EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

23 October 2017

Case Document No. 3

***Fédération FIECI* and *Syndicat SNEPI CFE-CGC* v. France**
Complaint No.142/2017

SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 13 October 2017

OBSERVATIONS BY THE GOVERNMENT OF THE FRENCH REPUBLIC ON THE MERITS OF COMPLAINT No. 142/2017, FIECI AND SNEPI CFE-CGC v. FRANCE

1. In a letter dated 10 February 2017, the European Committee of Social Rights (hereinafter "the Committee") forwarded to the French Government the complaint lodged on 23 January 2017 by the French trade union federation, the *Fédération de syndicats des métiers de l'ingénierie, de l'informatique, du conseil, de la formation, des bureaux et d'études* (hereinafter "the FIECI") and the *Syndicat national de l'encadrement du personnel de l'ingénierie* (hereinafter "the SNEPI CFE-CGC"), requesting the Committee to find that the situation in France is not in conformity with Article 5 (right to organise) of the European Social Charter (hereinafter "the Charter").

2. On 4 July 2017, the Committee declared the aforementioned complaint admissible.

3. The Government would like to make the following submissions to the Committee

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I. THE COMPLAINTS

4. The FIEPI and the SNEPI CFE-CGC allege that Article L. 2143-3 of the Labour Code, as interpreted by the French courts, prohibiting a trade union from appointing a trade union representative from among its members in a company in the event that candidates it put forward for the workplace elections who received at least 10% of the vote have withdrawn, infringes Article 5 of the Charter because it unreasonably restricts the freedom of trade unions to choose their own trade union representatives.

II. DOMESTIC LEGISLATION IN FORCE

1) Reminder of the legislation at issue

5. Law No. 2008-789 of 20 August 2008 on the reform of social democracy and working time amended Article L. 2143-3 of the Labour Code on the appointment of trade union representatives in companies with fifty or more employees.

6. It added a further condition to those generally required to be appointed as a trade union representative – relating to age, continued employment by the company and length of service – referred to as "electoral legitimacy".

7. Accordingly, Article L. 2143-3 of the Labour Code, in its current version as amended by Law No. 2014-288 of 5 March 2014 on vocational training, employment and social

democracy, provides as follows:

"Each representative trade union in a company or an establishment with fifty employees or more, constituting a trade union branch, shall appoint one or more trade union representatives to represent it in dealings with the employer from among candidates to the workplace elections, who have received, in their personal capacity and in their category, at least 10% of the votes cast in the first round of the last elections for the works council, the single staff delegate or the staff delegation, irrespective of the number of voters, although within the limits set by Article L. 2143-12.

If none of the candidates put forward by the trade union for workplace elections satisfies the conditions set out in the first paragraph above or if there is no longer any candidate to the workplace elections in the company or establishment who satisfies these conditions, a representative trade union may appoint a trade union representative from among the other candidates or, failing that, from among its members within the company or establishment.

A trade union representative may be appointed once the minimum staff number of fifty has been attained for twelve months, whether successive or not, over the last three years.

An appointment of this type may be made within an establishment bringing together employees under the management of a representative of the employer and constituting a workforce with its own interests, liable to give rise to joint and specific claims."

8. Under these provisions, trade unions must appoint a trade union representative from among the candidates who have obtained a personal score of at least 10% at the last workplace elections.

9. However, an exception to this rule may be made in the two following cases:
   - if none of the candidates put forward by the trade union to the workplace elections has reached a personal score of at least 10%;
   - if there is no longer a candidate to the workplace elections left in the company or establishment who has reached a personal score of at least 10%.

10. In these two scenarios, the trade union may appoint a trade union representative from among the candidates who obtained less than 10% in the last workplace elections or, failing that, from among its members in the company or establishment.

2) <u>Reminder of the background to and aims of this new legislation</u>

11. The reform of social democracy brought about by the Law of 20 August 2008 is a priority of the Government, which has made it one of the pillars of its labour law reforms. The aim was to strengthen the legitimacy and role of collective bargaining as an essential tool for the modernisation of the system of labour relations, which should make it possible to adapt French legislation so as to afford the law and collective agreements complementary roles.

