EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

12 April 2017

Case Document No. 1

***Confédération générale du travail (CGT)* and *Confédération française de l'encadrement-CGC (CFE-CGC)* v. France**
Complaint No. 149/2017

COMPLAINT

Registered at the Secretariat on 4 April 2017

Collective complaint lodged by the CGT and the CFE-CGC against the Government of France concerning Law No. 2016-1088 of 8 August 2016 on labour, the modernisation of social dialogue and the safeguarding of career paths (*Journal officiel de la République française* No. 184 of 9 August 2016) for violation of Articles 2§1, 2§5 and 4§2 of the Revised European Social Charter ("the Charter")

I. General presentation of complaint

I-A Authority of complainant trade unions to lodge a complaint

1. The Confédération Générale du Travail ("the CGT"), a representative trade union, is empowered to submit a collective complaint under Article 1c of the Additional Protocol of 9 November 1995, ratified by France. In accordance with Article 38 of the CGT's statutes, this complaint is being submitted by its General Secretary.

The Confédération française de l'encadrement-CGC ("the CFE-CGC"), a representative trade union defending the interests of a specific category of employees, is also empowered to submit a collective complaint under Article 1c of the Additional Protocol of 9 November 1995, ratified by France, as has already been recognised (CFE-CGC v. France, Complaint No. 9/2000, decision on admissibility of 6 November 2000; CFE-CGC v. France, Complaint No. 16/2003, decision on admissibility of 16 June 2003, §7). In accordance with Article 47 of the CFE-CGC statutes, this complaint is being submitted by its President.

I-B Background

2. As soon as it was established by Law No. 2000-37 of 19 January 2000, the annual working days system was the subject of a collective complaint by the CFE-CGC (No. 9/2000), which the European Committee of Social Rights ("the Committee") recognised as well-founded in its decision of 16 November 2001. Following amendments to the law in 2003, the CGT and the CFE-CGC each made a collective complaint (No. 22/2003 and No. 16/2003 respectively) against the French Government with regard to the working time legislation (annual working days system and on-call system). The Committee concluded that these complaints were well-founded, holding that the situation of managers under the annual working days system and the assimilation of on-call periods to periods of rest constituted a violation of Articles 2§1, 2§5 and 4§2 of the Charter (decisions of 12 October and 8 December 2004). The Committee of Ministers took note of these conclusions (Resolutions No. 2005/7 and No. 2005/8 of 4 May 2005).

3. The French Government has taken no heed of these decisions. On the contrary, Law No. 2008-789 of 20 August 2008, while leaving the on-call system unchanged, substantially reduced the workload monitoring arrangements required by the collective agreements regulating annual working days. The CGT and the CFE-CGC consequently lodged further collective complaints (No. 55/2009 and No. 56/2009 respectively), which the Committee again recognised as well-founded in its decisions of 23 June 2010, published on 14 January 2011.

4. The French Court of Cassation then delivered a number of judgments (including No. 10-14743 of 29 June 2011, No. 10-19807 of 31 January 2012, No. 11-14540 of 26 September 2012, No. 12-35033 of

14 May 2014 and No. 13-26444 of 7 July) laying down stringent requirements in respect of the guarantees to be included in the collective agreements needed for signature of individual package agreements on annual working days. It declared twelve industry-wide collective agreements to fall short of these requirements, finding that the package agreements that they were supposed to legitimate were null and void. In its monthly labour law bulletin (*Mensuel du droit de travail* No. 35, September 2012), it noted in its commentary on the judgment of 26 September 2012 that "the solutions adopted by the Labour Division in these various cases are largely guided by the decisions of the European Committee of Social Rights (ECSR) interpreting the European Social Charter" and reiterated the principal grounds of the Committee's decisions of 23 June 2010. In its 2014 annual report, the Court of Cassation urged Parliament to incorporate the principles of its case-law on annual working days into law.

5. In its 2014 conclusions on the 13th report submitted by France, the Committee observed that

> the new case-law of the Court of Cassation has provided guarantees to ensure that the reasonable working hours of the employees who come under the annual working days system will have to be respected. Therefore, the Committee considers that this will enable compliance with Article 2§1 when all collective agreements concerned are actually amended according to the Court's judgment. The Committee therefore asks the Government for information on the exact number of such collective agreements which have been amended according to the judgment. The Committee asks in particular whether the new limits to daily and weekly working hours, established henceforth for employees who come under the annual working days system, will be the same as provided by the Labour Code.

I-C Grounds of the complaint

6. It was against this background that Law No. 2016-1088 was passed, containing new provisions on the annual working day system and on-call system. These seriously undermine employees' right to just working conditions and fair remuneration. The CGT and the CFE-CGC consider that these provisions have not put an end to the previously reported violations of Articles 2§1, 2§5 and 4§2. This is because:

- On-call periods in which no effective work is performed are still deemed to be rest periods, in breach of Articles 2§1 and 2§5;
- The French legislation on annual working days still fails to ensure compliance with Articles 2§1 and 4§2 either by direct statutory measures or by mandatory provisions in the collective agreements governing these annual working days;
- Moreover, by allowing the signature of individual package agreements on annual working days even where collective agreements fail to comply with statutory provisions, with the sole condition that employers enforce thoroughly inadequate minimum measures on their own initiative, the new legislation has made control of annual working days even more hypothetical and weakened protection for the employees concerned.

