EUROPEAN COMMITTEE OF SOCIAL RIGHTS
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Case document No. 4

***Confédération française démocratique du travail* (CFDT) v. France**
Complaint No. 189/2020

OBSERVATIONS BY THE EUROPEAN TRADE UNION CONFEDERATION

Registered at the Secretariat on 29 October 2020

Collective Complaint

Confédération française démocratique du travail (CFDT)

v. France

Complaint No. 189/2020

Observations by the European Trade Union Confederation (ETUC)

(29/10/2020)

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1 In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (CCPP - Article 7§2) the European Trade Union Confederation (ETUC) would like to submit the following observations.

2 The ETUC welcomes the fact that the respondent State has ratified not only the Revised European Social Charter (RESC) in its entirety but also the Collective Complaints Procedure Protocol (CCPP).

3 These observations focus on the core allegation of the complaint, i.e. the possibility to by-pass social partners, in particular trade unions, from the right to collective bargaining and conclude collective agreements via the so-called "employers' referendum" in particular in very small enterprises where no social elections are required and/or elected staff representation are present.

4 These observations have been drafted in consultation with the complainant organisation CFDT being also an affiliated organisation of ETUC.

I. General observations

5 The main content of the complaint is described in the Decision on admissibility of 6 July 2020 as follows:

> The CFDT states that under Section 8 of Order No. 2017-1385 of 22 September 2017 on strengthening collective bargaining (ratified by Law No. 2018-217 of 29 March 2018), as inserted in Articles L. 2232-21, L. 2232-22, L. 2232-22-1 et L. 2232-23 of the French Labour Code, in small enterprises with fewer than 11 employees, where the holding of staff elections is not required, as well as in enterprises with 11 to 20 employees where there is no elected staff representative, the employer can decide to submit a draft agreement directly to the employees for voting. Once approved by a two-thirds majority of the employees, this agreement shall be of the same force and effect as a company-wide collective agreement. CFDT alleges that these provisions enable employers in small enterprises to bypass collective bargaining with trade union representatives in breach of Article 6§2 of the Charter.[1]

6 It is thereby to be noted that - as indicated in the complaint –

> 'the Order No. 2017-1385 of 22 September 2017 constitutes the final element in a series of major reforms that have overturned the rules governing social dialogue at company level and the role of company-level agreements: the ANI (national cross-industry agreement) on employment protection of 11 January 2013, Law No. 2015-994 of 17 August 2015 on social dialogue and employment and Law No. 2016-1088 of 8 August 2016 on employment, modernising social dialogue and protecting career paths. Their stated objective is so-called to strengthen and legitimise social dialogue. As these reforms have continued, numerous matters have been made the subject of company-level bargaining, moving away from the existing situation, in which employee safeguards

[1] ECSR Decision on admissibility, 6 July 2020, *Confédération Française Démocratique du Travail (CFDT) v. France*, Complaint No. 189/20, para. 1.

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and protection are the subject of various forms of regulation at branch level and in legislation.'

7 At an editorial level, it is indicated that all quotations will be governed by the following principles: they focus on the issues at stake (while still showing the relevant context) and will be ordered chronologically (beginning with the newest text). In principle, emphases which are underlined are added by the ETUC; eventual footnotes are, in principle, omitted.

II. International and European law and material

8 The ETUC would like to start by referring to pertinent international law and material.[2] From the outset, it should be noted that France has ratified all instruments (as far as they are open for ratification) mentioned below, unless otherwise mentioned.

A. United Nations

9 At a general level, it appears more than relevant to refer at first to the most recent Joint Declaration of the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CESCR) dealing with the two Covenants ICCPR and ICECSR respectively. Adopted at the occasion of the 100th anniversary of the ILO, in their Joint Statement 'Freedom of association, including the right to form and join trade unions' the following is highlighted:[3]

> 1. (…) The Human Rights Committee and the Committee on Economic, Social and Cultural Rights, welcome the progress made by States to guarantee the freedom of association in labour relations. At the same time, the two committees note the challenges faced in the effective protection of this fundamental freedom, including undue restrictions of the right of individuals to form and join trade unions, the right of unions to function freely, and the right to strike. (…)
>
> 3. Freedom of association includes the right of individuals, without distinction, to form and join trade unions for the protection of their interests. The right to form and join trade unions requires that trade unionists be protected from any discrimination, harassment, intimidation, or reprisals. The right to form and join trade unions also implies that trade unions should be allowed to function freely, without excessive restrictions on their functioning.
>
> 4. Freedom of association, along with the right of peaceful assembly, also informs the right of individuals to participate in decision making within their workplaces and communities in order to achieve the protection of their interests.(…)

10 From the outset, it is to be noted that neither the Universal Declaration on Human Rights (UDHR) of 1948, nor the International Covenant on Civil and Political rights

[2] As to legal impact of the 'Interpretation in harmony with other rules of international law' see the ETUC Observations in No. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden* - Case Document no. 4, Observations by the European Trade Union Confederation (ETUC), paras. 32 and 33.

[3] Joint Declaration of the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CECSR), Statement on freedom of association, including the right to form and join trade unions, 18 October 2019.

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(ICCPR) of 1966[4], nor the International Covenant on Economic, Social and Cultural Rights (ICECSR) of 1966, contain a provision that explicitly recognises a right to collective bargaining. Whereas the UDHR (Articles 20(1) and 23(4))[5] and the ICCPR (Article 22(1))[6] recognise the freedom of association in a generic way, the ICECSR recognises the freedom of association in a more specific way *id est* as a right of everyone to form and join trade unions in its Article 8. It is however clear, in particular from the case law of the CECSR, that the right to collective bargaining is thereby covered (see, as an example, para. 13).

1. International Covenant on Economic, Social and Cultural Rights (ICESCR)[7]

a) The Right to form and join trade unions (Article 8 ICECSR)

11 The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides in Article 8 on the right to form and join trade unions the following:

> **Article 8**
>
> 1. The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
>
> (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

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[4] Ratified by France in 1980.

