EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

23 November 2015

Case Document No. 3

***Confédération générale du travail Force ouvrière (CGT-FO)* v. France**
Complaint No.118/2015

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 20 November 2015

SUBMISSIONS BY THE GOVERNMENT OF THE FRENCH REPUBLIC ON THE MERITS OF COMPLAINT No. 118/2015, CGT-FO v. FRANCE

1. In a letter dated 7 May 2015, the European Committee of Social Rights (hereinafter "the Committee") forwarded to the French Government the complaint lodged on 28 April 2015 by the Confédération Générale du Travail - Force Ouvrière (hereinafter "CGT-FO"), requesting the Committee to find that the situation in France is not in conformity with Article 6§2 of the revised European Social Charter ("the revised Charter").

2. On 9 September 2015, the Committee declared CGT-FO's complaint admissible.

3. The French Government would like to make the following submissions to the Committee on the merits of this complaint.

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I – THE COMPLAINTS

4. The CGT-FO considers that the conditions imposed by French legislation on supplementary social protection of employees with regard to the choice of an insurer do not comply with Article 6§2 of the revised European Social Charter, which provides as follows:

Article 6
The right to bargain collectively
(§ 2)

"*With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: …*

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".

5. Consequently the CGT-FO asks the Committee to hold that the following French legislation is in breach of Article 6§2 of the revised Charter:

- 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;

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

[1] Curiously, although this decree is referred to in point 3.1.4.2 and called into question in point 3.2.1 of the complaint, it is not included in the operative part of the complaint.

6. The CGT-FO also invites the Committee to call on 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;

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

II – THE DOMESTIC LEGISLATION AT ISSUE

1) Reminder of the domestic legislation at issue

7. Article 14 of Law No. 2013-1203 of 23 December 2013 on social security financing for 2014 (hereinafter the "Law of 23 December 2013") added a new Article L. 912-1 to the Social Security Code.

8. The new article provides as follows:

"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."

9. Among the measures taken for the implementation of the new Article L. 912-1 of the Social Security Code, two decrees were adopted.

10. The first was 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 (hereinafter "the implementing decree of 11 December 2014").

11. Under this decree, guarantees affording a high degree of solidarity require two conditions to be fulfilled, one of which is linked to their financing and the other to their nature. These guarantees must amount to at least 2% of the premium or contribution and take the form of non-contributory benefits, prevention activities or social welfare benefits.

12. The second decree was 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 (hereinafter "the implementing decree of 8 January 2015").

13. Under this decree, the social partners which recommend one or more insurers to manage the compulsory supplementary social protection guarantees they set up must organise a prior competitive bidding procedure between the candidates. For this purpose, the social partners are required to publish a call for tenders, which must include the conditions for the admissibility and eligibility of applications, the criteria by which proposals will be evaluated and the content of the insurance specifications drawn up by the social partners.

14. The implementing decree of 8 January 2015 also includes provisions on preventing conflicts of interest when choosing the recommended insurer or insurers.

2) Reminder of the background to and origins of these new regulations

15. Until 2013, Article L. 912-1 of the Social Security Code 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, 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. 132-23 of the Labour Code shall apply*".

16. On 14 May 2013, Parliament adopted Law No. 2013-504 on the protection of employment, Article 1, paragraph II. 2° of which provided that a new paragraph worded as follows should be added to Article L. 912-1 of the Social Security Code:

"*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*".

17. However, when asked to give a ruling on the constitutionality of the Law on protection of employment, the Constitutional Council censured Paragraph II, 2° of Article 1 of this law and Article L. 912-1 of the Social Security Code in a decision of 13 June 2013 (No. 2013-672 DC: JurisData No. 2013-023077).

18. In paragraph 11 of this decision the Constitutional Council found as follows: "*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".

19. Furthermore, for the same reasons, the Constitutional Council censured Article L. 912-1 of the Social Security Code, criticising it for providing that once a sectoral agreement had come into force, the companies in the sector were bound to the social insurance body designated by the agreement whereas prior to the new agreement, these companies were bound by a contract concluded with another body.

20. It was this decision by the Constitutional Council which prompted the Parliament to adopt the Law of 23 December 2013, Article 14 of which added a new Article L.912-1 to the Social Security Code.

21. Under this article, occupational or inter-occupational agreements may comprise clauses recommending, after a transparent competitive bidding procedure, one or more insurers to manage the supplementary social protection scheme.