7. Parliament's inertia, despite the many previous findings of violations and the new violation of Article 4§2, has created an unacceptable situation, denying an enormous number of employees the guarantees provided for by the Charter, which the French state has nevertheless officially undertaken to apply. For this reason the CGT and the CFE-CGC request:

- that the Committee place on record the persistence and even the worsening of the violations of the above-mentioned articles of the Charter by the French Government and the urgent need to bring them to an end;
- that the French Government be sent a strong recommendation by the Committee of Ministers of the Council of Europe, asking it finally to bring its working time legislation into conformity with the provisions of the Charter.

II. Violations of the Charter by the new legislation on the on-call system

II-A Domestic law applying before and after promulgation of the law of 8 August 2016

8. Prior to the law of 8 August 2016, the on-call system was defined as follows by the Labour Code:

- Article L.3121-5. On-call periods shall mean periods in which employees, without being permanently and immediately at their employers' disposal, are under a duty to remain at home or close by so that they are ready to carry out work on the firm's behalf. The duration of such a call-out shall be considered effective working time.
- Article L.3121-6. Apart from actual call-out periods, on-call periods shall be taken into account when calculating the minimum daily rest period provided for in Article L.3131-1 and the weekly rest periods provided for in Articles L.3132-2 and L.3164-2.

The provisions applying at present are worded as follows:

- Article L.3121-9. On-call periods shall mean periods in which employees, without being at the workplace and without being permanently and immediately at their employers' disposal, must be ready to carry out work on the firm's behalf. The duration of such a call-out shall be considered effective working time. […]
- Article L.3121-10. Apart from actual call-out periods, on-call periods shall be taken into account when calculating the minimum daily rest period provided for in Article L.3131-1 and the weekly rest periods provided for in Articles L.3132-2 and L.3164-2.

(In both versions, the rest periods referred to are a daily rest period of 11 hours and a weekly rest period of 24 hours.)

9. The new Article L.3121-10 exactly reproduces the previous wording with regard to treating on-call periods not resulting in an actual call-out as rest periods. The only changes relate to Article L.3121-9 and concern the definition of on-call periods: firstly, the reference to spending them "at home or close by" has been deleted and, secondly, presence at the workplace will rule out classification as an on-call period.

II-B Violation of Article 2§1 of the Charter

10. Article 2 of the Charter (the right to just conditions of work) states:

> With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:
>
> 1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;
>
> […]

11. In paragraphs 35 to 37 of its decision of 8 December 2004 on the merits of Complaint No. 22/2003, CGT v. France, repeated in paragraph 65 of its decision of 23 June 2010, the Committee explained why on-call periods could not be rest periods:

> The Committee considers that the *"périodes d'astreinte"* [on-call periods] during which the employee has not been required to perform work for the employer, although they do not constitute effective working time, cannot be regarded as a rest period in the meaning of Article 2 of the Charter, except in the

framework of certain occupations or particular circumstances and pursuant to appropriate procedures.

The *"périodes d'astreinte"* are in effect periods during which the employee is obliged to be at the disposal of the employer with a view to carrying out work, if the latter so demands. However, this obligation, even where the possibility of having to carry out work is purely hypothetical, unquestionably prevents the employee from the pursuit of activities of his or her own choosing, planned within the limits of the time available before the beginning of work at a fixed time and not subjected to any lack of certainty resulting from the exercise of an occupation or from the situation of dependency inherent in that exercise.

The absence of effective work, determined *a posteriori* for a period of time that the employee a priori did not have at his or her disposal, cannot therefore constitute an adequate criterion for regarding such a period as a rest period.

12. The CGT and the CFE-CGC fully share this assessment. The activities that an employee can undertake during the on-call period are restricted simply because they must not prevent him or her from being reached without delay and they must be able to be interrupted immediately if the employee is called out. Such a restriction can be established without needing to take account of the constraint of having to remain close to home or in a prescribed place. Nor was this constraint mentioned in the Committee's reasoning, as cited in the previous paragraph. Consequently, the changes made to the definition of on-call periods, while they may possibly affect how such periods are classified, in no way alter the key point: the time that employees at risk of being called out do not have freely at their disposal cannot be treated as a rest period.

13. The abolition of the "duty to remain at home or close by" in the new definition of on-call periods in no way reduces these constraints, since many means of communication can be used to reach employees and call them out immediately. Moreover, even prior to the promulgation of the law of 8 August 2016 requiring an employee's presence at home or close by was no longer held by the courts to be a necessary criterion for establishing the existence of an on-call period. The Court of Cassation has for instance ruled on a number of occasions (cf. recently, Labour Division, Judgment No. 14-14919 of 2 March 2016 and Judgment No. 14-27971 of 16 March) that a duty to be reachable and ready to be called out immediately, without any requirement for attendance in a particular place, constitutes being on call. The Versailles Administrative Court of Appeal delivered a similar verdict with regard to a local-government employee (Judgment No. 12VE00164 of 7 November 2013,).

14. Use of the on-call system ~~is~~ remains widespread, not being confined to certain occupations or special circumstances inasmuch as:

- The Labour Code provides for no restrictions;
- It is in principle introduced by a collective agreement, but it is perfectly possible for it to be established merely by a unilateral decision of the employer after consultation of staff representatives (even if they advise against it) or just by notifying the labour inspectorate. It should be noted that, in this second case, the employer also unilaterally determines the corresponding compensation.