[5] Articles 20(1) and 23(4) UDHR respectively state:
Article 20(1) Everyone has the right to freedom of peaceful assembly and association.(…)
Article 23(4) Everyone has the right to form and to join trade unions for the protection of his interests.

[6]

[6]

Article 22 ICCPR provides:
1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

[7] Ratified by France in 1980.

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(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

b) CECSR Concluding observations concerning France

12 Until now, the CECSR has not yet elaborated a specific 'General Comment' in relation to Article 8.

13 In its Concluding observations on the fourth periodic report of France, adopted in 2016, the CECSR highlighted in relation to 'trade union rights' the following:[8]

Trade union rights

27. The Committee condemns the reprisals taken against trade union representatives and observes with concern the shrinking of democratic space for collective bargaining (art. 8).

28. **The Committee urges the State party to adopt effective measures for the protection of persons involved in trade union activities and for the prevention and punishment of all forms of reprisal. It also urges the State party to ensure that the collective bargaining process is effective and to uphold the right to union representation in accordance with international standards as a means of protecting workers' rights in terms of working conditions and social security.**

B. International Labour Organisation (ILO)

1. ILO Constitution and Declarations

14 One of the ILO's principle missions is to promote collective bargaining. This mission was already set out Article 1(1) to the ILO Declaration of Philadelphia of 1944 on the aims and purposes of the ILO (annexed to the Constitution) and which forms part of the ILO Constitution. Article 1(1) states:

III

The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: (…) (e) the effective recognition of the right of collective bargaining, (…).[9]

[8] CECSR (2016), Concluding observations on the fourth periodic report of France, adopted at its 58th meeting of 6-24 June 2016.
[9] ILO Declaration of Philadelphia of 1944.

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15 Firstly, in relation to the following Declarations the **ILO Declaration on Fundamental Principles and Rights at Work of 1998**, defines as first among the four main subjects of human rights in the labour field "freedom of association and the effective recognition of the right to collective bargaining' by stating that the International Labour Conference

> 2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> > 1. Freedom of association and the effective recognition of the right to collective bargaining; (…)[10]

16 This was reaffirmed by the **ILO Declaration on Social Justice for a Fair Globalization of 2008.**[11]

17 More recently, in the framework of its 100th anniversary, the ILO International Labour Conference adopted in 2019 the "**ILO Centenary Declaration for the Future of Work**"[12], in which the following is stated in relation to the right of collective bargaining:

> The Conference declares that:
>
> A. In discharging its constitutional mandate, taking into account the profound transformations in the world of work, and further developing its human-centred approach to the future of work, the ILO must direct its efforts to:
>
> (…) (vi) promoting workers' rights as a key element for the attainment of inclusive and sustainable growth, with a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights; (..;)
>
> B. Social dialogue, including collective bargaining and tripartite cooperation, provides an essential foundation of all ILO action and contributes to successful policy and decision making in its member States.
>
> C. Effective workplace cooperation is a tool to help ensure safe and productive workplaces, in such a way that it respects collective bargaining and its outcomes, and does not undermine the role of trade unions.

2. Conventions

18 Several ILO Conventions deal with the freedom of association and the right to collective bargaining in general and the public sector in particular. In first instance,

[10] ILO Declaration on Fundamental Principles and Rights at Work of 1998, adopted by the International Labour Conference at its Eighty-sixth session on 18 June 1998.
[11] ILO Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008
[12] ILO Centenary Declaration for the Future of Work, adopted by ILC at its 108th Session, Geneva, 21 June 2019.

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there are the two fundamental 'hard core' Conventions No. 87[13] and 98[14] as well as the ILO Conventions No. 151[15] and 154[16].

19 Furthermore, there is the Workers' Representatives Convention No. 135 which aims at ensuring that the role of trade unions is not undermined.[17]

a) Convention No. 87

20 Convention No. 87 ensures in first instance the protection of freedom of association and whereby the protection afforded to workers and trade union representatives against acts of anti-union discrimination and acts of interferences is an essential aspect as such acts may result in law and practice in a denial of freedom of association and also consequently of collective bargaining.

21 Although the Convention does not address the issue of collective bargaining in an explicit way, in Article 3 it formulates a principle of trade union autonomy in a very broad manner. It indicates that workers' and employers' organisations have the right to organise their activities and to formulate their programmes. Since according to Article 10 of the Convention, these organisations need to 'further and defend the interests of workers or of employers', there is no reason why the right to collective bargaining would not be covered by this principle, as also confirmed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee of Freedom of Association (CFA) case law (see below II.B.4).

b) Convention No. 98

22 The Convention No. 98 supplements in certain aspects Convention No. 87 and has three main objectives amongst with the promotion of collective bargaining, via in particular its Article 4 which states:

> **Article 4**
>
> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

23 Convention No. 98 has since then been supplemented by the Labour Relations (Public Service Convention No. 151 of 1978 but more importantly in the concext of this complaint by the Collective Bargaining Convention No. 154 of 1981).

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[13] Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) - Entry into force: 4 July 1950.
[14] Convention concerning the right to Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (No. 98) – Entry into force: 18 July 1951.
[15] Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, 1978 (No. 151) - Entry into force: 25 Feb 1981; France did not ratify this Convention.
[16] Convention concerning the Promotion of Collective Bargaining, 1981, (No. 154) - Entry into force: 11 Aug 1983; France did not ratify this Convention.
[17] Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971 (No. 135) - Entry into force: 30 Jun 1973; France did ratify this Convention on 30 June 1972.

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c) Convention No. 154

24 Convention No. 154 of 1981 concerning the Promotion of Collective Bargaining has as main aim to promote free and voluntary collective bargaining and is therefore intended to apply to all branches of economic activity (Article 1§1).