III - DISCUSSION OF THE MERITS OF THE COMPLAINTS

22. In support of its conclusion that France has violated Article 6§2 of the revised Charter, the CGT-FO relies in substance on five arguments. Firstly, it submits that since the Law of 23 December 2013, the number of collective social insurance agreements has decreased in France and this in itself constitutes a violation of Article 6§2. Secondly, the CGT-FO criticises the fact that the Law of 23 December 2013 allows only for the use of recommendation clauses and no longer also provides for designation clauses. Third, the CGT-FO argues that the belated adoption of the implementing decrees of 11 December 2014 and 8 January 2015 restricted the freedom to bargain collectively. Fourth, the CGT-FO submits that the prior competitive bidding procedure, provided for by the Law of 23 December 2013 and the implementing decree of 8 January 2015, also undermine this freedom. Fifth, the CGT-FO considers that the rules on conflicts of interest provided for by the implementing decree of 8 January 2015 infringe the right to organise.

1) The alleged decline in the number of collective social insurance agreements in France and the argument that a decline in the number of these agreements constitutes a violation of Article 6§2 of the Charter in itself

23. The CGT-FO submits that since the entry into force of the Law of 23 December 2013, the number of collective social insurance agreements has substantially declined in France and that the decline in the number of these agreements constitutes in itself a violation of Article 6§2 of the revised Charter. The CGT-FO relies in this connection on the Committee's conclusions concerning Latvia and Hungary.

24. However, contrary to the CGT-FO's claims, the number of collective agreements examined by the Committee on Retirement and Social Insurance Agreements (COMAREP) in 2014, after the entry into force of the Law of 23 December 2013, showed a considerable increase compared to 2013 and was hardly any lower than the highest numbers in previous years:

- 2011[2]: 154 agreements examined;
- 2012[3]: 153 agreements examined;
- 2013[4]: 112 agreements examined;
- 2014[5]: 143 agreements examined.

25. In this connection, it should be pointed out that, pursuant to Article L. 911-3 of the Social Security Code, the COMAREP is asked for its opinion on all sectoral collective agreements relating to supplementary retirement or social protection schemes before their extension or enlargement.

[2] http://www.securite-sociale.fr/IMG/pdf/rapport_activite_comarep_2011.pdf
[3] http://www.securite-sociale.fr/IMG/pdf/rapport_activite_comarep_2012.pdf
[4] http://www.securite-sociale.fr/IMG/pdf/ra_comarep_2013_vf.pdf
[5] http://www.securite-sociale.fr/IMG/pdf/rapport_d_activite_comarep_2014.pdf

26. In addition, contrary to what the CGT-FO claims, the conclusions referred to above concerning Latvia and Hungary do not show that the reduction in the number of collective agreements in a state constitutes in itself a violation of Article 6§2 of the revised Charter.

27. In its conclusions on Latvia, the Committee did note a decline in the number of collective agreements but only found a violation because of the fact that only 20% of employees were covered by such agreements. As to Hungary, the Committee noted that about 40% of employees were covered by collective agreements and mainly criticised the very low number of collective agreements concluded at sectoral level.

28. Yet, in France the number of employees covered by collective agreements consistently exceeds 90%, and in 2013 only 2.3% of employees were not covered by supplementary health insurance.

29. Consequently, the CGT-FO's complaint relating to the alleged reduction in the number of collective social insurance agreements must be dismissed.

2) <u>The alleged incompatibility of the prohibition on designation clauses with Article 6§2 of the revised Charter</u>

30. The CGT-FO claims that the fact that is impossible for sectoral agreements to designate one or more social insurance bodies to provide supplementary cover for all the companies in a sector and for this designation clause to be imposed on these companies constitutes a violation of Article 6§2 of the revised Charter.

31. In this respect, it should be pointed out that under Article 6§2 of the revised Charter, the States Parties undertake, with a view to ensuring the effective exercise of the right to bargain collectively, 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.

32. Therefore, while Article 6§2 of the revised Charter places States Parties under a general obligation to promote negotiation between social partners with a view to concluding collective agreements, nothing in this provision prohibits states, for reasons of public interest, from placing limits on this freedom of negotiation. In fact, it is clear from the provision that states enjoy considerable discretion in this respect, as is reflected by the words "undertake … to promote, *where necessary and appropriate*".

