EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 4

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

RESPONSE FROM CGT-FO TO THE SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 29 January 2016

Paris, 13 January 2015

RESPONSE

FROM THE CONFEDERATION GENERALE DU TRAVAIL – FORCE OUVRIERE
TO THE GOVERNMENT'S SUBMISSIONS
ON THE MERITS OF COMPLAINT No. 118/2015, CGT-FO v. FRANCE

In a letter of 2 December 2015, the European Committee of Social Rights presented the Confédération Générale du Travail – Force Ouvrière with the French Government's submissions on the merits of its collective complaint of 28 April 2015, registered under the number 118/2015, which was declared admissible in a decision of 9 September 2015.

The Confédération Générale du Travail – Force Ouvrière would like to present the Committee with its response to the Government's submissions on the merits.

In so doing and for greater clarity, the Confédération Générale du Travail Force Ouvrière (hereinafter the "CGT-FO") has decided to deal with its individual grounds of complaint in these submissions in the same order as it raised them in its initial collective complaint of 28 April 2015.

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1. THE VIOLATION OF ARTICLE 6§2 ON THE GROUND OF THE BELATED ADOPTION OF THE IMPLEMENTING DECREES FOR THE LAW OF 14 JUNE 2013

The belated implementation of the implementing decrees for Law No. 2013-504 of 14 June 2013 more than six months after the sectoral collective bargaining period set by this law infringed the right of the social partners to bargain at sectoral level.

The Government claims, however, that "social partners which [wished] to recommend one or more insurance bodies [could] still conclude a collective agreement up to 1 January 2016" (paragraph 43) and therefore that the belated adoption of the implementing decrees for the Law of 14 June 2013 did not restrict the social partners' possibility to negotiate.

This argument cannot be accepted as the Government perpetuates the confusion about the bargaining timetable set by Articles 1 I.-A and B of Law No. 2013-504 of 14 June 2013.

It should be recalled that the timetable set by these provisions is 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.

The fact is that the social partners in the sector were only placed in a position to negotiate from 10 January 2015 onwards, when Decrees Nos. 2014-1498 of 11 December 2014 and 2015-13 of 8 January 2015 actually came into force.

Before this date, the social partners had no indication about the bargaining procedure, what it was to cover and more generally speaking, the legal framework for bargaining, whereas they were expected to negotiate before 30 June 2014.

The Government cannot therefore dispute the fact that in January 2015, the negotiating period for sectoral agreements (1 June 2013 to 30 June 2014) had expired over 6 months previously and that the company-level agreement had already taken over from the social partners.

The Government also claims that "*the social partners in the sector still had the possibility of beginning or continuing a collective bargaining process after that date*" (see paragraph 43).

However, after 30 June 2014, company-level agreements could be negotiated and this made sectoral negotiations pointless as companies would already be covered by a supplementary social protection scheme and would have no interest in joining a body recommended by the sectoral social partners.

Furthermore, in the absence of the decree establishing the rules for the negotiating procedure at sectoral level,

the conclusion of a sectoral agreement could lead to conflict situations arising from the application of several collective agreements of different levels, which would be difficult to resolve in view of the special nature of the purpose of these negotiations.

Up to 2012, a compulsory scheme for health costs had been applied through about sixty national collective agreements, amounting to about 25% of the 255 national collective agreements which had set up a social insurance scheme.

The application of supplementary health cover to all employees provided for by the Law of 14 June 2013 should logically have resulted in a significant increase in this percentage. This increase did not occur however, although the Government attempts to demonstrate the contrary (see paragraph 24).

In a survey of 3 April 2015 on the implementation of the Law of 14 June 2013[1], the French Ministry of Labour itself states, contrary to the Government's current statements, that "*the Committee on Retirement and Social Insurance Agreements (COMAREP) noted that few occupational sectors have negotiated a supplementary health cover scheme yet. Applications have been made for the extension of seven new agreements*".

It adds: "*There has not yet been an agreement including a recommendation as the decrees were only published recently*".

The CGT-FO maintains therefore that the delay in the adoption of the implementing decrees for the Law of 14 June 2013 – for which no justification is provided by the Government – undermined the effective exercise of the right to collective bargaining and therefore constitutes a blatant violation of Article 6§2 of the European Social Charter.