12. For the vitality of social democracy to be preserved, social dialogue needs to be based on strong, legitimate organisations. This aim entailed a reform of trade union representativeness to enhance the legitimacy of negotiating partners, basing this on new criteria, assessed regularly and reliably, and taking account in particular of the type of electorate involved.

13. On 18 June 2007, as part of this essential project to reform social democracy, and pursuant to Article L.1 of the Labour Code, the Government presented the social partners with a concept paper inviting them to negotiate with it on the criteria of representativeness, the rules on the validity of agreements and collective bargaining in small and medium-sized enterprises.

14. Following the consultation on this paper, the negotiations resulted in the signature, on 9 April 2008 by the CFE-CGC, the *Mouvement des entreprises de France* (MEDEF), the *Confédération générale des petites et moyennes entreprises* (CGPME), the *Confédération générale du travail* (CGT) and the *Confédération française démocratique du travail* (CFDT) of a "joint position on representativeness, the development of social dialogue and the funding of trade unionism" (Document No. 1, appended).

15. The Law of 20 August 2008 was drawn up on the basis of this joint position and is intended to assign a greater role to collective bargaining by conferring more legitimacy on the social partners and enhancing the validity and scope for action of collective agreements.

16. It should be pointed out that since the creation of the institution of trade union representative by the Law of 27 December 1968 on the exercise of the right to organise in companies, the appointment of such representatives has been the prerogative of representative trade unions. Consequently, company trade unions which have established their representativeness are authorised to make such appointments, along with the trade union federations to which they belong, provided that their statutes do not rule this out and their field of competence covers the company, in both geographical and occupational terms.

17. Unlike staff representatives, whose role is merely to raise grievances, trade union representatives, who are the trade union's spokespersons within the company, have a negotiating role. They are the employer's discussion partners within the company when collective agreements are negotiated and concluded.

18. In the period between the creation of trade union representatives in 1968 and the reform that was adopted under the Law of 20 August 2008, the law had simply required the trade union to be representative and the company to be a certain size for trade union representatives to be appointed.

19. The adoption of the Law of 20 August 2008 considerably altered the rules on representation, introducing a democratic requirement into the staff representation system with a view, in particular, to enhancing the personal credit of trade union representatives

among employees.

20. This requirement, which relates to the granting of the actual status of representative trade union, also applies to employees who are appointed as trade union representatives, who must have received, in their personal capacity, at least 10% of the votes cast in the first round of the most recent workplace elections.

21. This means that trade union representatives now have dual legitimacy – an institutional legitimacy, which they draw from their membership of a representative trade union, and a personal legitimacy, which they draw from their score in the workplace elections.

22. However, while, in principle, trade unions may only appoint an employee who has received at least 10% of the votes cast in the first round of the workplace elections, Article L. 2143-3, paragraph 2, of the Labour Code provides for exceptions to the legal obligation laid down in paragraph 1 of the same article intended to deal with situations in which it is materially impossible for the trade union to appoint a representative.

23. The Law of 20 August 2008 provided for only one exception, namely a situation in which all the candidates who had obtained at least 10% of the votes were no longer with the company. Law No. 2014-288 of 5 March 2014 on vocational training, employment and social democracy amended paragraph 2 of Article L. 2143-3 of the Labour Code to add the possibility of a derogation from the rule in a situation where none of the candidates had obtained at least 10% of the votes. This stipulation, which was not made in the reform of 20 August 2008, makes it possible to cater for situations in which it is materially impossible for a trade union to appoint a representative.

3) Judicial interpretation of the contested provision

24. In their complaint, the FIECI and the SNEPI CFE-CGC contest the judicial interpretation of Article L. 2143-3 of the Labour Code, particularly the judgment of the Puteaux district court of 24 June 2015 and the subsequent judgment of the Court of Cassation of 24 May 2016, given in the context of the appointment of trade union representatives in the social and economic unit *EDF Energies nouvelles*.

