

3.1.3 The main French legislation that applies to this case

The main legislation that applies to this case is as follows:

3.1.4 The Preamble to the French Constitution of 27 October 1946, paragraph 8:

> *"Every worker shall participate through his/her delegates in the collective settlement of working conditions and in corporate management."*

Paragraph 8 of the Preamble to the French Constitution of 27 October 1946 guarantees a right to collective bargaining which is satisfied through negotiation at both company and sectoral level.

From this viewpoint, sectoral agreements are designed to cover more employees than company-level agreements as bargaining at company level is restricted to certain companies (companies with over 50 employees with a trade union delegate appointed by a representative trade union).

The possibility for the social partners to establish a designation clause therefore forms part of the principle of free collective bargaining.

Barring this possibility to the social partners therefore excessively interferes with their constitutionally guaranteed right to take collective decisions on their working conditions.

Article L. 912-1 of the Social Security Code as worded before the finding of unconstitutionality was therefore an exception based on the benefits of risk pooling at sectoral level.

3.1.4.1 Article L. 912-1 of the Social Security Code, as amended by Law No. 2013-1203 of 23 December 2013 on social security financing for 2014:

> *"I.-The occupational or inter-occupational agreements referred to in Article L. 911-1 may, under the conditions laid down by a decree of the Conseil d'Etat, provide for the establishment of collective guarantees affording a large degree of solidarity and thus comprising benefits that are not directly contributory, possibly taking the form, in particular, of the partial or total coverage of contributions for some employees or former employees, a prevention policy or social welfare benefits.*
>
> *In this case, the agreements may arrange the coverage of the risks concerned by recommending one or more of the bodies referred to in Article 1 of Law No. 89-1009 of 31 December 1989, strengthening the guarantees offered to insured persons against certain risks, or one or more of the institutions referred to in Article L. 370-1 of the Insurance Code, subject to compliance with the conditions laid down in section II of this article.*
>
> *These bodies or institutions shall send the minister responsible for social security an annual report on the implementation of the scheme, the substance of the solidarity elements and its equilibrium, the content of which shall be specified by decree.*
>
> *II.-The recommendation referred to in section I shall be preceded by a competitive bidding procedure between the bodies or institutions concerned, in conditions of transparency,*

impartiality and equal treatment between the candidates in accordance with arrangements established by decree.

Bodies or institutions may not refuse the affiliation of a company falling within the scope of the agreement. They are required to apply a single rate and offer identical guarantees to all the companies and all the employees concerned.

III.-The agreements referred to in section I shall comprise a clause laying down under what conditions and at what intervals, not exceeding five years, the arrangements for the organisation of the recommended scheme shall be reviewed. The procedure provided for in the first paragraph of section II above shall apply to this review.

IV.-The agreements referred to in section I may provide that some of the benefits requiring factors relating to employees' circumstances or not directly related to the employment contract binding them to their employer to be taken into account shall be financed and managed through a risk-pooling system according to the arrangements laid down by a decree of the Conseil d'Etat, for all of the companies falling within their scope."

Article L. 912-1 of the Social Security Code provides solely for a recommendation procedure and the practice of designation clauses is now no longer provided for in France's positive law.

3.1.4.2 Decree No. 2014-1498 of 11 December 2014 on the collective guarantees affording the high degree of solidarity referred to in Article L. 912-1 of the Social Security Code:

Under Article 1:

"Title I

GENERAL PROVISIONS RELATING TO THE SUPPLEMENTARY SOCIAL PROTECTION OF EMPLOYEES

"Article R. 912-1.-The occupational and inter-occupational agreements referred to in the first paragraph of section I of Article L. 912-1 shall determine the share of the premium or the contribution paid which shall be allocated to the financing of the benefits referred to in paragraphs 1°, 2° and 3° of Article R. 912-2 and, where appropriate, to other equivalent activities pursuing the goal of solidarity which they shall stipulate.

Agreements shall be regarded as affording a high degree of solidarity within the meaning of the provisions of the first paragraph of Article L. 912-1 if this share of the financing is equivalent to 2% or more of the premium or contribution.