25 The Convention provides in Articles 2 and 3 wide definitions of the term collective bargaining by providing that:

> **Article 2**
>
> For the purpose of this Convention the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for--
>
> (a) determining working conditions and terms of employment; and/or
> (b) regulating relations between employers and workers; and/or
> (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.
>
> **Article 3**
>
> 1. Where national law or practice recognises the existence of workers' representatives as defined in Article 3, subparagraph (b), of the Workers' Representatives Convention, 1971, national law or practice may determine the extent to which the term collective bargaining shall also extend, for the purpose of this Convention, to negotiations with these representatives.
> 2. Where, in pursuance of paragraph 1 of this Article, the term collective bargaining also includes negotiations with the workers' representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers' organisations concerned.

26 Finally, in Articles 5 to 8 under Part III on 'Promotion of Collective Bargaining', the Convention provides that:

> **Article 5**
>
> 1. Measures adapted to national conditions shall be taken to promote collective bargaining.
> 2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:
> (a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
> (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;
> (c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;
> (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;
> (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

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Article 7

Measures taken by public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organisations.

Article 8

The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining.

27 Convention No. 154 is supplemented by Recommendation No. 163 of 1981 concerning the Promotion of Collective Bargaining.[18] The latter specifies the relevant provisions of the Convention as follows:

I. Means of Promoting Collective Bargaining

2. In so far as necessary, measures adapted to national conditions should be taken to facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations.

3. As appropriate and necessary, measures adapted to national conditions should be taken so that--

(a) representative employers' and workers' organisations are recognised for the purposes of collective bargaining;

(b) in countries in which the competent authorities apply procedures for recognition with a view to determining the organisations to be granted the right to bargain collectively, such determination is based on pre-established and objective criteria with regard to the organisations' representative character, established in consultation with representative employers' and workers' organisations.

4. (1) Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.

(2) In countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels.

28 In this framework it should also be mentioned that the Collective Agreements Recommendation, 1951 (No. 91) provides for a definition of collective agreement as being:[19]

II. Definition of Collective Agreements

2. (1) For the purpose of this Recommendation, the term collective agreements means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the

[18] Collective Bargaining Recommendation, 1981 (No. 163), adopted in Geneva at the 67th ILC Session on 19 June 1981.
[19] Collective Agreements Recommendation, 1951 (No. 91), adopted in Geneva at the 34th ILC session on 29 June 1951.

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workers duly elected and authorised by them in accordance with national laws and regulations, on the other. (…)

d) Convention No. 135

29 This Convention deals in first instance with the protection and facilities that need to be afforded workers' representatives in the undertaking; however, it also specifies that the existence of workers' representatives in the undertaking might not undermine the prerogatives of trade unions, in particular the one on the right to collective bargaining.

> **Article 3**
>
> For the purpose of this Convention the term workers' representatives means persons who are recognised as such under national law or practice, whether they are--
>
> (a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
> (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.
>
> **Article 5**
>
> Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.

30 This Convention is accompanied by the Workers' Representatives Recommendation, 1971 (No. 143) which provides in its section II. General Provisions, more in particular Paragraphs 2 and 4 similar language as in the Articles 3 and 5 of the Convention[20]. In addition the Recommendation also specifies that:

> 17. (1) Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking.(…)

3. Other relevant ILO instruments

31 Furthermore, the ILO adopted unanimously in 2009 the Resolution "**Recovering from the crisis: A Global Jobs Pact"**.[21] This global policy instrument addresses the social and employment impact of the international financial and economic crisis and "its fundamental objective is to provide an internationally agreed basis for policy-making designed to reduce the time lag between economic recovery and a recovery with decent work opportunities". This Pact makes the following references to collective bargaining:

[20] Workers' Representatives Recommendation, 1971 (No. 143), adopted in Geneva at the 56th ILC session of 23 Jun 1971.
[21] ILO (2009) "Recovering from the crisis: A Global Jobs Pact", adopted by the International Labour Conference at its Ninety-eighth Session, Geneva, 19 June 2009.

I. Principles for promoting recovery and development

9. Action must be guided by the Decent Work Agenda and commitments made by the ILO and its constituents in the 2008 Declaration on Social Justice for a Fair Globalization. We set out here a framework for the period ahead and a resource of practical policies for the multilateral system, governments, workers and employers. It ensures linkages between social progress and economic development and involves the following principles:
(…)

(8) engaging in social dialogue, such as tripartism and collective bargaining between employers and workers as constructive processes to maximize the impact of crisis responses to the needs of the real economy; (…).

II. Decent work responses

Strengthening respect for international labour standards

14. International labour standards create a basis for and support rights at work and contribute to building a culture of social dialogue particularly useful in times of crisis. In order to prevent a downward spiral in labour conditions and build the recovery, it is especially important to recognize that:

(1) Respect for fundamental principles and rights at work is critical for human dignity. It is also critical for recovery and development. Consequently, increase:
(…)
(ii) respect for freedom of association, the right to organize and the effective recognition of the right to collective bargaining as enabling mechanisms to productive social dialogue in times of increased social tension, in both the formal and informal economies.

Social dialogue: Bargaining collectively, identifying priorities, stimulating action

15. Especially in times of heightened social tension, strengthened respect for, and use of, mechanisms of social dialogue, including collective bargaining, where appropriate at all levels, is vital.
16. Social dialogue is an invaluable mechanism for the design of policies to fit national priorities. Furthermore, it is a strong basis for building the commitment of employers and workers to the joint action with governments needed to overcome the crisis and for a sustainable recovery. Successfully concluded, it inspires confidence in the results achieved.
17. Strengthening capacities for labour administration and labour inspection is an important element in inclusive action on worker protection, social security, labour market policies and social dialogue.