An employee is not entitled to refuse the introduction of an on-call system arising out of application of a collective agreement (Article L.3121-11 of the Labour Code. See Court of Cassation, Labour Division, Judgment No. 00-40387 of 13 February 2002: "The employment contract, which did not contain any clauses relating to an on-call system, was not amended by the introduction of an on-call system, since the collective agreement for firms installing, maintaining and repairing ventilation, heating and refrigeration equipment, which applied to the contract, provided for this option." Such a refusal is even considered to constitute serious misconduct (see Court of Cassation, Labour Division, Judgment No. 96-42102 of 16 December 1998)).

15. Lastly, the CGT and the CFE-CGC would inform the Committee that the bill submitted to the French Cabinet on 17 February 2016 contained the following provision: "If an employee is called out during an on-call-period, at the end of the call-out period he or she shall be entitled to a compensatory rest period at least equivalent to the call-out period, enabling him or her to have a total of at least eleven hours of daily rest and thirty-five hours of weekly rest." This amounted to allowing rest periods to be split, with one part consisting of the on-call period prior to the call-out and the other part being granted after the call-out! This provision was subsequently dropped but nevertheless reflects an unacceptable approach to the concept of rest by the drafters of the bill.

16. For these reasons, the CGT and the CFE-CGC wish the Committee to confirm that Article 2§1 of the Charter has been violated and to recommend firmly that the French Government amend its legislation.

II-C Violation of Article 2§5 of the Charter

17. Article 2 of the Charter (the right to just conditions of work) states:

> With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:
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> […]
>
> 5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest*;*
>
> […]

18. In paragraph 39 of the Committee's decision of 8 December 2004 on the merits of Complaint No. 22/2003, CGT v. France, it is stated that "as far as these 'périodes d'astreinte' [on-call periods] can be on Sundays, the Committee holds that there is also a violation of Article 2§5 of the Revised Charter". This assessment was repeated in paragraphs 67 and 68 of the decision of 23 June 2010.

19. Since there have been no changes in French legislation that might affect this appraisal, the CGT and the CFE-CGC wish the Committee to find that there has been a persistent violation of Article 2§5 of the Charter.

III. Violations of the Charter by the new legislation on annual working days

III-A Domestic law applying to the system of annual working days before and after promulgation of the law of 8 August 2016

20. Prior to the law of 8 August 2016, the annual working days system was defined by the provisions of the Labour Code arising out of Law No. 2008-789 of 20 August 2008:

- Article L.3121-39. Conclusion of individual package agreements on annual working hours or days shall be provided for by an enterprise- or establishment-level agreement or, if this does not exist, an industry-wide agreement. This prior collective agreement shall establish the categories of employees entitled to conclude an individual package agreement, as well as the annual working time on which it is based, and shall define the main characteristics of these agreements.
- Article L.3121-40. Conclusion of an individual package agreement shall require the employee's consent. The agreement shall be drawn up in writing.
- Article L.3121-43. Subject to the maximum annual working time laid down by the collective agreement referred to in Article L.3121-39, package agreements on annual working days may be concluded by:

  1) Managers who have a degree of independence in organising their work schedules and whose duties are not such as to require them to work the normal hours applicable to their particular shop floor, department or team;

  2) Employees whose working hours cannot be determined in advance and who have an effective degree of independence in organising their work schedule in order to perform the duties entrusted to them.
- Article L.3121-44. The number of days worked over the year as laid down by the collective agreement referred to in Article L.3121-39 cannot exceed two hundred and eighteen.
- Article L.3121-45. Any employee may decide, in agreement with his or her employer, to waive some rest days in consideration of an increase in salary. The agreement between employee and employer shall be drawn up in writing. The number of days worked over the year cannot exceed the maximum number laid down in the agreement referred to in Article L.3121-39. Failing such an agreement, the maximum number shall be two hundred and thirty-five days.

  The maximum number of days worked annually must be consistent with the provisions of Title 3 concerning daily rest, weekly rest and public holidays observed by the enterprise and of Title 4 concerning paid leave.

  A supplementary agreement to the package agreement concluded between the employee and the employer shall lay down the increased rate of remuneration for the additional time worked. This rate shall not be less than 10%.
- Article L.3121-46. An individual yearly interview shall be organised by the employer with each employee having concluded a package agreement on annual working days. This interview shall cover the employee's workload, organisation of work within the enterprise, the employee's work-life balance and his or her remuneration.
- Article L.3121-47. When employees who have concluded package agreements on annual working days receive remuneration that is clearly incommensurate with the constraints imposed on them, they may, regardless of any terms to the contrary in an agreement or contract, apply to the courts to obtain compensation proportionate to the prejudice incurred, having particular regard to the salary level within the enterprise, and corresponding to their qualifications.
- Article L.3121-48. Employees having concluded package agreements on annual working days shall not be subject to the provisions concerning:

1) The statutory working week, in Article L.3121-10;
2) Maximum working hours per day, in Article L.3121-34;
3) Maximum working hours per week, in the first paragraph of Article L.3121-35 and the first and second paragraphs of Article L.3121-36.