Article R. 912-2.-The occupational and inter-occupational agreements referred to in the first paragraph of section I of Article L. 912-1 may, in order to offer guarantees affording a high degree of solidarity within the meaning of the provisions of this paragraph, provide for:

1° The total or partial coverage of the contributions of some or all of the employees or apprentices who may be entitled to the exemptions from affiliation provided for in sub-paragraph b of paragraph 2° of Article R. 242-1-6, together with the contributions of all or some of the employees, apprentices or former employees whose contributions amount to 10% or more of their gross income;

2° The financing of prevention activities concerning occupational hazards or other health policy aims, relating in particular to behaviour with regard to the consumption of medicines. These prevention activities may follow up on priority activities in areas identified as such when framing health policy, particularly national information or training campaigns, or provide for activities pertaining solely to the occupational or inter-occupational field concerned and intended to reduce future health risks and improve working conditions and employees' health.

3° Coverage of social welfare benefits, including in particular:

a) On an individual basis: the award, where the material circumstances of claimants so warrants, of individual assistance and relief to employees, former employees and their dependants;

b) On a collective basis, for employees, former employees and their dependants: the award, in accordance with criteria laid down by the agreement, of assistance enabling them to cope with the loss of autonomy, including expenses resulting from the accommodation of a disabled adult in a medico-social establishment, connected with the care of a disabled child or incurred when providing support for family carers.

The objectives of prevention activities and the operational rules and procedures for the award of social welfare benefits shall be determined by the sectoral joint committee, taking account, where appropriate, of the health improvement goals set in the context of the health policy to whose implementation these objectives contribute in the occupational and inter-occupational field they cover.

The sectoral joint committee shall supervise the pursuit of these objectives by the bodies with which companies arrange cover for their employees."

3.1.4.3 Decree No. 2015-13 of 8 January 2015 on the competitive bidding procedure between bodies organised in the context of the recommendation provided for by Article L. 912-1 of the Social Security Code:

Under Article 1:

A chapter worded as follows shall be added to Title I of Book IX of the third part of the Social Security Code:

"Chapter II

Mandatory clauses

Article D. 912-1.-Where the occupational or inter-occupational agreements described in Article L. 911-1 recommend one or more bodies referred to in Article 1 of Law No. 89-1009 of 31 December 1989 for the coverage of the risks described in Article L. 911-2, a prior competitive bidding procedure shall be arranged between the candidate bodies. This procedure shall also apply to all subsequent reviews of the recommendation clause. The joint committee provided for in the first paragraph of Article L. 2261-19 of the Labour Code shall be in charge of the competitive bidding procedure. In this connection, it shall ensure compliance with the principles of transparency of the procedure, impartiality and equal treatment between the candidate bodies and, on each review of the recommendation clause, between the body or bodies already recommended and the other candidate bodies.

Save for the final choice of the candidate or candidates selected, which shall be its exclusive responsibility, the joint committee may delegate the implementation of the procedure to a special joint committee comprising at least four of its own members. In this event, the special joint committee shall report on all its activities to the joint committee.
The joint committee and any joint special committee that is set up may call on the assistance of one or more experts appointed because of their professional experience.
The members of the joint committee and any special joint committee that is set up shall be bound by secrecy, together with the experts referred to in the preceding paragraph .

Article D. 912-8.- The composition of the joint committee and any special joint committee that has been set up may be communicated to all candidates who so request.

Article D. 912-9.- When the list of eligible candidates has been drawn up pursuant to paragraph 2° of Article D. 912-6, each of the members of the joint committee and any joint special committee that has been set up shall be required to declare any conflict of interests within eight days. Such declarations must also be made in the event of any conflict of interests arising after the establishment of the list, within eight days of the date on which the conflict arose.

A conflict of interests shall be considered to arise where one of the members of the joint committee or any special joint committee that has been set up engages in a salaried activity or performs, or has performed over the last five years, deliberative or management functions within the candidate bodies or the group to which they belong.

Article D. 912-10.- Members of the joint committee or any special joint committee that has been set up who declare a conflict of interests may not take part in any meeting or discussion connected with the selection phase described in paragraph 3° of Article D. 912-6. The member or members concerned may, however, be replaced at the instigation of the employees' trade union organisation or employers' professional organisation to which they belong.

Article D. 912-11.- The expert or experts referred to in the fourth paragraph of Article D. 912-1 shall be required, prior to their appointment, to declare any conflict of interests in which they might be placed vis-à-vis the individual members of these committees or, according to the arrangements provided for in Article D. 912-9, vis-à-vis one of the candidate bodies.