2. THE VIOLATION OF ARTICLE 6§2 BECAUSE OF THE REGULATIONS ON RECOMMENDATIONS AND THE COMPETITIVE BIDDING PROCEDURE

The implementing decrees for Law No. 2013-504 of 14 June 2013 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.

The Government states that both the social partners, in the National Inter-Occupational Agreement of 11 January 2013, and the French Competition Authority, in Opinion No. 13-A-11 of 29 March 2013, had recommended the establishment of a prior competitive bidding procedure both for designation and for recommendation (see paragraphs Nos. 47 to 51).

The Committee will note, however, that these texts were adopted prior to the finding that Article L. 912-1 of the

[1] Survey of 3 April 2015 on the Law of 14 June 2013 on the protection of employment, Sheet No. 1, Application of Supplementary Health Cover to all Employees – Paris : Ministry of Labour, Employment, Vocational Training and Social Dialogue, 2015 – p.6.

Social Security Code was unconstitutional, which has made it impossible for designation clauses to be established since 16 June 2013. At the time these texts were mainly aimed at designation, which the Competition Authority held to be "*a method that was [supposedly] less conducive to the dynamism of competition*".

The CGT-FO does not, moreover, dispute the principle of the prior competitive bidding procedure, but merely its clearly disproportionate degree of formalism and complexity in the case of a recommendation.

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 lays down a number of binding formal obligations to be fulfilled before the extension of the sectoral collective agreement.

This procedure comprises: the preparation of a notice calling for tenders including the rules on the admissibility, eligibility and assessment of applications and the maximum number of bodies to be recommended, the inclusion of the notice in a publication with a nationwide circulation and a publication specialising in the insurance sector, a 52-day deadline for submission following this publication, the successive stages in the selection of candidates and the ranking of candidates in accordance with the assessment criteria, etc.

In a decision of 17 December 2015[2], the Court of Justice of the European Union found that the obligation of transparency, which warrants the establishment of a competitive bidding procedure, resulted from the exclusive right granted by the state when it extends the sectoral collective agreement designating a single operator.

> *" In view of the foregoing considerations, the answer to the question raised in both cases is that the obligation of transparency, which flows from Article 56 TFEU, precludes the extension by a Member State, to all employers and employees within a sector, of a collective agreement concluded by the employers' and employees' respective representatives for a sector, under which a single economic operator, chosen by the social partners, is entrusted with the management of a compulsory supplementary social insurance scheme established for employees, where the national rules do not provide for publicity sufficient to enable the competent public authority to take full account of information which has been submitted concerning the existence of a more favourable offer."*

This decision does not, however, justify the state's self-assigned right to apply disproportionate controls and limits to the choice made by sectoral social partners when they merely recommend a body by way of guidance.

It should be recalled that recommendations consist in recommending one or more insurers to companies. Such recommendations are not binding: employers are free to choose the insurer with which they will sign a contract.

This competitive bidding procedure therefore seems excessively formal for a recommendation and this is a backward step in terms of efficiency, which is neither necessary nor appropriate in relation to the procedures

[2] CJEU, UNIS v. Beaudout Pere et fils SARL, 17 Dec. 2015, Nos. C-25/14 and C-26/14

implemented to date by the social partners.

This regulation is incompatible with the goals of Article 6§2 of the Social Charter, which is to promote, where necessary and appropriate, machinery for voluntary negotiations between the social partners.

Yet, on this issue, the Government does not provide any evidence to warrant such a binding procedure for a recommendation which is intended only to provide guidance.

The Government's argument therefore is ineffective.

3. THE VIOLATION OF ARTICLES 5 AND 6§2 BECAUSE OF THE REGULATIONS ON SO-CALLED CONFLICTS OF INTEREST

The regulations established by Article D. 912-9 of the Social Security Code, as established by Decree No 2015-13 of 8 January 2015, on alleged "conflicts of interest" within the joint committee in charge of the competitive bidding procedure are a further infringement of the freedom of negotiation.