21. With the law of 8 August 2016 Parliament adopted a new approach to drafting the Labour Code, drawing a distinction between "public policy provisions", which are mandatory, the "scope of collective bargaining", and "default provisions", applying in the absence of a collective agreement. With regard to annual working days, it also stipulated how to deal with collective agreements and individual package agreements on annual working time concluded prior to the promulgation of the law.

22. Section 8 of the law reworded as follows the provisions of the Labour Code relating to annual working days (Part 3, Book 1, Title 2, Chapter 1, Section 5: Package agreements. Only articles relating to all annual working time or annual working days are shown below):

Subsection 1: Public policy

- Article L.3121-53. Working time can be aggregated into a package of hours or days subject to the conditions laid down in Subsections 2 and 3 of this section.
- Article L.3121-54. Working time aggregated in hours shall be weekly, monthly or annual. Working time aggregated in days shall be annual.
- Article L.3121-55. Aggregation of working time must receive the employee's consent and be covered by an individual package agreement drawn up in writing.
- Article L.3121-58. Subject to the maximum number of days specified in subparagraph I.3 of Article L.3121-64, individual package agreements on annual working days may be concluded by:
  1) Managers who have a degree of independence in organising their work schedules and whose duties are not such as to require them to work the normal hours applicable to their particular shop floor, department or team;
  2) Employees whose working hours cannot be determined in advance and who have an effective degree of independence in organising their work schedule in order to perform the duties entrusted to them.
- Article L.3121-59. Any employee may decide, in agreement with his or her employer, to waive some rest days in consideration of an increase in salary. The agreement between employee and employer shall be drawn up in writing.
  A supplementary agreement to the package agreement concluded between the employee and the employer shall lay down the increased rate of remuneration for the additional time worked. This rate shall not be below 10%. The supplementary agreement shall be valid for the current year. It cannot be renewed by tacit agreement.
- Article L.3121-60. The employer shall check regularly that the employee's workload is reasonable and that his or her work is properly distributed over time.
- Article L.3121-61. When employees who have concluded package agreements on annual working days receive remuneration that is clearly incommensurate with the constraints imposed on them, they may, regardless of any terms to the contrary in an agreement or contract, apply to the courts to obtain compensation proportionate to the prejudice incurred, having particular regard to the salary level within the enterprise, and corresponding to their qualifications.
- Article L.3121-62. Employees having concluded package agreements on annual working days shall not be subject to the provisions concerning:
  1) Maximum effective working hours per day, in Article L.3121-18;
  2) Maximum working hours per week, in Articles L.3121-20 and L.3121-22;
  3) The statutory working week, in Article L.3121-27.

Subsection 2: Scope of collective bargaining

- Article L.3121-63. Annual working hours or days shall be established by an enterprise- or establishment-level agreement or, if this does not exist, an industry-wide agreement.
- Article L.3121-64. I.- The agreement providing for conclusion of individual package agreements on

annual working time shall specify:

1) The categories of employees that may conclude an individual package agreement, in compliance with Articles L.3121-56 and L.3121-58;

2) The reference period for annual working time, which may be the calendar year or any other period of twelve consecutive months;

3) The number of hours or days covered by annual working time, not to exceed two hundred and eighteen in the case of annual working days;

4) The conditions under which absences, together with arrivals and departures during this period, are to be taken into account in employees' remuneration;

5) The main characteristics of individual agreements, which must include the number of hours or days covered by annual working time.

II.- The agreement allowing conclusion of individual package agreements on annual working days shall specify:

1) The arrangements under which the employer is to assess and regularly monitor the employee's workload;

2) The arrangements under which the employer and employee are to communicate regularly concerning the employee's workload, work-life balance and remuneration and the organisation of work within the enterprise;

3) The arrangements under which the employee can exercise his or her right to disconnect, as provided for in subparagraph 7 of Article L.2242-8.

The agreement can lay down the maximum number of days to be worked in the year if the employee waives some rest days pursuant to Article L.3121-59. This number must be consistent with the provisions of Title 3 of this book concerning daily rest, weekly rest and bank holidays observed by the enterprise and with the provisions of Title 4 on paid annual leave.

Subsection 3: Default provisions

- Article L.3121-65. I.- In the absence of the clauses provided for in subparagraphs II.1 and II.2 of Article L.3121-64, an individual package agreement on annual working days can be validly concluded subject to compliance with the following provisions:

  1) The employer shall draw up a monitoring document showing the number and dates of days and half-days worked. This document can be completed by the employee under the employer's responsibility;

  2) The employer shall check that the employee's workload is compatible with that employee's daily and weekly rest periods:

  3) The employer shall organise an interview with the employee once a year to talk about the employee's workload, which must be reasonable, the organisation of his or her work, the employee's work-life balance and his or her remuneration.

  II.- In the absence of the clauses provided for in subparagraph II.3 of Article L.3121-64, the arrangements for employees to exercise their right to disconnect shall be laid down by the employer and notified to the employees concerned by any means. In enterprises with at least fifty employees, these arrangements shall be consonant with the charter referred to in subparagraph 7 of Article L.2242-8.

- Article L.3121-66. If an employee waives some rest days pursuant to Article L.3121-59, and if not stated in the collective agreement referred to in Article L.3121-64, the maximum number of days worked in the year shall be two hundred and thirty-five.