25. In a judgment of 24 June 2015, the Puteaux district court set aside the appointment by the SNEPI CFE-CGC of a trade union representative on the ground that the appointed member did not satisfy the conditions of Article L. 2143-3, paragraph 2, of the Labour Code as two candidates had received over 10% of the votes and still worked in the company.

26. The court gave the following reasons for its finding:

> "It has been found that from the point at which a trade union has candidates who have received at least 10% of the votes cast during the first round, it is obliged to appoint a trade union representative from among these (Court of Cassation, Social Affairs Division (C. Cass. Soc.) 29.06.11, No. 10-60394). It is only when these elected representatives have left the company that the trade union is allowed to broaden its choice, as the trade union no longer materially has any candidates capable of legally

performing the function of trade union representative (C.Cass Soc 27.02.2013, No. 12-18828).
Consequently, the SNEPI CFE-CGC did not have the right to appoint Bruno L. instead of his colleagues, who satisfied the legal conditions and were still members of the company's staff".

27. In a judgment dated 24 May 2016, the Social Affairs Division of the Court of Cassation rejected an appeal by the SNEPI CFE-CGC and one of its members, Mr Lecaille, whose appointment had been set aside, on the following grounds:

"However, whereas the obligation imposed by Article L. 2143-3 of the Labour Code on representative trade unions to choose their trade union representative firstly among candidates who have obtained at least 10% of the votes is not incompatible with any prerogative inherent in freedom of association and, in attempting to ensure that the employees themselves determine which persons are most capable of defending their interests in the company and negotiating on their behalf, it does not constitute any arbitrary interference in trade union operations;
Whereas having found that the SNEPI CFE-CGC had candidates who had obtained 10% of the votes cast in the first round of the last workplace elections, the district court, which was not expected to carry out an investigation into the fraudulent nature of these candidates' withdrawal and was not asked to do so, inferred precisely from this that the trade union could not rely on the provisions of Article L. 2143-3, paragraph 2, of the Labour Code to appoint a trade union representative who did not meet the criteria set out in paragraph 1 of the same article".

28. These decisions form part of an established body of case-law of the Court of Cassation, which considers that Article L. 2143-3 of the Labour Code does not allow representative trade unions to appoint a union representative from among candidates who have obtained less than 10% of the votes cast or among their members if the trade union has candidates within the company who have obtained 10% of the votes, even where the latter refuse to perform the function of representative (Soc. 29 June 2011, No. 10-60.394; Soc. 20 June 2012, No. 11-21.425; Soc. 20 June 2012, No. 11-18.586; Soc. 24 September 2013, No. 12-60.583; Soc. 25 November 2015, No. 15-14.061; Soc. 3 November 2016, Nos. 15-60.203 and 15-60.223).

III. DISCUSSION OF THE MERITS OF THE COMPLAINTS

29. The Government notes firstly that in support of their argument the complainant organisations cite Article 11 of the European Convention on Human Rights. In this respect, the Government points out that Article 4 of the Additional Protocol of 1995 providing for a system of collective complaints of 9 November 1995 states that the complaint must "relate to a provision of the Social Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision". The complainant organisations cannot therefore legitimately invoke a violation of provisions of the European Convention on Human Rights before the European Committee of Social Rights.

30. Article 5 of the Charter provides:

> "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations".

31. The Committee has already asserted that this stipulation does not prevent a state from introducing trade union representativeness criteria.

32. However, it has also pointed out that for the situation to be in conformity with Article 5 of the Charter, the representativeness criteria applied must be reasonable, clear, pre-established, objective, imposed by law and permit judicial review (Conclusions XVI-1 (2000), Belgium; Conclusions 2016, Ukraine).