Article D. 912-13.- When employees' trade union organisations and employers' professional organisations request the extension of a collective agreement comprising a recommendation clause pursuant to Article L. 911-3, they shall attach to their request the documents relating to the competitive bidding procedure, a list of which shall be laid down by order of the minister responsible for social security, the minister responsible for the budget and the minister responsible for labour."

The Decree of 10 January 2015 on the competitive bidding procedure between bodies organised in the context of the recommendation provided for by Article L. 912-1 of the Social Security Code may legitimately be subject to various criticisms which will lead ultimately to a finding of a violation of the right to collective bargaining.

3.2 The violation of Article 6§2 of the European Social Charter

The belated implementation of the Decree on the application of Article L. 912-1 of the Social Security Code has made the collective bargaining procedure more complex by framing the recommendation

and competitive bidding mechanism too rigorously, thus reducing the social partners' prerogatives in the collective bargaining procedure.

In addition, the existence of a possible conflict of interest within the joint committee responsible for the competitive bidding procedure is a further infringement of the freedom of negotiation.

As things stand, the finding of unconstitutionality of designation clauses has restricted collective bargaining in that Article L. 912-1 of the Social Security Code, as amended by Law No. 2013-1203, no longer provides for the possibility of establishing designation clauses and this constitutes an infringement of the freedom of negotiation.

Article L. 912-1 of the Social Security Code now provides solely for the recommendation method.

3.2.1 The belated adoption of the Decree of 10 January 2015

Under Article 1, I.-A of Law No. 2013-504 of 14 June 2013 on the protection of employment:

> *"Before 1 June 2013, **organisations bound by a sectoral agreement or failing that by occupational agreements shall begin negotiation** to enable employees who do not have collective cover with mandatory affiliation for the supplementary reimbursement of costs resulting from illness, maternity or an accident, for which each of the categories of guarantee and the share of the financing covered by the employer are at least as favourable as for the minimum cover referred to in section II of Article L. 911-7 of the Social Security Code, at sector and company level, to have access to such cover by 1 January 2016."*

Section B of the same article continues as follows:

> *"**From 1 July 2014 to 1 January 2016, in companies** where a trade union delegate has been appointed and which are not covered by one of the arrangements referred to in Article L. 911-1 of the Social Security Code by collective cover with mandatory affiliation for the supplementary reimbursement of costs resulting from illness, maternity or an accident, for which each of the categories of guarantee and the share of the financing covered by the employer are at least as favourable as for the minimum cover referred to in section II of Article L. 911-7 of the Social Security Code and applicable on 1 January 2016 at the latest, **the employer shall begin negotiation on the matter**."*

It is clear from these articles that a timetable for negotiation was set by the Law of 14 June 2013 so that collective health cover could be extended to all employees.

In this way and in sum, the law gave priority to sectoral-level bargaining, with company-level bargaining taking over only if no sectoral agreement had been concluded.

The timetable was as follows:

- from 1 June 2013 to 30 June 2014: sectoral-level bargaining;
- from 1 July 2014 to 1 January 2016: company-level bargaining;
- by 1 January 2016 at the latest: failing a sectoral or company-level agreement, establishment of arrangements by unilateral decision of the employer.

Consequently, Decree No. 2014-1498 of 11 December 2014 on the collective guarantees affording the high degree of solidarity referred to in Article L. 912-1 of the Social Security Code and Decree No. 2015-13 of 8 January 2015 on the competitive bidding procedure between bodies organised in the context of the recommendation provided for by Article L. 912-1 of the Social Security Code were adopted after the date up to which the social partners were able to negotiate at sectoral level (in fact, six months after the expiry of the negotiating period).

It has to be concluded therefore that the social partners did not have access to any of the information contained in the decrees concerning the recommendation procedure, the competitive bidding procedure or conflicts of interest and that this made it impossible for them to negotiate.

For these reasons, the right of social partners to bargaining at sectoral level was infringed because it was impossible for them to obtain information about the rules on negotiation of the extension of supplementary cover to all employees.

The decree and, by extension, the French Government did not make it possible to foster or facilitate the conclusion of collective agreements.

It is clear therefore that Article 6§2 of the Social Charter has been infringed because the belated introduction of the decree restricted the possibility for the social partners to negotiate.