23. Section 12 of the law contains the following provisions relating to collective agreements and individual package agreements signed prior to 8 August 2016.

- I. - When an industry-wide agreement or an enterprise- or establishment-level agreement concluded prior to publication of the present law and allowing conclusion of package agreements on annual hours or days is amended to bring it into conformity with Article L.3121-64 of the Labour Code as worded under the present law, the individual package agreement on annual working hours or days shall continue to apply without the employee's consent being required.
- II. - Subparagraphs I.2 and I.4 of Article L.3121-64 of the Labour Code as worded under the present law shall not take precedence over industry-wide agreements or enterprise- or establishment-level

agreements allowing conclusion of package agreements on annual working hours or days concluded prior to publication of the present law.

- III. - An individual package agreement on annual working days concluded on the basis of an industry-wide agreement or an enterprise- or establishment-level agreement which, at the time publication of this law, does not comply with subparagraphs II.1 to II.3 of Article L.3121-64 of the Labour Code can continue to apply provided that the employer complies with Article L.3121-65 of the same code. Subject to the same conditions, the aforesaid collective agreement can also serve as the basis for conclusion of new individual package agreements.
- […]

24. It should here be noted that the new law does not in any way amend the definition of employees eligible for agreements on annual working days. Their number has been steadily growing ever since the system was introduced. According to official statistics from the Directorate for the Coordination of Research and Statistics (DARES, *Analyses*, No. 48, July 2015), the system applies to 13.3% of employees covered by the Labour Code, for all occupational categories combined (as against 4% in 2001). In some sectors the proportion is over 20%, reaching 31% in finance and insurance. It applies to 46.8% of managers (58.8% in industry overall) as against 44% in 2014. It is therefore obvious that a large number of employees are concerned. Consequently, it is not possible to invoke a lawful exception to the Charter's full application to these employees, particularly not the exceptions referred to in Article 4§2 –as the Committee noted, moreover, in paragraph 74 of its decision of 23 June 2010.

25. It should further be noted that the new law contains no new provisions on remuneration of employees working under package agreements on annual working days, particularly concerning its relationship to the number of overtime hours actually worked.

26. Lastly, the CGT and the CFE-CGC think it pertinent to inform the Committee that splitting of rest periods for employees working under package agreements on annual working days was also a key measure of the first draft of the bill. In view of the strong presumption of incompatibility with domestic, European and international law, the CGT and the CFE-CGC, together with other trade unions, succeeded in having this measure withdrawn from the bill. However, it has nevertheless resurfaced in the consultation with the social partners on teleworking provided for in section 57 of the law of 8 August 2016:

> I. - A consultation on development of teleworking shall be started by 1 October 2016 with national and cross-industry employers' organisations and representative trade unions, which, if they so wish, can open negotiations on this matter.
>
> This consultation shall be based on a broad overview of the following:
>
> 1) The level of teleworking in each industry by occupational family and gender;
>
> 2) The list of occupations, by occupational group, potentially eligible for teleworking. This consultation shall also cover assessment of the workload of employees working under agreements on annual working days, consideration of practices relating to digital tools allowing a better work-life balance, and **the advisability of and any arrangements for splitting the daily or weekly rest of these employees**.
>
> Following the consultation, a best practice guide is to be prepared and used as a reference document during negotiation of enterprise-level agreements.
>
> II. - By 1 December 2016 the Government shall submit to Parliament a report on legal adaptation of the concepts of workplace, workload and working time associated with the use of digital tools.

This consultation began on 6 March 2017 and meetings are scheduled up to April 2017.

III-B Violation of Article 2§1 of the Charter

27. In paragraph 50 of its decision of 23 June 2010,

> "the Committee draws attention to the fact that it has considered that flexible measures regarding working time are not as such in breach of the Revised Charter (see in particular General Introduction, Conclusions XIV-2, p. 33). In order to be found in conformity with the Revised Charter, national laws or regulations must fulfil three criteria:
>
> *i.* they must prevent unreasonable daily and weekly working time ;
>
> *ii.* they must operate within a legal framework providing adequate guarantees;
>
> *iii.* they must provide for reasonable reference periods for the calculation of average working time.

The CGT and the CFE-CGC maintain that the system of annual working days arising out of the new law fails to meet any of these three criteria and also permits unreasonable working time, as will be explained below.

III.B.(i) Daily and weekly working time under the law

28. The new legislation continues to exclude employees working under package agreements on annual working days from the scope of the daily and weekly limits on working time provided for in Articles L.3121-18, -20, -22 and -27 of the Labour Code (in the revised numbering introduced by the new law) and sets no limits other than those implied by the minimum rest periods. As the Committee noted in its previous decisions (cf. paragraphs 51 and 52 of the decision of 23 June 2010), it follows that the only limits under the law are 13 hours per day and 78 hours per week.