4. ILO Supervisory bodies case law

32 There exists a longstanding case law by both the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in particular on the issue of the right to collective bargaining. Below, an overview of the most relevant case law parts is provided both in general as well as specific decisions in relation to France.

a) General case law

(1) Committee of Experts on Application of Conventions and Recommendations

33 In its most recent General Survey on fundamental rights Conventions, in particular on Convention No. 87 (2012), the CEACR states the following:[22]

> 167. The protection afforded to workers and trade union leaders against acts of anti-union discrimination and acts of interference is an essential aspect of freedom of association, as such acts may result in practice in a denial of freedom of association and of the guarantees laid down in Convention No. 87, and also consequently of collective bargaining. Collective bargaining is one of the principal and most useful institutions developed since the end of the nineteenth century. As a powerful instrument of dialogue between workers" and employers" organizations, collective bargaining contributes to the establishment of just and equitable working conditions and other benefits, thereby contributing to social peace. (…)
>
> **Scope of the Convention and methods of application**
>
> ***General principle and authorized exceptions***
>
> 168. Convention No. 98 covers all workers and employers, and their respective organizations, in both the private and the public sectors, regardless of whether the service is essential. The only exceptions authorized concern the armed forces and the police, as well as public servants engaged in the administration of the State (see below). (…)
>
> ***Promotion of collective bargaining***
>
> 199. While law or practice in the vast majority of countries recognizes the right of all workers to negotiate collectively through their trade unions, even though the extent to which collective bargaining is promoted varies, certain systems continue to deprive important categories of workers of this right. These restrictions are in addition to two trends to which the Committee draws attention. The first is the tendency for the legislature in several countries to give precedence to individual rights over collective rights in employment matters. This tendency runs counter to ILO principles, and particularly the Collective Agreements Recommendation, 1951 (No. 91), which recalls the principle of the binding effects of collective agreements and their primacy over individual contracts of employment (with the exception of provisions in the latter which are more favourable to the workers covered by the collective agreement). Secondly, in certain countries, direct agreements between employers and groups of non-unionized workers are much more numerous than the collective agreements concluded with the representative organizations of workers. This shows that the obligation to promote collective bargaining within the meaning of Article 4 is not yet fully respected.
>
> *Workers covered by collective bargaining*
>
> 209. With the exception of organizations representing categories of workers which may be excluded from the scope of the Convention, namely the armed forces, the police and public servants engaged in the administration of the State, recognition of the right to

[22] ILO, International Labour Conference, 101st Session, 2012, Report of the Committee of Experts on the Application of Conventions and Recommendations – Report III (Part 1 B), General Survey – Giving globalisation a human face, Geneva 2012, § 168.

collective bargaining is general in scope and all other organizations of workers in the public and private sectors must benefit from it.

Negotiation with representatives of non-unionized workers

239. Since, under the terms of the Convention, the right of collective bargaining lies with workers" organizations of whatever level, and with employers and their organizations, collective bargaining with representatives of non-unionized workers should only be possible when there are no trade unions at the respective level. Indeed, the Committee considers that direct bargaining between the enterprise and its employees with a view to avoiding sufficiently representative organizations, where they exist, may undermine the principle of the promotion of collective bargaining set out in the Convention. It is in this spirit that Article 5 of the Workers" Representatives Convention, 1971 (No. 135), provides that, where there exist in the same undertaking "both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives".
Article 3(2) of Convention No. 154 is drawn up in similar terms and the Collective Agreements Recommendation, 1951 (No. 91), establishes that the term "collective agreements" means "all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers" organisations, on the one hand, and one or more representative workers" organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other."
240. In practice, the Committee has recalled on several occasions that, where there exists a representative trade union and it is active within the enterprise or branch of activity concerned, the authorization for other workers" representatives to bargain collectively not only weakens the position of the trade union, but also undermines ILO rights and principles on collective bargaining. Despite this principle, several States continue to promote or allow non-unionized workers" representatives to conclude collective agreements, even where there exists in the sector or enterprise concerned a trade union that is more able to guarantee the independence of its positions in relation to the employer. Recalling the principle that the use of machinery for voluntary negotiation has to be encouraged, the Committee considers that if, in the course of collective bargaining with the trade union, the enterprise offers better working conditions to nonunionized workers, there would be a serious risk of undermining the negotiating capacity of the trade union and giving rise to discriminatory situations in favour of the nonunionized staff; furthermore, it might encourage unionized workers to withdraw from the union. Emphasizing that collective bargaining is a fundamental right recognized in many national constitutions, and therefore accorded a high legal ranking, the Committee calls on governments to take measures to prevent direct agreements with non-unionized workers being used for anti-union purposes, as is still the case in certain countries. It has accordingly criticized, for example, the clear disproportion between the high number of direct agreements concluded with non-unionized workers, and the low number of collective agreements with trade unions.

(2) Committee on Freedom of Association

34 From the CFA Digest, (in particular §§ 1231-1561), it becomes amongst others apparent that:[23]

[23] ILO, Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Sixth edition, 2018.

Anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions (§ 1072).

The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers and employers organizations should have the right to organize their activities and to formulate their programmes. (§ 1232)

The voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association. (§ 1313)

The Committee emphasizes the importance of respecting the autonomy of the parties in the collective bargaining process so that the free and voluntary character thereof, established in Article 4 of Convention No. 98, is ensured. (§ 1314)

35 As for collective bargaining being the prerogative of trade unions and is thus not to be opened to obscure organisations or groups of persons, the CFA case law (in particular §§ 1342-1349), mainly based on the Collective Agreements Recommendation, 1951 (No. 91) and the Workers' Representatives Convention, 1971 (No. 135), is also clear that:

The conclusion, with workers who are not union members or who leave their trade union, of collective accords which provide better terms than the collective agreements, serve to discourage collective bargaining as laid down in Article 4 of Convention No. 98. (§ 1342)

The Collective Agreements Recommendation, 1951 (No. 91), emphasizes the role of workers organizations as one of the parties in collective bargaining; it refers to representatives of unorganized workers only when no organization exists. (§ 1343)

The Collective Agreements Recommendation, 1951 (No. 91), provides that: For the purpose of this Recommendation, the term collective agreements means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers organisations, on the one hand, and one or more representative workers organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other. In this respect, the Committee has emphasized that the said Recommendation stresses the role of workers organizations as one of the parties in collective bargaining. Direct negotiation between the undertaking and its employees, by-passing representative organizations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted. (§ 1344)