3.2.2 The regulations on recommendations and the competitive bidding procedure

According to Article 931-1, paragraph 1, of the Social Security Code:

> *"Social insurance bodies are non-profit-making legal persons governed by private law, administered jointly by affiliate members and by participating members".*

Social insurance bodies are joint non-profit-making bodies, which manage collective personal insurance contracts.

They are said to be joint bodies because they are managed by employers' representatives (*"affiliate members"*) and employees' representatives ("*participating members*"), who have equal representation.

According to paragraph 10 of the article cited above:

> *"They [social insurance bodies] shall be formed on the basis of a collective agreement, by a draft agreement proposed by the company manager and ratified by a majority of the persons concerned or by an agreement between the affiliate members and the participating members meeting for this purpose in general assembly."*

The bodies will then send the companies concerned the rules of procedure, laying down what has been decided by the social partners in the sector.

Anyone who affiliates with a social insurance body also automatically subscribes to the rules of procedure.

The designation procedure which was formerly allowed made it possible to designate a social insurance body and make it compulsory for all the companies in the sector signing the agreement to affiliate with it.

In France, in 2013, over 2 million companies entrusted the management of supplementary social protection to a social insurance body, thus providing[25]:

- 13 million employees with social insurance cover (for death, incapacity, disability and dependence) and
- 7.2 million employees and former employees with supplementary health cover.

The activity of social insurance bodies grew by 6.5%, bringing total contributions up to 12.8 billion euros.

Yet, the risk to which France exposes itself through the recommendation procedure is that the number of affiliations to social insurance bodies will decline in favour of traditional insurance companies or mutual insurance organisations.

The direct effect of this could be to limit the role of social insurance bodies despite the fact that they are the very embodiment of collective bargaining.

Furthermore, the regulations on the recommendation procedure, which are largely based on the Public Procurement Code, are particularly cumbersome and disproportionate in view of their purpose.

They require compliance with a public notice and competitive bidding procedure comprising a degree of formalism and complexity which is clearly disproportionate considering that at the end of the procedure, the candidate is merely the subject of a recommendation, which has only an indicative value and cannot justify such a restrictive procedure.

3.2.3 The regulations on so-called conflicts of interest

Article D. 912-9 of the Social Security Code states that a conflict of interest is considered to arise where one of the members of the joint committee or any special joint committee that has been set up engages in a salaried activity or performs, or has performed in the last five years, deliberative or management functions within the candidate bodies or the group to which they belong.

The effect of this provision is to exclude members who are in a situation alleged to create a conflict of interests from the collective bargaining process.

Worse still, it has the effect of excluding from the joint committee anyone who has had deliberative or management functions within the candidate bodies or groups to which they belong. The result is that these committees are deprived of professional expertise because, on a purely practical level, such persons have acquired the necessary negotiating and management skills to be members.

Furthermore, the reference to the "group to which they belong" considerably increases the risk of conflicts of interest and hence the risk of exclusion.

The notion of deliberative functions is also open to interpretation.

Lastly, the composition of the mixed joint committee as provided for in the decree constitutes an infringement of the principles of joint management as it narrows the bounds within which candidates can be selected.

[25] Technical Association of Social Care Institutions (CTIP) - July 2014

Moreover, a report by the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organisation contains the following conclusion:[26]

> *"The government should endeavour to convince the parties to have regard voluntarily in their negotiations to major economic and social policy considerations and the general interest invoked by the government."*[27]

In other words, major economic and social policy considerations and the general interest are so important that they must take precedence over other considerations.

Consequently, excluding a member from collective bargaining on the pretext that he or she is subject to a conflict of interests is tantamount to accusing a partner in the collective bargaining process of failing to value major economic and social policy considerations and the general interest.

The truth, however, is that the social partners are the main exponents of these considerations and that they cannot be accused of having conflicting interests.

It should be added that Article D. 912-9 of the Social Security Code totally misjudges the functioning of trade unions and the fact that they appoint one or more representatives to apply decisions taken collectively by their executives. This means that in principle, representatives cannot be exposed to conflicts of interest.

This article therefore interferes with the management of trade unions, restricting their free choice as to the composition of the trade union delegation most suited to negotiations.

Lastly, it is clear from the wording of Article D. 912-9 of the Social Security Code that the reference to "the group to which they belong" is aimed explicitly at joint employer/employee institutions, in other words joint social insurance groups.