33. In its conclusions of 2014 on the application of Article 5 by France, the Committee stated as follows:

> "In its previous conclusion (Conclusions 2010), the Committee took note of the new representativeness criteria established by Act No. 2009-789 of 20 August 2008 on the reform of social democracy and working time. In this context, it noted that in April 2010, the Court of Cassation had given a judgment (No. 899), in which it had considered that Article 5 of the Charter did not prohibit the existence of some kind of trade union representativeness. The Committee had confirmed that this was the case as long as the criteria of representativeness were reasonable, clear, predetermined, objective and laid down in law and could be subject to judicial scrutiny (see Conclusions XV-1 (2000), France).
>
> With regard to the criteria set by the aforementioned law, the Committee considered that they were clear, predetermined, objective, laid down in law and subject to judicial scrutiny. On the other hand, as to whether they could be considered reasonable, the Committee noted that several trade unions had criticised the reform, particularly the thresholds, which they regarded as too high (trade unions are required to have obtained at least 10% of the votes cast in the first round of the most recent elections of the works council or the company's staff representatives). … Bearing in mind that the system established by the new law would only be in place in 2013, the Committee decided to examine the consequences of the implementation of the new legislation on freedom to organise at a later stage and reserved its position on the matter in the meantime".

34. At all events, the Government notes that the complainant organisations do not question the 10% threshold set by the Law of 20 August 2008 in any way but simply complain about the fact that it is impossible for trade unions to appoint a union representative among their members if the candidates who have obtained at least 10% of the votes refuse to be appointed.

35. The Government considers that the introduction of representativeness criteria, intended

to enhance social democracy, and the strict interpretation of the exceptions prescribed by the law to the application of these criteria, do not in any way undermine the trade union's freedom to choose the candidates that it wishes to put forward for elections, and consequently the persons it may subsequently appoint as union representatives, and is therefore not in breach of Article 5 of the Charter.

36. Firstly, the Government would point out that the representativeness criteria introduced by the Law of 20 August 2008 are the culmination of a process of reflection carried out with the social partners and a response to the obsolescence of the criteria formerly in force, particularly the irrefutable presumption of representativeness enjoyed formerly by five major trade union confederations under a ministerial order of 1966.

37. The Government therefore took the view, and was joined in this by the trade unions, that it was necessary to strengthen the legitimacy of trade union representatives, given that the collective agreements signed by these representatives applied to all the employees falling within their jurisdiction whether they were members of the union signing the agreement or not.

38. The new rules on the appointment of trade union representatives provided for by the Law of 20 August 2008 reproduce those of the joint position of 9 April 2008 referred to in paragraph 14 above, Article 10-3 of which states: "Organisations recognised as being representative in companies with 50 employees or more may appoint a trade union representative chosen from among the candidates who have received at least 10% of the votes in the last workplace elections".

39. The Government also notes that the CFDT, which was consulted in connection with the complaint by the *Confédération générale du travail – Force ouvrière* (CGT-FO) to the International Labour Office referred to by the complainant organisations, stated in its observations of 15 December 2010 that "the freedom to appoint trade union officials is preserved while enhancing the legitimacy of the trade union … The freedom of appointment conferred on unions is actually considerable …. The slight constraint of appointing a person who has been a candidate simply obliges the union to think ahead regarding who it wishes to represent it when submitting the list of candidates for election. But this constraint is more than compensated for by the strengthening of the links between the employees and the union, which consolidates its legitimacy and freedom. Given that the union acts on behalf of the employees, particularly when it performs its role as negotiator, it is normal and useful for the employees to be acquainted with the person who has the authority to conclude collective agreements which concern them directly" (Document No. 2, appended).

40. Similarly, in its observations of 15 December 2010, the CGT stated that: "the organizations which signed the joint position paper considered that this [i.e. the new conditions to be satisfied for the appointment of a trade union representative] did not constitute a constraint which jeopardized the freedom of unions to appoint their delegates, otherwise they would not have accepted this provision" (Document No. 3, appended).

41. Therefore, the new condition set by the Law of 20 August 2008 for the choice of trade union representatives does not in any way constitute a measure which limits or impairs the legal exercise of the right of organisations to elect their representatives freely and to organise their own management and activities within the meaning of Article 5 of the

Charter.

42. Secondly, the aim of this new condition is to strengthen the link between workers and their representatives holding the power to negotiate and sign collective agreements, thus enhancing the latter's legitimacy and increasing social democracy within companies.