The Workers Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), also contain explicit provisions guaranteeing that, where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures are to be taken to ensure that the

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existence of elected representatives is not used to undermine the position of the trade unions concerned. (§ 1345)

Collective agreements with the non-unionized workers should not be used to undermine the rights of workers belonging to the trade unions. (§ 1346)

36 In relation to this, it should also be highlighted that the CFA has longstanding case law in relation to so-called solidarist or other associations or grouping of persons and which risk to undermine the trade union activities and prerogatives (see CFA Digest of Case law §§ 1220-1230). The CFA has amongst others stated that:

> The provisions governing solidarist associations should respect the activities of trade unions guaranteed by Convention No. 98. (§ 1222)
>
> The necessary legislative and other measures should be taken to guarantee that solidarist associations do not get involved in trade union activities, as well as measures to guarantee effective protection against any form of anti-union discrimination and to abolish any inequalities of treatment in favour of solidarist associations. (§ 1223)
>
> The interference of solidarist associations in trade union activities, including collective bargaining, through direct settlements signed between an employer and a group of non-unionized workers, even when a union exists in the undertaking, does not promote collective bargaining as set out in Article 4 of Convention No. 98, which refers to the development of negotiations between employers or their organizations and workers organizations. (§ 1226)
>
> The Committee has recalled that legislative or other measures have to be taken in order to ensure that organizations that are separate from trade unions do not assume responsibility for trade union activities and to ensure effective protection against all forms of anti-union discrimination. (§ 1230)

b) Specific case law in relation to France

37 The problem of the collective bargaining rights in particular the possibility of concluding collective agreements with non-union representatives in France has been raised recently also by the CEACR.

> **Direct Request** - adopted 2019, published 109th ILC session (2021) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - France (Ratification: 1951)
>
> The Committee notes, on the one hand, the Government's report and, on the other hand, the observations of the General Confederation of Labour–Force Ouvrière (CGT–FO) received on 9 October 2019. The Committee notes that the observations of the CGT–FO concern, on the one hand, aspects raised in a representation filed under article 24 of the ILO Constitution currently under examination and, on the other hand, additional legislative and practical issues relating, inter alia, to the protection against anti-union discrimination and the possibility of concluding collective agreements with non-union representatives. The Committee requests the government to provide its comments on the additional issues contained in the CGT–FO's observations.

C. Council of Europe

38 The Council of Europe (CoE) is characterised by two main human rights instruments, the European Convention on Human Rights (ECHR, see below 1)) and the European

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Social Charter (ESC, see below 2)) which is at the very core of this complaint. However, there are also other relevant documents (see below 3)).

1. European Convention of Human Rights (ECHR)

39 The right to collective bargaining is, unlike in other international and European human rights texts (see above and below), not explicitly referred to in the ECHR. However, from case law of the European Court of Human Rights (ECtHR) the right to collective bargaining is covered in Article 11 ECHR on 'Freedom of assembly and association' which states the following:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

40 Whereas already in the cases *Gustafsson, Wilson* and *National Union of Journalist and others*[24], the ECtHR already included elements which were rather positive to the trade union involvement in the process of collective bargaining, the actual breakthrough in confirming that Article 11 ECHR covers the right to collective bargaining came with the ECtHR Grand Chamber decision in *Demir and Baykara*.[25]

41 In this case, the ECtHR Grand Chamber reconsidered and reversed its earlier jurisprudence, ruling that, having regard to the development of both international and national labour law and to the practice of the Contracting Parties (of the Council of Europe) in such matters, the right to collective bargaining had, in principle, become one of the essentials of the right to form and join trade unions and is thus enshrined in the protection of freedom of association as guaranteed by Article 11 ECHR.

> "154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. (…)."

[24] ECtHR, *Gustafsson v. Sweden*, App. No. 15573/89, Judgment of 25 April 1996; ECtHR, *Wilson, National Union of Journalists and others v. UK*, App. Nos. 30668/96, 30671/96 and 30678/96, Judgment of 2 July 2002.

[25] ECtHR, 12 November 2008, *Demir and Baykara v. Turkey*, App. No. 34503/97, Judgment of 12 November 2008. In this case a Turkish trade union, active in the civil/public service, was given access to the bargaining table and had concluded a collective agreement with the municipality. As at the at time (mid-1990s) there was no explicit recognition of the freedom of association in/for the Turkish public service and no legal framework for it, the Turkish courts considered the agreement to be null and void. As a consequence, public servants had to repay a wage increase granted under the collective agreement. This was declared to be in violation of Article 11 ECHR by the ECtHR.

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42 In its argumentation in relation to the particular right of collective bargaining, the ECtHR also noted the existence of other international and European instruments (i.a. ILO Convention No. 98 (see II.B.2.b) above), the European Social Charter (Article 6§2) (see II.C.2 below) and the Charter of Fundamental Rights of the European Union (CFREU, in particular Article 28 thereof) (see para. 59 below).

43 This judgment is thus also the fruit of that kind of dynamic interpretation often embraced by constitutional courts in Europe enabling them to continually modernise their case law; even the ECtHR refers in this judgment to the 'living nature of the Convention'.[26]

> 85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
>
> 86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, mutatis mutandis, Marckx, cited above, § 41).