The CGT-FO would like to begin by pointing out that Article 5 of the Social Charter provides that the contracting parties undertake that national law will not impair or be applied so as to impair the freedom of workers and employers to form organisations to protect their interests.

The freedom to organise protected by Article 5 of the Charter is therefore inextricably linked with the right to collective bargaining enshrined in Article 6§2. Accordingly, any violation of Article 6§2 of the Charter inevitably entails a violation of Article 5.

This is also the position of the European Court of Human Rights (ECHR), which considers that "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' ".*3*

Consequently, the Government's argument (paragraphs 54 to 56) that because this complaint is founded in part on Article 5, it should be rejected, is erroneous.

The Government also maintains, in particular bad faith, that Article D. 912-9 of the Social Security Code, as established by Decree No. 2015-13 of 8 January 2015 does not infringe Articles 5 and 6§2 of the Charter because the rules on conflicts of interest apply both to social insurance institutions and to insurance companies and mutual insurance organisations (paragraphs 58 to 61).

It should be recalled that three main types of organisation are authorised to operate on the French insurance market:

- Insurance companies, which are private capital enterprises, which pay dividends to their shareholders and are regulated by the Insurance Code;

- Mutual insurance organisations, which are non-profit-making associations of persons, promoting

[3] ECHR, Demir and Baykara v. Turkey, 12 November 2008, No. 34503/97

solidarity between their members, regulated by the Mutual Insurance Code;

– Social insurance bodies, which are joint non-profit-making organisations, formed on the basis of collective agreements and regulated by the Social Security Code. They are set up to provide staff and material resources for the supplementary protection schemes set up collectively by the employers and employees of the sectors concerned, which they are required to manage because of the powers delegated to them by these social partners.

These institutions may be grouped together in joint social insurance groups, which amount to assemblies of bodies set up, led and supervised by the social partners. Among other things, they implement compulsory supplementary pension schemes and individual or group supplementary social protection cover. In general therefore, they are made up of supplementary pension institutions, one or more social insurance bodies and mutual insurance organisations.

The power to decide on and frame these groups' political and strategic policies is exercised by the national social partners.

The CGT-FO takes note of the Government's position on the application of the regulations on conflicts of interest to the three types of insurance body.

However, this position takes no account of the existing ties between the social partners and the social insurance bodies, which are joint non-profit-making bodies managed by employers' and employees' representatives.

This provision has the direct effect of excluding both from collective bargaining and from the joint committee[4], any representative of an employers' organisation or a trade union who has had deliberative or management functions within a social insurance body or a joint social insurance group.

It cannot therefore be disputed that these regulations on conflicts of interest relate primarily only to the type of social insurance bodies deriving from collective bargaining.

They undermine the principle of "double joint management" by reducing the autonomy of sectoral social partners – as this is the level at which collective bargaining takes place – and social insurance bodies, which are themselves created through collective agreements and managed by representatives of the social partners.

Article D. 912-9 of the Social Security Code therefore undermines the effective exercise of the right to collective bargaining referred to in Article 6§2 of the Social Charter as it has the direct effect of restricting the contribution of social insurance bodies and depriving joint committees of members who have acquired the necessary skills to negotiate and manage supplementary social protection schemes for employees.

Article D. 912-9 also directly infringes Article 5 of the Social Charter in that it limits the freedom to choose a trade union delegation capable of negotiating collective agreements on supplementary social protection and radically reduces the field of potential candidates.

[4] The tasks of the sectoral joint committee, made up of employees' and employers' representatives, include establishing the main lines of the sectoral supplementary social protection scheme through collective bargaining, and supervising its implementation vis-à-vis employees.

4. THE VIOLATION OF ARTICLE 6§2 BECAUSE OF THE PROHIBITION OF DESIGNATION CLAUSES

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.

To dismiss this complaint, the Government simply attempts to demonstrate that the recommendation mechanism makes it possible, just as much as designation, to pool risks at sectoral level.

It states in this connection that "*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 … 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*" (see paragraph 37).

As has been demonstrated by the CGT-FO's complaint, this is an especially misleading statement.