43. In this respect, the Government stresses that the Court of Cassation has adopted a broad interpretation of the electoral requirement, in accordance with the aim of the Law of 20 August 2008 to ensure that employees themselves determine which persons are most suited to defending their interests in the company and conducting negotiations on their behalf, deeming that for this condition to be fulfilled, employees:

    - may have stood in any election – for company or establishment works councils or to be staff representatives (Soc. 28 September 2011, No. 11-10.601) (Document No. 4, appended);
    - may have stood to become full representatives or substitutes and keep their scores even if they have left the trade union upon whose list they stood for election (Soc. 28 September 2011, No. 10-26.762) (Document No. 5, appended);
    - may be appointed by a trade union other than the one on whose list they were elected at the most recent elections (Soc. 17 April 2013, No. 12-22.699; Soc. 14 November 2013, No. 12-29.984) (Documents Nos. 6 and 7, appended).

44. The Court of Cassation also considered that the obligation established by Article L. 2143-3, paragraph 1, of the Labour Code was a matter of public policy. In other words the trade unions in a company could not choose to ignore the requirement even if the employer agreed (Soc. 29 May 2013, No. 12-26.457). The electoral legitimacy of a trade union representative may not therefore be amended by a unilateral undertaking or a collective agreement.

45. Instead, the Court of Cassation made a strict interpretation of the exceptions provided for in Article L. 2143-3, paragraph 2, of the Labour Code, in accordance with the legitimate aim of the Law of 20 August 2008, which was to enhance the personal credit of union representatives among employees.

46. The legislator's aim was indeed to confine the possibility of resorting to representatives whose electoral legitimacy was partly or completely lacking to circumstances in which it was materially impossible for the trade union to appoint a representative satisfying the representativeness condition (namely when the candidates who obtained 10% of the votes cast had left the company or none of the candidates put forward had reached this score).

47. Contrary to what the complainant organisations assert, the situation in which a trade union finds itself unable to appoint a representative from among its members in the company following the withdrawal of the candidates it put forward for the workplace elections who obtained at least 10% of the votes cast cannot be equated to the two exceptions provided for by Article L 2143-3, as cited above.

48. Candidates who stand for workplace elections accept thereby that they may be appointed as trade union representatives.

49. The main guarantors of workers' representation and the defence of their interests are still the trade unions themselves, through the performance of their functions and their responsibilities. Accordingly, it is for the trade unions to be sure, prior to workplace elections, of the real intentions and consent of employees they put forward as candidates or to draw the consequences of their refusal, which may be based on perfectly legitimate reasons.

50. Furthermore, the Government points out that it would be easy for a trade union to put forward a candidate who is certain, in its view, to obtain the 10% of votes required while being aware that he or she will withdraw subsequently in favour of a candidate who would never have reached this score. Such an abuse of the dual legitimacy of trade union representatives provided for by Article L. 2143-3 of the Labour Code would of course be contrary to the motives of the Law of 20 August 2008.

51. Lastly, the Government points out that the arrangements provided for by the contested provisions were validated by the French courts in the light of the principle of freedom of association, which is protected by the French Constitution of 4 October 1958 and by several international instruments for the protection of fundamental rights to which France is a party.

52. For example, in a judgment of 14 April 2010 (Appeals Nos. 09-60.426 and 09-60.429), the Court of Cassation declared that Article L. 2143-3 of the Labour Code complied with the international law set out in Articles 4 of Convention No. 98 of the International Labour Organisation (hereinafter "the ILO"), 5 of ILO Convention No. 135, 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 and 6 of the European Social Charter, and 28 of the Charter of Fundamental Rights of the European Union, on the following grounds:

    "Whereas, however, firstly, the right to conduct collective bargaining has in principle become one of the main elements of the right to form and join trade unions for the defence of one's interests set out in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, states are still free to reserve this right to representative trade unions, and this is not incompatible with Articles 5 or 6 of the European Social Charter, Article 8 of the Charter of Fundamental Rights of the European Union or ILO Conventions Nos. 98 or 135. The fact that, when workplace elections are held, employees take part in the determination of trade unions suited to represent them in collective bargaining does not have the effect of weakening trade union representatives in comparison to elected representatives as they each preserve their own powers;

    Whereas, secondly, the obligation imposed on representative trade unions to choose their trade union representative firstly among candidates who have obtained at least 10% of the votes is not incompatible with any prerogative inherent in freedom of association and, in attempting to ensure that the employees themselves determine which persons are most capable of defending their interests in the company and negotiating on their behalf, it does not constitute any arbitrary interference in trade union operations" (Document No. 8, appended).