33. Given this, a State Party is entitled to consider that the designation of one or more social insurance bodies in a sectoral agreement which is binding on all the companies in that sector constitutes an excessive infringement of the freedom of enterprise and contractual freedom guaranteed by its Constitution and that such designation must therefore be prohibited.

34. Furthermore, it should be pointed out that, although sectoral agreements may not now designate one or more social insurance bodies, which all the companies in the sector

would then be obliged to use, they may recommend one or more bodies to these companies.

35. Under Article L. 912-1 of the Social Security Code, recommended bodies may not refuse the affiliation of a company in the sector concerned and they are required to apply a single rate and offer identical guarantees to all the companies and all the employees concerned.

36. Therefore, it is the aim of Article L. 912-1 of the Social Security Code to provide access for all companies and all employees in a given sector to a single rate and high level of protection irrespective of their individual characteristics (age, sex, geographical location, etc.). It also enables companies exposed to a higher level of risk (employing a large proportion of elderly employees, women or disabled workers, based in a disadvantaged geographical location or working in a sector of activity with high unemployment levels) to be offered cover calculated on the basis of an average risk whereas, if no such arrangement could be made, they would incur considerable extra costs that some of them could simply not afford.

37. By allowing the affiliation of a large number of companies to a recommended supplementary insurance body, Article L. 912-1 of the Social Security Code makes it possible to afford substantial guarantees at a lower price. This aim is particularly well justified in the field of social insurance as this is a risk which rarely materialises but entails very high costs when it does. It is also essential for the financing of aspects of solidarity which are not directly linked to the payment of contributions (social welfare benefits, prevention activities, etc.). As with social insurance, the cost of these guarantees is all the more reduced and affordable if it is pooled.

38. In order to be able to offer the lowest rate possible, bodies which respond to the call for tenders must be reassured that if they are recommended they will have a broad enough base of contributions. Consequently, the aim of Article L. 912-1 of the Social Security Code is to ensure that the objective set by the law on the extension of supplementary health cover to all employees is achieved, particularly in the smallest companies, many of which could not obtain an offer of insurance at a price they could afford if such a mechanism did not exist. It also enables the social partners to establish specifically what guarantees must be set up for employees, making use of a competitive bidding procedure based on objective criteria, then to manage the resultant scheme for the benefit of the employees and companies in the sector.

39. Lastly, while in its case-law, the Court of Justice of the European Union has found that a designation clause included in a collective agreement is compatible with the competition laws outlined in the Treaty Establishing the European Community and the Treaty on the Functioning of the European Union, this circumstance is not relevant to the instant case as this quite clearly does not mean that, according to this Court, a member state of the European Union is required to include designation clauses in its legislation rather than recommendation clauses.

40. Consequently, the CGT-FO’s complaint deriving from the fact that it is impossible for sectoral agreements to designate one or more social insurance bodies must be dismissed.

3) <u>The alleged violation of Article 6§2 of the revised Charter because of the belated adoption of the implementing decrees for the Law of 23 December 2013</u>

41. The CGT-FO claims that the belated adoption, on 11 December 2014 and 8 January 2015, of the implementing decrees for the Law of 23 December 2013, undermined the right to collective bargaining and therefore constituted a violation of Article 6§2 of the revised Charter.

42. Admittedly, it is true that Article 1 of Law No. 2013-504 of 14 June 2013 on the protection of employment provided that collective bargaining in companies was to begin from 1 July 2014 onwards in cases where the sector had not concluded a collective agreement on supplementary health insurance.

43. However, the social partners in the sector still had the possibility of beginning or continuing a collective bargaining process after that date. Therefore, social partners which wish to recommend one or more insurance bodies can still conclude a collective agreement up to 1 January 2016.

44. Consequently, the CGT-FO's complaint arising from the belated adoption of the implementing decrees for the Law of 23 December 2013 must be dismissed.

4) <u>The alleged violation of Article 6§2 of the revised Charter because of the establishment of a prior competitive bidding procedure</u>

45. The CGT-FO submits that the prior competitive bidding procedure set up by the Law of 23 December 2013 and its implementing decree of 8 January 2015 infringes the freedom of collective bargaining because it is a formalistic and complex process leading only to the recommendation of a social insurance body.