29. The Committee has consistently held that the 78-hour weekly limit "is manifestly excessive and therefore cannot be considered reasonable within the meaning of Article 2§1 of the Revised Charter" (decision of 23 June 2010, paragraph 52). It has also decided that because the daily working time of 13 hours can never be exceeded, it is not in itself unreasonable (ibid., paragraph 51). The CGT and the CFE-CGC nevertheless recall that "the provisions of the Revised Charter concerning working time are intended to protect workers' safety and health in an effective manner" (Committee decision of 8 December 2004 on the merits of Complaint No. 22/2003, CGT v. France). While it can be accepted that occasional performance of a 13-hour working day is not a serious threat to health, the same cannot be said if this situation recurs repeatedly. The CGT and the CFE-CGC further note that daily working time and its compliance with the 13-hour limit are usually assessed only on the basis of the employees' "visible" work (presence in the enterprise or on a customer's premises, completion of a job at home under a contract providing for teleworking). But the activity of many employees coming under the annual working days system includes a considerable amount of time spent working during travel or at home, a phenomenon that has escalated with the use of modern means of communication (checking and possibly answering e-mails, text messages, etc.), which nothing in the legislation makes it possible to assess.

30. The CGT and the CFE-CGC therefore wish the Committee to reconsider the question of whether French legislation meets the obligation to ensure reasonable daily working hours. At all events, the finding with regard to weekly working hours is enough to demonstrate that this legislation fails to guarantee compliance with Article 2§1 of the Charter. It should therefore now be examined whether the statutory conditions for collective bargaining provide adequate guarantees.

III.B.(ii) Legal framework for collective bargaining on annual working days

31. The new law has confirmed the delegation of the regulation of annual working days to collective agreements. In its decision of 23 June 2010, the Committee held that this type of delegation was legitimate but that "in order to be in conformity with the Revised Charter, a flexible working time system must operate within a precise legal framework which clearly circumscribes the discretion left to employers and employees to vary, by means of a collective agreement, working time" (paragraph 53). It also observed that "collective agreements may be concluded at enterprise level" and considered that

> the possibility to do so regarding working time is in conformity with Article 2§1 only if specific guarantees are provided for. It observes in this respect that the procedure for contesting collective agreements under Articles L.2232-12, L.2232-13 and L.2232-27 of the Labour Code do not constitute such a guarantee since its use is too hypothetical.

32. The CGT and the CFE-CGC consider that the legal framework deriving from the new law does not always provide adequate guarantees, for three reasons, which will be explained in the following paragraphs:

- While the measures to be contained in the collective agreement regulating annual working days (Article L.3121-64) may give the impression that this new framework offers more protection, they remain inadequate (paragraphs 33 to 36 below);
- Annual working days are allowed even if the collective agreement does not contain these measures, provided that employers comply, of their own accord, with certain rules that are even less effective (paragraphs 37 to 39 below);
- The option of concluding agreements at different levels, including the enterprise level, is not accompanied by the "specific guarantees" required according to the Committee's decisions (paragraphs 40 to 42 below).

33. According to subparagraph II of Article L.3121-64:

> The agreement allowing conclusion of individual package agreements on annual working days shall specify:
>
> 1) The arrangements under which the employer is to assess and regularly monitor the employee's workload;
>
> 2) The arrangements under which the employer and employee are to communicate regularly concerning the employee's workload, work-life balance and remuneration and the organisation of work within the enterprise;
>
> 3) The arrangements under which the employee can exercise his or her right to disconnect, as provided for in subparagraph 7 of Article L.2242-8.

34. On the one hand, it will be noted that no reference is made to providing for "reasonable daily and weekly working hours" under the terms of Article 2§1 of the Charter. Conversely, the position of the Court of Cassation, as the Committee recognised in its 2014 conclusions on the 13th report submitted by France (see paragraph 5 above), is that "any package agreement on annual working days must be provided for by a collective agreement whose terms ensure compliance with reasonable maximum daily and weekly working hours and with daily and weekly rest periods" and that these terms must, for example, "guarantee that an employee's working hours and workload are reasonable and ensure that the work is properly distributed over time".

35. On the other hand, subparagraph II.3 of Article L.3121-64 ("Right to disconnect") can, at best, be only one factor contributing to compliance with minimum rest periods. The legislation as it stands does not really establish an entitlement, incorporating objective elements, that can be enforced

against an employer but entails only an annual obligation to negotiate, which may result in either an agreement or a unilateral decision by the employer, with no real mandatory substance. Article L.2242-8, which will come into effect on 1 January 2017, states:

> "Annual negotiations on workplace gender equality and quality of life shall cover:
> […]
> 7) Arrangements for employees fully to exercise their right to disconnect and introduction by the enterprise of mechanisms for regulating use of digital tools, for the purpose of ensuring compliance with rest periods and periods of leave as well as respect for private and family life. Failing agreement, the employer shall draw up a charter, after consulting the works council or, failing this, staff representatives. This charter shall lay down the arrangements for exercising the right to disconnect and further provide for introduction, for employees and supervisory and managerial staff, of training and awareness-raising regarding reasonable use of digital tools.

36. It follows from the above observations that the provisions that are supposed to be included in collective agreements allowing introduction of package agreements on annual working days do not guarantee compliance with Article 2§1.

37. But the new legislation is open to another, particularly serious, criticism: although inadequate, the measures that the collective agreement should contain are not always mandatory. Article L.3121-65 permits individual package agreements on annual working days to be signed even if the agreement allowing them does not contain the arrangements set out in subparagraph II of Article L.3121-64, on the sole condition that the employer comply with the following three provisions:

> 1) The employer shall draw up a monitoring document showing the number and dates of days and half-days worked. This document can be completed by the employee under the employer's responsibility;
> 2) The employer shall check that the employee's workload is compatible with that employee's daily and weekly rest periods:
> 3) The employer shall organise an interview with the employee once a year to talk about the employee's workload, which must be reasonable, the organisation of his or her work, the employee's work-life balance, and his or her remuneration.