2. European Social Charter (ESC)

44 Trade union rights and in particular the right to collective bargaining are embedded in Articles 5 and 6 of the ESC, both articles belonging to the so-called "hard core provisions of the Charter" and their fundamental character remained thus unchanged in the Revised European Social Charter.

a) Text

45 The European Social Charter provides in Article 6§2 the following:

> **Article 6 – The right to bargain collectively**
>
> With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
> (…)

[26] Jacobs, A. (2014), Article 11 ECHR : The Right to Bargain Collectively under Article 11 ECHR, in Dorssemont, F., Lörcher, K. and Schömann, I. (eds.) (2014) The European Convention of Human Rights and the Employment Relation, London: Hart Publishing, Chapter 12, p. 309-316. The ECtHR had in relation to Article 11 ECHR already pointed out before that the ECHR is a 'living instrument' by stating that '(…) it should be recalled that the Convention is a living instrument which must be interpreted in the light of present-day conditions'. (ECtHR, *Sigurdur A. Sigurjonsson v. Iceland* (24/1992.369/443), Judgment 30 June 1993, para. 35.

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2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; (…).

46 Furthermore, the RESC provides in Article 28 for the right of workers' representatives to protection in the undertaking and facilities to be accorded to them and in Articles 21 and 22 for the right of workers to the right to information and consultation and the right to take part in the determination and improvement of the working conditions and working environment. Whereas the Appendix to Articles 21 and 22 allow for Member States to exclude from the application of these articles undertakings employing less than a certain number of workers, such an exclusion based on the size of the undertaking is not provided for in relation to Article 6§2 (right to collective bargaining) and 28 (on protection of workers' representatives in undertakings).

b) Compilation of case law

47 The ECSR has emphasised the importance of the right to collective bargaining i.a. in the following terms:

> 109. From a general point of view, the Committee considers that the exercise of the right to bargain collectively and the right to collective action, guaranteed by Article 6§§2 and 4 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2), […]
>
> 110. In addition, the Committee notes that the right to collective bargaining and action receives constitutional recognition at national level in the vast majority of the Council of Europe's member States, as well as in a significant number of binding legal instruments at the United Nations and EU level. In this respect, reference is made inter alia to Article 8 of the International Covenant on Economic, Social and Cultural Rights (see paragraph 37 above), the relevant provisions of the ILO conventions Nos. 87, 98 and 154 (see paragraph 38 above) as well as the EU Charter of Fundamental Rights,(…).
>
> 111. The Committee recalls that on the basis of Article 6§2 of the Charter "Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other (…)" (Conclusions I - 1969, Statement of Interpretation on Article 6§2). The Committee also considers that the States should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned.[27]

[27] Decision on admissibility and the merits, 3 July 2013, Complaint No. 85/2012, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, paras. 109 – 111.

48 The 'Digest of the Case Law of the European Committee of Social Rights' (Digest 2018) compiles the main principles deriving from the ECSR's case law based on Statements of Interpretation, Conclusions or Decisions further in the following terms.[28]

49 From the outset, it should be noted that Article 6 applies in principle to both private and public sector undertakings. The ESC only allows for putting certain restrictions or limitations in relation to certain categories of workers like armed forces, police or certain civil servants. The ESC nor the ESCR case law do not contain any element which could allow to argue that both the right to organise and the right to collective bargaining can be restricted or limited on the basis of the size of the undertaking.

50 Concerning the protection offered by Article 6§2 ESC, the Digest 2018 states the following:

> According to Article 6§2, domestic law must recognise that employers' and workers' organisations may regulate their relations by collective agreement. If necessary and useful, i.e. in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. Whatever the procedures put in place are, collective bargaining should remain free and voluntary. (…) .[29]
> States Parties should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned, including the use of collective action. Trade unions must be allowed to strive for the improvement of existing living and working conditions of workers and in this area the rights of trade unions should not be limited by legislation to the attainment of minimum conditions.

51 As for unilateral actions by employers in relation to collective bargaining and collective agreements, it might be relevant also to refer to the ECSR case law in relation to Spain whereby the ECSR considers such unilateral actions as not in conformity with the ESC:

> **Conclusions XXI-3 (2018) - Spain - Article 6§2**
>
> The Committee further found the situation not to be in conformity with Article 6§2 of the Charter on the grounds that according to the amended Article 41 of the Workers' Statute an employer is unilaterally allowed not to apply the working conditions previously agreed with the workers' representatives in company level pacts and agreements (Conclusions XX-3 (2014)).
>
> The Committee concludes that the situation in Spain is not in conformity with Article 6§2 of the 1961 Charter on the ground that legislation permits employers unilaterally not to apply conditions agreed in collective agreements.

[28] Digest of the Case Law of the European Committee of Social Rights, December 2018.

[29] In footnotes 180 and 181, references are made respectively to Conclusions III, Germany, p. 34 (fn. 180) and European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 11/2001, Decision on the merits of 21 May 2002, §58 (fn. 181). According to Dorssemont, the notion of 'public official' needs to be interpreted narrowly and can it only refer to employees exercising public authority. The latter stems also from the ECSR case law identifying the different groups of public service workers who should have the right to collective bargaining. (Dorssemont, F., Article 6: The Right to Bargain Collectively: A Matrix for Industrial Relations; in Bruun, N.; Lörcher, K.; Schömann, I. and Clauwaert, S. (2017), The European Social Charter and Employment Relation, London: Hart Publishing, (in particular) p. 257 -261.

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According to the information in the report and from the Spanish Trade Union Confederations there has been no change to this situation. Therefore the Committee reiterates its previous conclusion. (…)

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 6§2 of the 1961 Charter on the ground that legislation permits employers unilaterally not to apply conditions agreed in collective agreements.

Conclusions XX-3 (2014) - Spain - Article 6§2

This law does not adequately define the bases for unilateral disapplication. The Committee asks for examples or case-law interpreting this Article so as to establish what these grounds include. However, it considers that the collective or individual right to appeal to an employment court following decisions by the employer to suspend or disapply matters contained within a collective agreement is not sufficient to prevent the undermining of voluntary negotiation procedures. Furthermore, following the consultation period mentioned by the Government, which may not apply in every case, if no agreement has been reached the employer may still unilaterally apply the changes. The legitimation of unilateral derogation from freely negotiated collective agreements is in violation of the obligation to promote negotiation procedures. Accordingly, the Committee finds that the situation is in violation of Article 6§2 of the 1961 Charter on this point. (…)

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 6§2 of the 1961 Charter on the following grounds: (…)

Act 3/2012 allows employers unilaterally not to apply conditions agreed in collective agreements.