46. In this connection it is worth emphasising that a social insurance body which is recommended by a collective agreement will inevitably have an advantage over other such bodies. These agreements are published on several official sites, meaning that successful bodies are very widely publicised. It is for this reason that a state is entitled to set up a prior competitive bidding procedure to ensure that it can make the best possible choice.

47. Accordingly, in an opinion of 1 February 2013 on the effects on competition of the extension of supplementary health insurance to all employees, the French Competition Authority called for equal conditions of competition to be created between the various types of insurance body (mutual insurance organisations, traditional insurance companies or social insurance bodies) and for precedence to be given to employer's freedom to choose whichever body or bodies they preferred.

48. Similarly, in Opinion No. 13-A-11 of 29 March 2013, the Competition Authority argued that the law had to insist on a full competitive bidding procedure for operators competing for a recommendation and that this should apply both to the first occasion on which the recommendation or designation clauses were implemented and to the review of any that were already in force. According to the Competition Authority, the recommended insurer or insurers gained an advantage over their competitors because the reference to them in the collective agreement, which was published on several

official sites, meant that their services were widely advertised. This was why a prior competitive bidding procedure was warranted.

49. In the same opinion, the Competition Authority insisted on the fact that the arrangements for any prior competitive bidding should be based on a procedure which met strict transparency criteria in terms of public notice and evaluation.

50. Moreover, in the National Inter-Occupational Agreement of 11 January 2013 on a new economic and social model enhancing the competitiveness of companies and protecting employees' jobs and careers, which predated the Law of 23 December 2013, the social partners also proposed that the recommendation of a social insurance body in a collective agreement should be preceded by a competitive bidding procedure.

51. Article 1 of this agreement provides: "*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*".

52. Consequently, the CGT-FO's complaint arising from the establishment of a prior competitive bidding procedure must be dismissed.

5) <u>The alleged violation of the freedom to organise because of the introduction of rules on conflicts of interest</u>

53. The CGT-FO claims that the rules on conflicts of interest provided for by the implementing decree of 8 January 2015 infringe the right to organise.

54. In this respect, it should be noted that the CGT-FO's complaint is entitled "Complaint lodged by the Confédération Générale du Travail - Force Ouvrière against France for the incorrect application of Article 6§2 of the European Social Charter".

55. Yet, freedom to organise is not the subject of Article 6§2 of the revised Charter, but of Article 5, under which, "*with a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations*".

56. The CGT-FO's complaint in this respect should be dismissed on this ground.

57. In any case, Article 5 of the revised Charter cannot be interpreted as prohibiting a member state from laying down rules on conflicts of interest in order to preclude any suspicion of favouritism in the choice of recommended social insurance bodies.

58. Furthermore, contrary to what the CGT-FO claims, Article D. 912-9 of the Social Security Code covers not just social insurance institutions but all three types of insurance body.

59. The second paragraph of this article provides as follows: *"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*".

60. In addition, Article D. 912-1 of the Social Security Code, which delimits the scope of the implementing decree of 8 January 2015, refers to the "*the bodies mentioned in Article 1 of Law No. 89-1009 of 31 December 1989*", namely insurance companies, social insurance institutions and mutual insurance organisations.

61. The result of this is that the implementing decree of 8 January 2015 applies as much to trade unions as to professional employers' organisations and insurance bodies covered by the Insurance Code, the Mutual Insurance Code or the Social Security Code.

62. Consequently, the CGT-FO's complaint arising from the rules on conflicts of interest must be dismissed.

IV – THE COSTS INCURRED BY CGT-FO

63. CGT-FO invites the Committee to ask the Government to pay a sum of 3 000 euros to the CGT-FO to cover the expenses incurred in preparing and lodging this collective complaint.

64. It should be noted that the CGT-FO fails to provide any supporting documents in this connection. The Government therefore invites the Committee to dismiss the request for compensation.

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65. Bearing in mind all of the foregoing, the Government concludes that the CGT-FO's complaints of infringements of Article 6§2 of the revised Charter are unfounded.

66. Furthermore, if the CGT-FO invites the Committee to urge France to adopt a number of measures, it should be pointed out that the Committee does not have any powers of injunction. Article 8 of the Additional Protocol to the European Social Charter providing for a system of collective complaints simply provides that the Committee "*shall draw up a report in which it shall describe the steps taken by it to examine the complaint and present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint*".

67. Consequently, the Government asks the Committee to dismiss the CGT-FO's

complaint in its entirety.