This "monitoring" by the employer is limited strictly to minimum rest periods, which, as we have seen, even if respected do not guarantee reasonable weekly working hours or, in the opinion of the CGT and the CFE-CGC, daily working hours (paragraph 29 above). It will also be noted that the Court of Cassation has held on several occasions that the annual interview (already provided for by the legislation prior to the law of 8 August 2016) could not replace regular monitoring of the workload (see Judgment No. 11-28398 of 24 April 2013, for example).

38. Similarly, subparagraph III of section 12 of the law approves package agreements signed on the basis of a prior agreement not containing the arrangements provided for in subparagraph II of Article L.3121-64 if the employer complies with the three provisions cited above. This being so, new agreements can thus be signed without any need to amend the collective agreement to bring it into conformity with the new recommendations.

39. This possibility of circumventing subparagraph II of Article L.3121-64 renders its arrangements entirely inoperative (irrespective of how they are assessed in terms of adequacy) and allows the introduction of package agreements on annual working days in the absence of collective agreements effectively alleviating the shortcomings of the legislation, which constitutes a flagrant breach of the obligations laid down in Article 2§1 of the Charter. Moreover, the possibility of circumventing Article L.3121-65 of the Labour Code and section 12 of the law of 8 August 2016 also renders the case-law of France's Court of Cassation inoperative, since the judgments delivered over the years by the Labour Division, drawing on previous decisions by the ECSR, prompted employers to renegotiate their collective agreements to guarantee the right to health and rest of employees working under

package agreements on annual working days. The law of 8 August 2016 not only offers no such guarantees but, on top of this, sends a signal to employers that it is no longer necessary to renegotiate their collective agreements as employees will no longer be allowed to challenge their individual package agreements on account of the former's inadequacies.

40. The law of 8 August 2016 has confirmed the option of determining the duration and organisation of working time by means of enterprise- or establishment-level agreements and has given general effect to the principle that, in this respect, industry-wide agreements (covering enterprises in the same field of business) will apply only if there are no enterprise- or establishment-level agreements. The complainant trade unions maintain that the guarantees required by the Committee for accepting the option of package agreements on annual working days under enterprise-level agreements (referred to in paragraph 31 above) have still not been met. Furthermore, if there are no representative trade unions in the workplace, collective agreements can be negotiated and approved as follows:

- Article L.2232-21. In the absence of trade union representatives in the enterprise or establishment, or of a staff representative appointed as a trade union representative in enterprises with fewer than fifty employees, the representatives elected by the staff to the works council or single staff delegation [works council plus staff representatives], or to the body referred to in Article L.2391-1, or, failing this, staff representatives, can negotiate, conclude and revise collective agreements if they are expressly mandated for this purpose by one or more representative trade unions in the industry to which the enterprise belongs or, failing this, by one or more representative trade unions at the national or cross-industry level. Each organisation can mandate only one employee.

  Representative trade unions in the industry to which the enterprise belongs or, failing this, representative trade unions at the national or cross-industry level shall be notified by the employer of the latter's decision to open negotiations.

- Article L.2232-21-1. The agreement signed by a staff representative elected to the works council or single staff delegation, or, failing this, by a staff representative who has been mandated, must have been approved by the employees by a majority of votes cast, under conditions laid down by decree and with due regard for the general principles of electoral law.

- Article L.2232-22. In the absence of an elected staff representative mandated pursuant to Article L.2232-21, permanent staff representatives elected to the works council or the single staff delegation or the body referred to in Article L.2391-1, or, failing this, permanent staff representatives who have not been expressly mandated by an organisation specified in Article L.2232-21, can negotiate, conclude and revise collective agreements.

  This negotiation shall be confined to collective agreements relating to measures whose implementation the law makes conditional on a collective agreement, with the exception of the collective agreements referred to in Article L.1233-21 [agreements concerning consultation of the works council in the event of mass redundancies].

  The validity of agreements or supplementary agreements concluded pursuant to the present article is conditional on their signature by permanent elected members of the works council or single staff delegation or, failing this, by permanent staff representatives who have obtained the majority of votes cast in the most recent workplace election. If this condition is not met, the agreement or supplementary agreement shall be considered null and void. Agreements concluded pursuant to the present article shall be forwarded for information to the industry-level joint committee. Completion of this formality shall not be a prerequisite for registration and entry into force of agreements.

  Unless there are different provisions in an industry-wide agreement, the industry-level joint committee shall comprise one permanent representative and one deputy representative of each representative trade union in the industry and an equal number of representatives of employers' organisations.

- Article L.2232-24. In enterprises where there are no trade union representatives, if, at the end of the procedure laid down in Article L.2232-23-1, no elected representative has expressed an interest in negotiating, enterprise- or establishment-level agreements can be negotiated, concluded and revised by one or more employees expressly mandated by one or more representative trade unions in the industry or, failing this, by one or more representative trade unions at the national or cross-industry level. For this purpose, each trade union can mandate only one employee.