The decree therefore does not apply to a member who has performed "deliberative or management functions" in a mutual insurance or traditional insurance company and results in unwarranted discrimination between the three families of insurers.

From the date of issue, the effect of this decree was to exclude any representative nominated by a trade union organisation for five years, even if he or she had resigned. This amounts to an intolerable infringement of the right to organise.

3.2.4 The decision of the Constitutional Council – an infringement of the right to collective bargaining

On 13 June 2013, the Constitutional Council found Article L. 912-1 of the Social Security Code to be unconstitutional on the ground that it constituted a disproportionate interference with the freedom of enterprise and the freedom of contract in view of the goal that it pursued of pooling risks.[28]

[26] The Committee of Experts on the Application of Conventions and Recommendations (CEACR) is an independent body made up of legal experts tasked with examining the application of ILO conventions and recommendations in the member states.
[27] Report by the Committee of Experts on the Application of Conventions and Recommendations – International Labour Conference, 81st session, 1994
[28] Constitutional Council, 13 June 2013, No. 2013-672

3.2.4.1 The unconstitutionality of Article L. 912-1 of the Social Security Code and the infringement of the right to collective bargaining

It will be recalled that the law which was referred to the Constitutional Council required trade unions which were bound by a sectoral collective agreement or, failing that, an occupational agreement to engage in negotiations to enable employees who do not have collective cover with mandatory affiliation for the supplementary reimbursement of costs resulting from illness, maternity or an accident, for which each of the categories of guarantee and the share of the financing covered by the employer are at least as favourable as for the minimum cover referred to in section II of Article L. 911-7 of the Social Security Code, at sector and company level, to have access to such cover by 1 January 2016.

The negotiation was supposed to relate to the arrangements for the selection of insurers, focusing especially on the conditions, particularly in terms of rates, under which companies could adopt the insurer or insurers of their choice without disregarding the aim of providing effective cover for all the employees of the companies in the sector and universal access to healthcare.

There was therefore an obligation to negotiate but no obligation to produce results.

As the French Government pointed out in a comment of 16 June 2013 on the subject of the law referred to the Constitutional Council, the social partners could initially choose the most general option, in which case the agreement would be limited to imposing minimum funding by the employer or setting out the guarantees which had to be on offer. In this case, companies could sign an insurance contract with the insurer of their choice. They could also go a step further and invite companies to sign up to guarantees with one or more pre-selected bodies.[29]

Paragraph I, A, 2° of Article 1 of the law in question enabled the social partners to adopt this approach of allowing companies to choose their insurers freely or to act on a recommendation.

The social partners could also decide to set up a single scheme, pooling the risks to be assumed at sectoral level by assigning them to a single body by means of a designation clause.

This mechanism existed before the impugned law in the version of Article L. 912-1 of the Social Security Code stemming from Law No. 94-678 of 8 August 1994.

Two conditions were set, however, namely a review every five years at least, and for companies which had taken out or signed a contract with a different body to that provided for by the agreements guaranteeing the same risks at an equivalent level to fall into line with the requirements at sectoral level.

Paragraph II, 2° of Article 1 of the law referred to the Council provided that when the occupational or inter-occupational agreements referred to in Article L. 911-1 provided for the pooling of risks pursuant to the first paragraph of this article or where they recommended, with no binding force, that companies should subscribe to one or more bodies for insurance of the risks for which they organise cover, a prior competitive bidding procedure was to be organised between the bodies referred to in Article 1 of Law No. 89-1009 of 31 December 1989 strengthening the guarantees offered to insured persons against certain risks. This competitive procedure was to be carried out in conditions of transparency, impartiality and equal treatment between the candidates in accordance with arrangements established by decree.

[29] Comments by the Government on the appeals against the Law on the protection of employment, 16 June 2013

This decree laid down, in particular, the rules designed to guarantee sufficient prior public notice, prevent conflicts of interest and determine the means by which the contract would be monitored. The competitive procedure was also to be organised whenever the contract was reviewed.

Therefore, the law did no more than to provide firstly that collective bargaining had to take place, regardless of the result, and secondly that a competitive bidding procedure had to be held to support an existing mechanism, so as to ensure the equal treatment of candidate bodies.