The current legislation, which prohibits designation clauses, severely limits the power of the partners to use collective bargaining to negotiate binding collective agreements on supplementary social protection making it possible to pool risks entirely at sectoral level.

As the sectoral social partners can only recommend insurers, companies may sign an insurance contract with the operator of their choice.

Yet, companies representing a bad risk in social insurance terms, namely those with elderly employees or particular risks of illness linked to their activities, have every interest in using the recommended insurer, which cannot refuse the affiliation of a company falling within the scope of the agreement.

Conversely, companies in the opposite situation, with a lower number of potential claims, can negotiate the signature of an insurance contract with a non-recommended body at more advantageous rates, or even improved cover.

Accordingly, whereas designation gave all the companies in a sector access to cover under the same conditions and at the same rates regardless of their size and level of risk, the recommendation system results in a "two-track" supplementary social protection scheme. Risks are no longer pooled despite the fact that this is essential.

The CGT-FO's interpretation has also been confirmed by all of the decisions and reports issued on this question.

The Court of Justice of the European Union (CJEU) took the following view:

> *"77. 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."* [5]

This was also the argument put forward by the French Government in the cases of UNIS and Beaudout Père et fils in December 2015:

> *"48. The French Government maintains, first, that, if the general obligation to conclude a contract with a single managing body appointed by the social partners in the framework of existing supplementary social insurance schemes were called in question, that would have serious repercussions, since, in addition to the 142 000 and 117 476 employees in the real property and bakery and pastry-making sectors respectively, approximately 2 400 000 employees, when all occupations are taken into account, would be affected. That would cause detriment to the principle of risk pooling, as it has been applied. The latter is particularly important in these schemes, which are characterised by a high degree of solidarity, and thus their financial equilibrium and the benefits they provide would be affected. As a consequence, calling that general obligation into question in this way would jeopardise the cover to which the employees concerned are currently entitled under those schemes. The French Government also contends that it would also be liable to give rise to vast numbers of cases before the national courts. »* [6]

Similarly, the report on solidarity and collective supplementary social protection7 submitted in September 2015 by Mr Dominique Libault to Ms Marisol Touraine, Minister of Social Affairs, Health and Women's Rights, states as follows:

> *"[201} However, the recommendation system, as it stands today, might not be very attractive in certain circumstances. The main difficulty lies in the asymmetry between the impositions on the recommended body, which is required to accept the affiliation of all the companies in the sector at an identical rate, and the impositions on these companies themselves, which are free to adopt the insurer of their choice. This means that companies with "good risk profiles" (with young employees, for example) will have no financial interest in joining the scheme and decide instead to seek out non-recommended insurers, which are often less expensive because they are not subject to the restrictions of the recommendation.*
>
> *[202} This asymmetry creates the threat of an imbalance in sectoral agreements applying the recommendation system. These difficulties are increased when the agreement relates to social*

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

6 CJEU, UNIS and Beaudout Pere et fils SARL, 17 Dec. 2015, Nos. C-25/ 14 and C-26/14

7 Report on solidarity and collective supplementary social protection, Dominique Libault, working with Vincent Reymond.- Paris: Ministry of Social Affairs, Health and Women's Rights, 2015 - p.39.

insurance. In contrast with health insurance, in which risks last a short time, social insurers must take over current risks (workers on sick leave on the day the agreement takes effect) and this prompts them to set aside funds from the start in respect of each employee concerned to cover the probable duration of the sick leave and the statistical risk that the person will become disabled or even die.

[203} Furthermore, being recommended is not enough to gain companies' affiliation. This will mean that provision will have to be made in the relevant agreements for acquisition costs to gain or preserve companies' affiliation and this is likely to increase administrative expenses."

In the view of the Defender of Rights, who is the independent French constitutional authority whose task it is to defend persons whose rights have not been respected and give all men and women equal access to their rights,

"40. While the recommendation clauses now replacing designation clauses do not call into question the access of companies in the sector to social insurance cover, ultimately the system might give rise to an adverse selection risk. While it is in the interest of all companies with higher risks or higher numbers of potential claims to use the recommended bodies, it may be more worthwhile for those with low or moderate risk to seek out more favourable rates than those negotiated within the sector from a rival insurer. Their right to do so may lead to an increase in the sectoral rates."[8]

Consequently, recommending one or more insurers, unlike designation, does not make it possible to guarantee the full effectiveness of risk pooling and could result in companies exposed to major risks encountering difficulties in accessing high-quality supplementary insurance at a price they can afford.