53. In addition, on 20 September 2010, the Court of Cassation referred to the Constitutional Council for a preliminary ruling on the constitutionality of Article "L. 2143-3 of the

Labour Code, deriving from Law No. 2008-789 of 20 August 2008, with regard to the constitutional principles of pluralism of viewpoints, freedom of association, worker participation [and] free collective bargaining, …".

54. In Decision QPC n°2010-63/64/65 of 12 November 2010, the Constitutional Council found this article to be in conformity with the Constitution, stating that "by requiring representative trade unions to choose their trade union representative firstly among candidates who have obtained at least 10% of the votes in the most recent workplace elections, Article L. 2143-3 involves employees in the appointment of persons recognised as being most capable of defending their interests in the company and negotiating on their behalf. In adopting this article, the legislature did not infringe the principle of freedom of association laid down in the sixth paragraph of the 1946 Preamble" (Document No. 9, appended).

55. Consequently, the Constitutional Council considered that by requiring candidates for the function of trade union representative to have a personal score of 10% while laying down subsidiary rules for cases in which it is materially impossible to appoint a representative, the Law of 20 August 2008 did not impair the exercise of the right to organise; it merely made it subject to conditions to make it more legitimate.

56. In so doing, both the Court of Cassation and the Constiutional Council held that the rules for the appointment of trade union representatives complied with the principle of the freedom to organise because of the very purpose of the reform of August 2008, which was to enhance the personal credit of union representatives among employees.

IV. THE COSTS INCURRED BY THE COMPLAINANT ORGANISATION

57. The FIECI and the SNEPI CFE-CGC invite the Committee to ask the Government to pay them a sum of €7 000 excluding tax to cover the expenses they claim to have incurred in preparing and lodging this collective complaint.

58. However, the Government would point out that no provision is made in the relevant texts for the costs of proceedings to be reimbursed, nothing being stipulated to this effect in the Additional Protocol to the European Social Charter providing for a system of collective complaitns of 9 November 1995, the Explanatory Report to this Protocol or the European Committee of Social Rights' Rules of Procedure.

59. In this respect, the Government notes that the Committee of Ministers asserted, in Resolution CM/ResChS(2016)4, adopted on 5 October 2016 in connection with Collective Complaint No. 100/2013 – European Roma Rights Centre (ERRC) v. Ireland – that "the question of compensation for costs is not provided for under the Additional Protocol to the European Social Charter providing for a system of collective complaints and on that basis [it] does not accept the ECSR's invitation on this point" [i.e. to recommend that Ireland should pay a sum to the complainant organisation]".

60. Consequently, the Government invites the Committee to dismiss the complainant

organisations' request for the reimbursement of a sum of €7 000 they claim to have incurred.

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61. In the light of all of the foregoing, the Government considers that there has been no violation of Article 5 of the Charter in connection with the French legislation on the appointment of trade union representatives in companies with fifty employees or more and its application by the Court of Cassation.

APPENDICES

Document No. 1: Joint position of 9 April 2008 on representativeness, the development of social dialogue and the funding of trade unionism

Document No. 2: Observations by the CFDT of 15 December 2010

Document No. 3: Observations by the CGT of 15 December 2010

Document No. 4: Judgment of the Court of Cassation of 28 September 2011, No. 11-10.601

Document No. 5: Judgment of the Court of Cassation of 28 September 2011, No. 10-26.762

Document No. 6: Judgment of the Court of Cassation of 17 April 2013, No. 12-22.699

Document No. 7: Judgment of the Court of Cassation of 14 November 2013, No. 12-29.984

Document No. 8 : Judgment of the Court of Cassation of 14 April 2010, No. 09-60.426 et 09-60.429

Document No. 9: Decision of the Constitutional Council of 12 November 2010, QPC No. 2010-63/64/65