In this respect, the provisions were not an unwarranted or disproportionate infringement of contractual freedom or, at any rate, freedom of enterprise and competition.

The infringement of the freedom of enterprise of company managers in the sector concerned or of insurers is, as the French Government points out, a legitimate response to a particularly powerful public interest.

The mechanism is based on the existence of elements of solidarity within the scheme. It makes it possible to apply a single rate for all employees in the sector irrespective of their characteristics.

It also has the merit of establishing better levels of guarantee at a lower cost than when these guarantees are covered at individual company level, particularly if the company presents major risks.

This approach was entirely in keeping with the thinking behind Law No. 2013-504 of 14 June 2013 on the protection of employment, which extended collective supplementary health cover to all employees and enhanced the portability of health and social insurance cover for jobseekers in France.

The aim was to ensure that all companies would be covered, including the smallest ones which, without such a mechanism, would find it most difficult to obtain an offer of insurance at a price they could afford.

Preventing the social partners from establishing designation clauses at sectoral level is tantamount to burdening such companies with too great a risk, particularly in the social insurance field, as this is a risk which rarely materialises but entails very high costs when it does. The consequence of this would be either to exclude some of these companies from supplementary cover or force them to take on expensive contracts.

For all these reasons, the existence of designation clauses pursues a public interest goal, namely pooling risks, and the infringement of the freedom of enterprise and competition is warranted because it is proportionate and necessary in view of the aim pursued.

Before the censure by the Constitutional Council, the French social partners were free to designate an insurer and the option of a simple recommendation was also guaranteed.

The prohibition imposed by the Constitutional Council therefore has the effect of limiting collective bargaining between employees' representatives and company managers in the sector.

In addition, the risk-pooling system made possible by designation clauses does not prevent a company, if it so wishes, from providing greater cover for its employees through an additional supplementary scheme.

Lastly, provision was made for a prior competitive bidding procedure between insurers guaranteeing companies the best deal.

In denouncing the designation clause system, the Constitutional Council limited the social partners' powers and denied them any independence. By basing its decision solely on the employer's contractual freedom, the Constitutional Council attached too much importance to the insurance market and overlooked the right to collective bargaining.

Every collective agreement is an infringement of the employer's freedom of contract, but it is an infringement that the employer accepts because he or she is the co-author of the agreement.

The Constitutional Council's reasoning is all the more open to criticism because it makes no reference to employees' contractual freedoms.

In no respect therefore was the Constitutional Council's decision based on the public interest as it took account solely of the sectional interest of insurers.

Mr Bernard Daeschler, the president of the Technical Association of Social Care Institutions (CTIP), has stated as follows:

> *"If risk-pooling is done away with in the occupational sectors, thousands of employees of very small enterprises and small to medium-sized enterprises may have reduced access to high-quality supplementary insurance".*[30]

The trade unions represented on the Committee on Retirement and Social Insurance Agreements (COMAREP) were invited to present their view of collective bargaining and their role in the Committee.

In the view of the CFE-CGC (*Confédération française de l'encadrement - Confédération générale des cadres*):

> *"The pooling of risks is a fundamental insurance technique, the aim of which is to group together a number of insured persons exposed to risks so as to offset risks that have materialised and those that have not. Therefore the more people are involved, the more accurate forecasts of claims are."*[31]

In the view of the CGT (*Confédération générale du travail*)[32]:

> *"The CGT regrets the Constitutional Council's decision as it prevents the pooling of risks and a high degree of solidarity. The recommendation procedure fails to make up for this shortcoming as it is not binding."*

In the view of the CGT-FO (*Confédération Générale du Travail - Force ouvrière*) [33]:

> *"While taking full note of the liberal excesses of the Constitutional Council, which considers, contrary to the conclusions of the European Court of Justice, that health is a marketable good like any other, the CGT-FO would also highlight the historical responsibility of the signatories of the national inter-occupational agreement of 11 January 2013.*

[30] 2013 annual report of the CTIP
[31] COMAREP activity report provided for by Article L. 911-3 of the Social Security Code - 2013
[32] COMAREP activity report provided for by Article L. 911-3 of the Social Security Code - 2013
[33] COMAREP activity report provided for by Article L. 911-3 of the Social Security Code - 2013

It is this text which heralded the end of designation clauses. If proof were needed, it is enough to highlight the energy that various lobbies put into persuading the decision-makers to get rid of designation clauses.

