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COUNCIL OF EUROPE
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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

2 September 2016

Case Document No. 5

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

FURTHER RESPONSE FROM THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 12 April 2016

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[1], (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

1 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.[2]

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

2 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 20153 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

3 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.