If, as the Government states, the aim is "*to afford substantial guarantees at a lower price"* through collective labour agreements (see paragraph 37), it is clear that recommendation does not make it possible to achieve this result.

The Government does not provide any evidence to justify this restriction on the autonomy and the freedom of negotiation of the social partners, which is incompatible with France's undertaking to ensure the effective exercise of the right to collective bargaining in accordance with Article 6§2 of the Social Charter.

5. THE COSTS INCURRED BY THE CGT-FO

The CGT-FO considers itself justified in asking for the reimbursement of 3 000 euros to cover the expenses incurred in bringing this collective complaint.

The Government asks the Committee to dismiss this request in the absence of any supporting documents. However, in its decision of 12 October 2004 on the merits of Collective Complaint No. 16/2003, the European Committee of Social Rights states as follows:

"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.»[9]

8 Defender of Rights, decision MLD-2015-283 of 17 December 2015 on the establishment of a compulsory social insurance and complementary health scheme in companies.

9 ECSR. 12 October 2004, CFE-CGC v. France, Collective Complaint No. 16/2003

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 CGT-FO to conduct extensive research, draft a long document and seek legal assistance.[10]

6. CONCLUSIONS

Consequently, the CGT-FO asks the Committee to dismiss the arguments presented by the French Government, stands by the complaints outlined in its initial collective complaint of 28 April 2015 and reiterates its requests.

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 FORWARD:

Its decision to the Committee of Ministers so that it can 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;

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

in order 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.

[10] The relevant bills are available to the Committee.

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DOCUMENTS IN SUPPORT OF THE CGT-FO's CLAIMS

30. Survey of 3 April 2015 on the Law of 14 June 2013 on the protection of employment, Sheet No. 1, Application of Supplementary Health Cover to all Employees – Paris: Ministry of Labour, Employment, Vocational Training and Social Dialogue, 2015 – p.6.

31. CJEU, UNIS v. Beaudout Père et fils SARL, 17 Dec. 2015, Nos. C-25/14 and C-26/14

32. Report on solidarity and collective supplementary social protection, Dominique Libault, working with Vincent Reymond.- Paris: Ministry of Social Affairs, Health and Women's Rights, 2015 - p.39.

33. Defender of Rights, decision MLD-2015-283 of 17 December 2015 on the establishment of a compulsory social insurance and complementary health scheme in companies

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

1. In a decision of 9 September 2015, the European Committee of Social Rights (hereinafter "the Committee") declared admissible Complaint No 118/2015 by the Confédération Générale du Travail Force Ouvrière (hereinafter the "CGT-FO"), requesting the Committee to find that the arrangements for the selection of insurers for supplementary social protection in France is not in conformity with Article 6§2 of the revised European Social Charter (hereinafter "the Charter").

2. On 20 November 2015, the French Government sent the Committee its submissions on the merits of the complaint, to which the CGT-FO responded on 11 February 2016.

3. In its submissions in response to the Government, the CGT-FO invites the Committee again to find that Article 6§2 of the 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.

4. The CGT-FO also asks the Committee to forward its decision to the Committee of Ministers so that it can 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;

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

5. The French Government would like to make the following further submissions concerning the CGT-FO's submissions in response.

6. The Government notes firstly that in its submissions in response, the CGT-FO does not go back over the first argument in its complaint, based on the alleged reduction in France of the number of collective agreements on social insurance and the idea that a decline in the number of such agreements constitutes in itself a violation of Article 6§2 of the Charter (section 3.1.2.2 of the complaint). As a result, the CGT-FO fails to respond to the Government's arguments that the Committee's conclusions concerning Latvia and Hungary referred to by the complainant organisation do not show that a decline in the number of collective agreements in a state constitutes in itself a violation of Article 6§2 of the Charter (paragraphs 23 to 29 of the Government's submissions on the merits).