A system which it had taken 60 years to build up was sacrificed by the signatories in exchange for something that actually amounted to a reduction in labour rights!

What was deliberately abandoned was the pooling of risks at sectoral level.

And as if that was not enough, the government is preparing decrees which will limit the little room for manoeuvre left in the bargaining process.

By placing both lower and upper limits on the levels of reimbursement that can be negotiated through collective agreements, this government is at odds with the freedom to negotiate, which is a constitutional freedom. Furthermore, it burdens the negotiators with a responsibility it will not assume itself, namely the management of care provision.

Lastly, as the drafting of the decrees in question was clearly a very delicate matter, the delay in their publication serves somewhat opportunely for the government as a means of impeding the negotiations being held or rather, those that should have been held."

Consequently, the prohibition of designation clauses prevents the social partners from pursuing a goal of solidarity and disregards the fundamental nature of the right to collective bargaining.

3.2.4.2 The unconstitutionality of Article L. 912-1 of the Social Security Code and the indirect prohibition of designation clauses

Law No. 2013-1203 of 23 December 2013 on social security financing for 2014 has therefore provided for a new wording of Article L.912-1 of the Social Security Code to take account of the Constitutional Council's finding of unconstitutionality.

Designation clauses therefore constituted a means by which to pursue the goal of solidarity.

The Constitutional Council's decision has quite simply downscaled the solidarity element.

Ultimately, on the pretext of preserving freedom of contract and freedom of enterprise, the Constitutional Council has not sought to maintain a "fair balance" between the aforementioned freedoms and the right to collective bargaining.

The prohibition on social partners establishing designation clauses in future is a disproportionate infringement of this right.

"Governments need to play an active role in promoting collective bargaining, taking into account its voluntary nature. The focus of policy-makers needs to be on how to improve the reach and effectiveness of collective bargaining, not on how to reduce its scope and coverage."[34]

For these reasons, the European Committee of Social Rights must therefore find that France has not properly applied Article 6§2 on the grounds that:

[34] Executive Summary of the International Labour Organisation, "The role of collective bargaining in the global economy: Negotiating for social justice", 2011

- Article L. 912-1 of the Social Security Code, as amended by Law No. 2013-1203 of 23 December 2013 on social security financing for 2014, and

- Decree No. 2015-13 of 8 January 2015 on the competitive bidding procedure between bodies organised in the context of the recommendation provided for by Article L. 912-1 of the Social Security Code,

have not allowed for the development of collective bargaining as required by Article 6§2 of the European Social Charter and have in fact undermined free and voluntary negotiation by failing to encourage or facilitate the conclusion of collective agreements.

4. THE PARTIES' CLAIMS FOR JUST SATISFACTION

The texts on collective complaints do not deal with the question of compensation for the expenses incurred in such proceedings.

In the European Committee of Social Rights' decision on the merits of Complaint No. 16/2003, it was decided as follows:

> *"The Committee notes that the Protocol does not regulate the issue of compensation for expenses incurred in connection with complaints. However, it does consider that as a consequence of the quasi-judicial nature of the proceedings under the Protocol in case of a finding of a violation of the Charter, the defending State should meet at least some of the costs incurred.*
>
> *Moreover, when the Ministers' Deputies considered such a request transmitted by the Committee in connection with Complaint No. 1/1998, they considered that they were not called upon in the present case to take action regarding the request. This indicates that the Committee of Ministers accepted the principle of such a form of compensation.*
>
> *The Committee has therefore considered the complainant's request and submits its opinion on it to the Committee of Ministers, leaving it to the latter to decide how it might invite the Government to meet all or part of these expenses.*
>
> *The Committee sees no reason to accept the Government's contention that there is no evidence that the CFE-CGC actually incurred the expenses in question. Indeed, the Committee is aware that much work has gone into the complaint itself and the subsequent memorials throughout the proceedings."*

In the present case, the Committee will note the considerable amount of work that has gone into the presentation of this complaint. The special features of the complaints procedure and the technical nature of the subject dealt with have prompted the Confédération générale du travail – Force ouvrière to conduct extensive research and draft a long document.

Under these circumstances, the Confédération générale du travail – Force ouvrière considers itself justified in asking for the reimbursement of 3 000 euros to cover the expenses incurred.