3. Other relevant Council of Europe documents

52 In its Resolution 2033 (2015) of 28 January 2015 on the "Protection of the right to bargain collectively, including the right to strike"[30], the Parliamentary Assembly (PACE) highlights the following:

1. Social dialogue, the regular and institutionalised dialogue between employers' and workers' representatives, has been an inherent part of European socio-economic processes for decades. The rights to organise, to bargain collectively and to strike – all essential components of this dialogue – are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163).

2. However, these fundamental rights have come under threat in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures. In some countries, the right to organise has been restricted,

[30] PACE Resolution 2033 (2015), Protection of the right to bargain collectively, including the right to strike', Rapporteur Mr. Andrej Hunko; text adopted by the Assembly on 28 January 2015 (6th Sitting).

collective agreements have been revoked, collective bargaining undermined and the right to strike limited. As a consequence, in the affected countries, inequalities have grown, there has been a persistent trend towards lower wages, and negative effects on working and employment conditions have been observed.

3. The Parliamentary Assembly is most concerned by these trends and their consequences for the values, institutions and outcomes of economic governance. Without equal opportunities for all in accessing decent employment and without appropriate means of defending social rights in a globalised economic context, the inclusion, development and life chances of whole generations will be put into question. In the medium term, the exclusion of certain groups from economic development, the distribution of wealth and decision making could seriously damage European economies and democracy itself.

4. Investing in social rights is an investment in the future. In order to build and maintain strong and sustainable socio-economic systems in Europe, social rights need to be protected and promoted.

5. In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. "Social partners" should be taken to mean just that: "partners" in achieving economic performance, but sometimes opponents striving to find a settlement concerning the distribution of power and scarce resources.

53 Therefore, the PACE calls in this Resolution amongst others on the member states to take measures to uphold the highest standard of democracy and good governance in the socio-economic sphere including:

7.1. protect and strengthen the rights to organise, to bargain collectively and to strike by:
(…) 7.1.2. developing or revising their labour legislation to make it comprehensive and solid with regard to these specific rights; (…)

D. European Union

1. Primary law

54 Based on the **Treaty of the Functioning of the European Union (TFEU),** the EU has the competence to regulate on the issues of social dialogue in general and collective bargaining in particular.

55 The promotion of dialogue between social partners is enshrined as a common objective of the Union and the Member States in Article 151 of the Treaty on the Functioning of the European Union (TFEU).

Article 151
The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working

conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.
To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.
They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

56 Next to the reference to the European Social Charter in Article 151 TFEU is should also recalled that in the Recital 5 to the Treaty of the European Union (TEU) that all EU member states are

> CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

57 Furthermore, and in view of reaching the objectives of Article 151, Article 153 TFEU stipulates:

> 1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (…)
>
> (…)
>
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (…)
>
> 3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.
>
> In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision. (…)

58 Recognising the vital role of social dialogue (including collective bargaining) and social partners, the EU even provides for a specific social dialogue at 'its level', i.e. the European one and this for both the cross-sectoral as sectoral dimension. This is elaborated in Articles 152 and 154-155 TFEU.

> **Article 152**
>
> The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. (…)
>
> **Article 154**

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.
2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.
3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.
4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 155

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.
2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.
The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).

59 Secondly, there is of course also the **Charter of Fundamental Rights of the European Union** (CFREU) which provides under 'Chapter IV Solidarity' in its Article 28 on 'Right to collective bargaining and action' that:[31]

> Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

60 The 'Explanations' on Article 28 CFREU show that this article is clearly based on and inspired by Article 6 ESC (and its case law) and should thus be interpreted in light of the ECSR requirements and case law:[32]

> This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). (…) As regards the appropriate levels at which collective negotiation might take place, see the explanation given for the above Article. (…)[33]

[31] For a recent extensive academic analysis, see Dorssemont, F. and Rocca, M. (2019) Chapter 22. Article 28 – Right of Collective Bargaining and Action, Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds.) (2019), The Charter of Fundamental Rights of the European Union and the Employment Relation, London: Hart Publishing, pp. 465-504.
[32] Explanations relating to the Charter of Fundamental Rights, O.J. C303, 14 December 2007, p. 17-35.
[33] In the explanations to Article 27 on 'Workers' right to information and consultation within the undertaking' it is mentioned that "(…) The reference to appropriate levels refers to the levels laid

2. Fundamental rights texts

61 Over the course of time, the European Community/European Union has developed several mainly politically binding catalogues of fundamental social rights.

62 Firstly, there is the **Community Charter of Fundamental Social Rights of Workers** (1989) which explicitly includes the right to collective bargaining:

> 12.. Employers or employers' organizations, on the one hand, and workers' organizations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.

63 Furthermore, the preamble mentions that in the implementation of this Charter:

> "(…) inspiration should be drawn from the Conventions of the International Labour Organization and from the European Social Charter of the Council of Europe; (10th paragraph of Preamble)

64 Secondly, there is the solemnly proclaimed **European Pillar of Social Rights** (EPSR) (November 2017).

65 Under "Chapter II – Fair working conditions", the right to social dialogue and collective bargaining is particularly referred to in Principle 8 of the Pillar as follows:

> **Social dialogue and involvement of workers**
>
> a. The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States.
>
> c. Support for increased capacity of social partners to promote social dialogue shall be encouraged.

66 It is thereby also to be noted that the accompanying Staff Working Document[34] highlights the following in relation to capacity building:

> While capacity-building is first and foremost a bottom-up process depending on the will and efforts of the social partners themselves, the provisions of the Pillar highlight that the efforts by the social partners can be complemented by public authorities while respecting the social partners' autonomy. Capacity-building refers to increasing the representativeness of social partners and to strengthening their operational, analytical and legal capabilities to engage in collective bargaining and to contribute to policy-making. This support can take the form of setting the appropriate institutional/legal framework, by giving a clear role to social partners in policymaking and also by providing financial support**.**

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down by Union law or by national laws and practices, which might include the European level when Union legislation so provides. (…).