7. The CGT-FO does, however, return to the four other grounds of its complaint, claiming that there has been a violation of Article 6§2 because of (1) the belated adoption of the implementing decrees for the Law of 23 December 2013[11], (2) the regulations on recommendations and the competitive bidding procedure, (3) the regulations on so-called conflicts of interest and (4) the prohibition of designation clauses.

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

8. In its submissions in response, the CGT-FO argues that the belated adoption of these decrees infringed the right to collective bargaining, hence constituting a violation of Article 6§2 of the Charter.

9. In addition to its submissions on the merits, the Government would point out that the purpose of Article 1 of Law No. 2013-504 of 14 June 2013 on the protection of employment was to make cover for the reimbursement of employees' health costs compulsory from 1 January 2016 onwards. The guarantees offered by this cover must be at least equivalent to the minimum basket set by decree and at least half-funded by employers. For this purpose, as the social partners wished, priority was given to negotiation, which takes place at two levels:

   - the first level of negotiation lies within each occupational sector. Article I.A of the law required organisations bound by a sectoral agreement or alternatively by occupational agreements to begin negotiations before 1 June 2013 if they had not already set up compulsory health cover at least as favourable as the minimum cover prescribed by decree. The deadline for companies to comply with the new requirements concerning agreements expired on 1 January 2016;

   - the second level of negotiation lies within companies (Article I.B of the law). Between 1 July 2014 and the end of 2015, companies in sectors which did not have compulsory health cover at least as favourable as the minimum cover prescribed by decree were required to engage in negotiations on this issue.

10. As the Government states in paragraph 43 of its submissions on the merits, social partners which wished to recommend one or more insurance bodies could still conclude a collective

11 In this connection, contrary to what the CGT-FO claims (page 2 of its submissions in response), 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 are not the implementing decrees for Law No. 2013-504 of 14 June 2013 on the protection of employment but for Law No. 2013-1203 of 23 December 2013 on social security financing for 2014.

agreement up to 1 January 2016. If no agreement had been negotiated by this date, companies were required to establish cover at least equivalent to the basic cover prescribed by decree and at least half-funded by the employer, in accordance with Article L. 911-7 of the Social Security Code.

11. The CGT-FO also claims, in line with the survey on the Law on the protection of employment of 14 June 2013 conducted by the Ministry of Labour, that few occupational sectors have negotiated a supplementary health insurance scheme yet and that there have not yet been any agreements containing a recommendation clause.

12. However, contrary to the CGT-FO's claims, the number of collective agreements examined by the Committee on Retirement and Social Insurance Agreements (COMAREP) has been substantial.

13. While it is true that only 7 collective agreements establishing a compulsory scheme to cover healthcare costs were signed in 2013, 55 further agreements have been examined since by COMAREP.

14. Lastly, contrary to what the CGT-FO infers, in its submissions in response, from the survey of 3 April 2015 by the Ministry of Labour on the Law on the protection of employment of 14 June 2013, the social partners have been making use of recommendation clauses. Since 1 January 2014, when the new provisions of Article L. 912-1 of the Social Security Code came into effect, 37 recommendation clauses have been examined by COMAREP.

15. 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.

2) <u>The alleged violation of Article 6§2 of the Charter because of the regulations on recommendations and the competitive bidding procedure</u>

16. The CGT-FO continues to maintain 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.

17. In this respect, the Government points out that in Opinion No. 13-A-11 of 29 March 2013, the Competition Authority considered that the law had to insist on a full competitive bidding procedure for operators competing for designation or 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 (paragraphs 107 et seq. of the opinion). A recommendation clause gives considerable publicity to an operator and therefore gives it an advantage over its competitors, meaning that a prior competitive bidding procedure is also justified in such cases.

18. Moreover, contrary to what the CGT-FO claims, the state does not interfere at all in the competitive bidding procedure. In no way does it restrict the choice of the social partners, who are free to decide on the criteria which will enable them to make a reasoned selection. For instance, Decree No. 2015-13 of 8 January 2015 merely establishes the authority of the joint committee, made up of representatives of representative employers' and employees' organisations and provided for by paragraph 1 of Article L. 2261-19 of the Labour Code, to ensure compliance with the competitive bidding procedure under conditions of transparency, impartiality and equal treatment and to choose the preferred operator.