  Representative trade unions in the industry to which the enterprise belongs, or, if there are none, representative trade unions at the national or cross-industry level, shall be notified by the employer of the latter's decision to open negotiations. The present article shall apply automatically in enterprises without trade union representatives in which an official report has established the absence of elected staff representatives and in enterprises with fewer than eleven employees.

- Article L.2232-27. The agreement signed by a mandated employee must have been approved by employees by a majority of the votes cast, under conditions laid down by decree and with due regard for the general principles of electoral law.

  If the agreement is not approved it shall be deemed null and void.

Important changes should be noted in comparison with the legislation arising out of Law No. 2008-789, which was in force at the time of the previous collective complaint submitted by the CGT (No. 55/2009): negotiation by elected staff representatives was then limited to enterprises with under 200 employees and any agreement had to be approved by the industry-level joint committee rather than just being "forwarded for information".

41. Furthermore, the new law allows employers to open negotiations not only at the enterprise, establishment or group level, as they were able to do before, but also for a set of establishments within the enterprise (Article L.2232-16) or for a number of enterprises not necessarily constituting a group or a social and economic unit within the meaning of French law. The terms of this multi-enterprise agreement may even take precedence over those of a pre-existing enterprise-level agreement:

- Article L.2232-36. An agreement can be negotiated and concluded for a number of enterprises between the employers on the one hand and representative trade unions in all the enterprises concerned on the other.
- Article L.2253-7. When an agreement concluded for a number of enterprises expressly so provides, its provisions shall replace the provisions concerning the same subject-matter in agreements concluded previously or subsequently in the enterprises or establishments covered by this agreement.

42. The CGT and the CFE-CGC consider that this new legal framework for enterprise-level negotiation contains even fewer guarantees than the earlier legislation:

- Employers are entirely free to choose the level of negotiation: establishment, combination of certain establishments, enterprise, group or even combination of enterprises. They can thus choose the configuration they consider the most advantageous, taking into account union presence, composition of employees concerned, etc., and making full use of the new rules on validity of agreements at the different levels. At the same time, paragraph 3 concerning Articles 21 and 22 in the Appendix to the Charter, states "for the purpose of the application of these articles, the term 'undertaking' is understood as referring to a set of tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy". The CGT and the CFE-CGC consider that an establishment, combination of establishments or combination of enterprises not constituting a group or social and economic unit cannot be defined as an "undertaking" within the meaning of Article 22 of the Charter, an article to which the Committee usually refers for matters associated with enterprise-level negotiation

(cf. *Digest of the Case-Law of the European Committee of Social Rights*, 1 September 2008, page 53).

- The possibilities for negotiating without the trade unions have been broadened, in particular with the abolition of monitoring by the industry-level joint committee in cases where it previously existed.

The outcome of negotiation of package agreements on annual working days at the enterprise level therefore seem more "hypothetical" than ever. This is an additional ground for concluding that there has been a violation of Article 2§1.

III.B.(iii) Reasonable reference periods for calculation of average working time

43. In its previous decisions on the annual working days system, the Committee held that it had not been necessary to ascertain whether "reasonable reference periods for the calculation of average working time" had been provided, since its earlier findings were sufficient to establish a violation of Article 2§1. The CGT and the CFE-CGC nevertheless recall that, according to the Committee's case-law, "the reference periods must not exceed six months. They may be extended to a maximum of one year in exceptional circumstances" (*Digest of the Case-Law of the European Committee of Social Rights*, 1 September 2008, page 28). In the case of annual working days, the only reference period specified by law or to be determined by a collective agreement is one year. The CGT and the CFE-CGC consider that in the case of annual working days, this situation also affects assessment and remuneration of overtime, which will be addressed below with regard to violation of Article 4§2 of the Charter.

III-C Violation of Article 4§2 of the Charter

44. Article 4 of the Charter (the right to a fair remuneration) states:

> With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:
>
> [...]
>
> 2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
>
> [...]

45. As noted in paragraph 27, the new legislation has not in any way changed the rules for remuneration of employees working under package agreements on annual working days. The CGT and the CFE-CGC therefore consider that the Committee's appraisal in its decision of 23 June 2010 is still entirely relevant and that violation of Article 4§2 is continuing:

- (74) The Committee considers that the number of employees concerned and the nature of their duties clearly excludes them from the scope of the exceptions referred to in Article 4§2. They are therefore entitled for the right embodied in this article.
- (75) The Committee considers that the number of hours of work performed by employees who come under the annual working days system and who do not benefit from a higher rate for overtime, under this flexible working time system, is abnormally high. The fact that an increased remuneration is now foreseen for the days worked which correspond to the days of leave which the employee under the annual working days system has relinquished cannot be considered sufficient under paragraph 2 of Article 4. In such circumstances, a reference period of one year is excessive.

III-D Conclusion

46. In conclusion, the CGT and the CFE-CGC maintain that the new legislation is far from providing the guarantees that the Committee's previous decisions had nevertheless rendered urgent and indispensable, in persistent violation of Articles 2§1 and 4§2. They particularly regret that the law makes it possible to introduce package agreements on annual working days even if the agreement allowing them fails to respect the arrangements that the law itself has laid down, thus divesting this system of any legal framework worthy of the name at a time when it is constantly expanding to cover an increasing number of employees. They therefore urge that a further decision by the Committee be followed by a recommendation calling on the French Government to put an end to these violations of the Charter which undermine employees' right to just conditions of work and fair remuneration.