5. CONCLUSIONS

The decisions of the European Committee of Social Rights must prompt governments to amend their legislation and practice if they are found not to be in conformity with the European Social Charter.

On these grounds, and subject to any that might be raised in additional memorials, the European Committee of Social Rights is asked:

TO FIND:

That Article 6§2 of the European Social Charter has been violated by:

- Article L. 912-1 of the Social Security Code, as amended by Law No. 2013-1203 of 23 December 2013 on social security financing for 2014;

- and Decree No. 2015-13 of 8 January 2015 on the competitive bidding procedure between bodies organised in the context of the recommendation provided for by Article L. 912-1 of the Social Security Code.

TO ORDER:

France:

- to amend its legislation so that the social partners can entrust the cover of social risks to the sole body of their choice;

- to discard the notion of conflicts of interest, as provided for in Decree No. 2015-13 of 8 January 2015 on the competitive bidding procedure between bodies organised in the context of the recommendation provided for by Article L. 912-1 of the Social Security Code;

- to do away with the competitive bidding procedure provided for in the Decree of 8 January 2015;

to bring itself into line with the principles of Article 6§2 of the European Social Charter.

TO REQUIRE FRANCE TO PAY:

A sum of 3 000 euros to the Confédération Générale du Travail – Force Ouvrière as compensation for the expenses incurred in these proceedings.

Jean-Claude Mailly
Secretary General of CGT-FO

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DOCUMENTS IN SUPPORT OF CGT-FO'S CLAIMS

1. Statutes of the Confédération générale du travail – Force ouvrière;

2. Decision of 20 April 2015 by the CGT-FO bureau to assign authority on this matter to its Secretary General, Mr Jean-Claude Mailly;

3. Article L. 912-1 of the Social Security Code, as amended by Law No. 2013-1203 of 23 December 2013 on social security financing for 2014;

4. Decree No. 2015-13 of 8 January 2015 on the competitive bidding procedure between bodies organised in the context of the recommendation provided for by Article L. 912-1 of the Social Security Code;

5. Decree No. 2014-1498 of 11 December 2014 on the collective guarantees affording the high degree of solidarity referred to in Article L. 912-1 of the Social Security Code;

6. Pélissier J., Auzero G., Dockès E., *Droit du travail* – Précis Dalloz, 25th edition, p. 1234;

7. Lyon-Caen G., *La prévoyance*, Dalloz, 1994;

8. CJEU, Albany, 21 September 1999, Case C-67/96;

9. CJEU, Van der Woude, 21 September 2000, Case C-222/98;

10. CJUE, AG2R Prévoyance c/ Beaudout Père et fils SARL, 3 mars 2011, n°C-437/09 ;

11. Court of Cassation, Social Division, 10 March 1994, No. 91-11.516;

12. Agen Court of Appeal, 8 March 2011, No. 09/01757;

13. Lyon Court of Appeal, 17 March 2011, No. 10/02311;

14. Court of Cassation, Social Division, 21 November 2012, No. 10-21.254, No. 10-21.255, No. 10-21.256, No. 10-21.257;

15. Court of Cassation, Social Division, 27 November 2012, No. 11-18.554;

16. Court of Cassation, Social Division, 5 December 2012, No. 11-24.233;

17. Conseil d'Etat, 7 July 2000, No. 198564;

18. Fair Competition Board (*Conseil de la Concurrence*), 21 January 1992, No. 92-A-01;

19. Comments by the Government on the appeals against the Law on the protection of employment, 16 June 2013;

20. Constitutional Council, 13 June 2013, No. 2013-672;

21. European Committee of Social Rights, Conclusions XVIII-2 - Latvia;

22. European Committee of Social Rights, Conclusions XVI-2 – Hungary;

23. European Committee of Social Rights, Conclusions XIX-3 - Latvia;

24. DGT review - inter-occupational and sectoral negotiation: general data for 2013, p. 566;

25. Technical Association of Social Care Institutions (CTIP);

26. Report by the Committee of Experts on the Application of Conventions and Recommendations – International Labour Conference, 81st session, 1994;

27. 2013 annual report of the CTIP;

28. COMAREP activity report provided for by Article L. 911-3 of the Social Security Code - 2013;

29. Executive Summary of the International Labour Organisation, "The role of collective bargaining in the global economy: Negotiating for social justice", 2011.