19. It should be added that when the social partners ask for the extension of a collective agreement including a recommendation clause, the authorities simply ask them to produce three supporting documents, two showing that the call for tenders has been published in a publication with national circulation authorised to carry legal notices and in a publication specialising in the insurance sector and one ranking the candidates according to the assessment criteria.[12]

20. Lastly, the CGT-FO relies on the *UNIS* judgment of the Court of Justice of the European Union of 17 December 2015 (C-25/14 and C-26/14), in which it was found that the extension to all the employers and employees in a sector of activity of a collective agreement assigning the management of a compulsory supplementary social insurance scheme to a single economic operator without a properly publicised prior competitive bidding procedure was incompatible with EU law. It is true that this judgment does not imply that such procedures must be set up when the collective agreement merely recommends an economic operator.

21. However, the Government has never claimed that the need to set up a prior competitive bidding procedure for recommendation clauses derived from a requirement of EU law.

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

3) <u>The alleged violation of Articles 5 and 6§2 of the Charter because of the regulations on so called conflicts of interest</u>

23. The CGT-FO maintains that the rules on conflicts of interest provided for by the implementing decree of 8 January 2015 infringe the right to organise and therefore infringe Articles 5 and 6§2 of the Charter.

24. It should be pointed out firstly that in its complaint, the CGT-FO referred solely to Article 6§2 of the Charter in this respect. Consequently, in its observations on the merits, the Government argued that the freedom to organise was not the subject of this provision but that of Article 5 of the Charter and therefore that the CGT-FO was wrong not to have referred to that article.

25. To justify this omission, the CGT-FO argues, in its submissions in response, that the freedom to organise protected by Article 5 of the Charter is inextricably linked with the right to collective bargaining enshrined in Article 6§2. In support of its argument, it refers to the judgment of the European Court of Human Rights on *Demir and Baykara v. Turkey* of 12 November 2008, in which the Court found that the right to bargain collectively with an employer has become, in principle, one of the essential elements of the right to form and to join trade unions for the protection of one's interests enshrined in Article 11 of the European Convention on Human Rights.

26. The Government does not of course dispute the clear link between the freedom to organise protected by Article 5 of the Charter and the right to collective bargaining enshrined in Article 6§2. The fact remains, however, that freedom to organise is the subject of Article 5 of the Charter, which is entitled "The right to organise" and not of Article 6, which is entitled "The right to bargain collectively".

27. The CGT-FO was wrong therefore not to refer to Article 5 of the Charter for this aspect of its

12 Order of 19 August 2015 on the list of documents to be attached to a request for the extension of a collective agreement comprising a recommendation clause, as provided for by Article D. 912-13 of the Social Security Code.

complaint. This is moreover implicitly recognised by the CGT-FO as it feels the need to refer to this article in the context of this ground of complaint – albeit belatedly – in its submissions in response.

28. In any case, as the Government has stated in paragraph 57 of its submission on the merits, Article 5 of the 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.

29. Furthermore, as it states in paragraphs 58 to 61 of its submissions on the merits, the Government would point out 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. The Government notes that this point is no longer contested by the CGT-FO. In the same way, the only requirement imposed on candidate bodies is for them to mention it in their file if they have business and/or financial relations with the trade unions or employers' organisations of the occupational sector concerned.

30. Furthermore, as a complement to its submissions on the merits (paragraphs 33 et seq.), the Government would point out that under Article D. 912-10 of the Social Security Code, members of the joint committee who declare a conflict of interests may not take part in any meeting or discussion connected with the selection phase. In such circumstances, the member or members concerned may be replaced at the instigation of the employees' trade union organisation or employers' professional organisation to which they belong. Therefore, the existence of a conflict of interests results only in the replacement of the member of the joint committee concerned, not the exclusion of the candidate insurer.

31. In addition, if it were true that cases of conflicts of interest related more particularly to social insurance bodies, which the CGT-FO fails to demonstrate, this would not amount to a breach of equality between the three types of insurer given that no candidate would be excluded from the procedure. There are no exclusions in the event of a conflict of interest, just the replacement of a joint committee member.

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

4) <u>The alleged violation of Article 6§2 of the Charter because of the prohibition of designation clauses</u>

33. In its submissions in response, the CGT-FO maintains 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 to be imposed on these companies constitutes a violation of Article 6§2 of the Charter.

34. In the CGT-FO's view the Government's attempt to dismiss this complaint in its submissions on the merits is limited to trying to demonstrate that recommendation clauses also make it possible to pool risks at sectoral level.

35. However, the Government would point out that in its submissions on the merits (paragraphs 31 to 33), it began by outlining the reasons why the provisions of Article 6§2 of the Charter, which grant states a considerable degree of discretion in this area, cannot be interpreted as prohibiting

these states from proscribing all designation clauses in collective agreements.

36. It should also be pointed out that while the social partners can no longer make use of designation clauses, it is still possible for them to use collective bargaining to define the framework for supplementary social protection in the health and social insurance field and to adopt, where appropriate, a clause recommending an insurer.

37. In addition, the CGT-FO refers again to the judgment of the Court of Justice of the European Union of 3 March 2011, *AG2R Prévoyance* (C-437/09), in which it was found that a designation clause in a collective agreement is compatible with the competition rules enshrined in the Treaty establishing the European Community.

38. However, as the Government stresses in paragraph 39 of its submissions on the merits, this judgment does not mean that a member state of the European Union is required to include designation clauses in its legislation in addition to recommendation clauses.
39. Lastly, the CGT-FO relies on a decision by the Defender of Rights of 17 December 201513 to conclude that recommending one or more insurers, unlike designation, does not make it possible to guarantee the full effectiveness of risk pooling (page 9 of the submissions in response).

40. However, it should also be noted that while, in this decision, the Defender of Rights highlights certain risks which the recommendation system might entail, he considers nonetheless that the use of recommendation clauses in sectoral agreements is a means of establishing genuine professional solidarity in the sphere of supplementary social protection and invites the social partners to make systematic use of the system. Accordingly, in his conclusion, he simply recommends that the Government should set up a system to monitor companies' access to compulsory collective social insurance cover.

41. 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.

5) <u>The costs incurred by the CGT-FO</u>

42. The CGT-FO reiterates its request for the reimbursement of 3 000 euros to cover the expenses it claims to have incurred in bringing the collective complaint, while still refusing to produce any supporting documents in this connection.

43. To support this request, the CGT-FO refers to a decision of 12 October 2004, *CFE-CGC v. France* (Collective Complaint No. 16/2003), in which, despite the absence of supporting documents, the Committee awarded the complainant organisation a sum to cover procedural costs, reflecting the amount of work it had put in during the proceedings.

44. However, it should be noted that, in this decision, the Committee accepted the Government's objection that the request for the reimbursement of costs of 9 000 euros was not accompanied by supporting documents. Consequently, the Committee awarded the complainant organisation a sum of 2 000 euros, in other words nearly five times less than it had originally claimed.

45. Furthermore, although the CGT-FO states that its bills are available to the Committee, it does not produce them, thus preventing the Government from expressing a view on them, which is at

13 Decision MLD-2015-283 of 17 December 2015 on the establishment of a compulsory social insurance and complementary health scheme in companies.

odds with the adversarial principle.

46. Consequently, the Government again invites the Committee to dismiss this request.

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

48. Furthermore, the Government notes that, contrary to the approach it adopted in its complaint, the CGT-FO no longer invites the Committee to order France to adopt a number of measures. The reason why the CGT-FO has conceded on this matter is that, in paragraph 66 of its submissions on the merits, the Government pointed out that the Committee does not have any powers of injunction. However, in its submissions in response, the CGT-FO now asks the Committee to forward its decision to the Committee of Ministers of the Council of Europe and ask the latter to order France to take the measures in question. Yet the Committee of Ministers has no more powers of injunction than the Committee itself.

49. Consequently, the Government repeats its request to the Committee to dismiss the CGT-FO's complaint in its entirety.