[34] Commission Staff Working Document - Accompanying the document Communication from the Commission to the European Parliament, the Council, the European And Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights, Brussels, 26.4.2017, SWD(2017) 201 final.

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67 Furthermore, the abovementioned explanatory notes state in particular in the listing of the applicable "Union acquis:

> **1. The Union acquis**
>
> ***a) The Charter of Fundamental Rights of the European Union***
>
> Article 28 of the Charter provides that workers and employers, or their respective organisations have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. Article 27 of the Charter gives every worker the right at the appropriate levels to be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

68 It has also to be recalled that the Preamble to the EPSR refers at several occasions to the European Social Charter and ILO Conventions in particular in relation to the interpretation and implementation of the EPSR:

> The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, including the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation.

69 From the above it is clear that as Principle 8 thus builds on Articles 27 and 28 CFREU (and its interpretation), which on their turn draw amongst others on Article 6 ESC (and which in its turn draws on relevant ILO Conventions (see sections B.2.a) and B.2.b)), that both in the interpretation and implementation of Principle 8 due regard needs to be taken to the interpretation given to the latter mentioned ESC and ILO norms.

3. Secondary law

70 In several EU secondary legislative acts (Directives, Regulations), a particular role is given to social partners, collective bargaining and collective agreements to regulate the concrete working conditions at stake in these acts. None of these instruments allow for any sort of referendum initiated by the employer.

> **Directive 2006/54/EC** of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26.7.2006, p. 23–36; legal basis: Article 141(3) TEC (now Article 157(3) TFEU))
>
> **Article 21 - Social dialogue**
>
> **1.** Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well

as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy**,** to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures.

Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (OJ L 186, 11.7.2019, p. 105–121; legal basis; Article 153(1)b TFEU)

(38) The autonomy of the social partners and their capacity as representatives of workers and employers should be respected. It should therefore be possible for the social partners to consider that in specific sectors or situations different provisions are more appropriate, for the pursuit of the purpose of this Directive, than certain minimum standards set out in this Directive. Member States should therefore be able to allow the social partners to maintain, negotiate, conclude and enforce collective agreements which differ from certain provisions contained in this Directive, provided that the overall level of protection of workers is not lowered.

Article 14 - Collective agreements

Member States may allow the social partners to maintain, negotiate, conclude and enforce collective agreements, in conformity with the national law or practice, which, while respecting the overall protection of workers, establish arrangements concerning the working conditions of workers which differ from those referred to in Articles 8 to 13.

Council **Directive 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[35]

(33) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.

CHAPTER II REMEDIES AND ENFORCEMENT

Article 13 - Social dialogue

1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.

[35] To note is that this Directive refers in its Recital 4 to the following International and European human rights instruments: the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')

(15) In many Member States, the social partners play an important role in the context of the posting of workers for the provision of services since they may, in accordance with national law and/or practice, determine the different levels, alternatively or simultaneously, of the applicable minimum rates of pay. The social partners should communicate and inform about those rates. (…)

(31) In order to cope in a flexible way with the diversity of labour markets and industrial relations systems, by way of exception, the management and labour and/or other actors and/or bodies may monitor certain terms and conditions of employment of posted workers, provided they offer the persons concerned an equivalent degree of protection and exercise their monitoring in a non-discriminatory and objective manner.

Article 8 Accompanying measures:

(…) 3. While respecting the autonomy of social partners, the Commission and Member States may ensure adequate support for relevant initiatives of the social partners at the Union and national level that aim to inform undertakings and workers on the applicable terms and conditions of employment laid down in this Directive and in Directive 96/71/EC.

Article 11 Defence of rights — facilitation of complaints — back-payments:

(…) 3. Member States shall ensure that trade unions and other third parties, such as associations, organisations and other legal entities which have, in accordance with the criteria laid down under national law, a legitimate interest in ensuring that this Directive and Directive 96/71/EC are complied with, may engage, on behalf or in support of the posted workers or their employer, and with their approval, in any judicial or administrative proceedings with the objective of implementing this Directive and Directive 96/71/EC and/or enforcing the obligations under this Directive and Directive 96/71/EC.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU - Preamble, Article 8(1) and 20(8).

(50) Member States are encouraged, in accordance with national practice, to promote a social dialogue with the social partners with a view to fostering the reconciliation of work and private life, including by promoting work-life balance measures in the workplace, establishing voluntary certification systems, providing vocational training, raising awareness, and carrying out information campaigns. In addition, Member States are encouraged to engage in a dialogue with relevant stakeholders, such as non-governmental organisations, local and regional authorities and service providers, in order to promote work-life balance policies in accordance with national law and practice.

(51) The social partners should be encouraged to promote voluntary certification systems assessing work-life balance at the workplace.

III. The law

A. The principles drawn from the International and European law material

71 This case concerns the social human right to bargain collectively. This is one of the most important collective rights for trade unions. It has been recognised expressly first at international level by the ILO in Convention No. 98 (1949) and at European level first by Article 6§2 ESC (1961). It has been developed for regulating working conditions on a collective basis through negotiations between employers (or their organisation) and trade unions. This collective approach was aimed at compensating the lack of bargaining power of individual workers. Any national legislation or practice limiting or undermining these principles should therefore not be recognised.

1. General considerations

72 Firstly, it should also be recalled that the rights and freedoms set out in the Charter are to be interpreted in the light of relevant international instruments as well as that it is the objective of the Charter to ensure 'concrete and effective rights' and that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact. In this respect it considers that the implementation of the Charter cannot be achieved solely by the adoption of legislation if its application of it is not accompanied by an effective and rigorous control. The implementation of the Charter thus requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter by amongst others making available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein.

73 From the abovementioned international (UN and IL0) and European (Council of Europe and EU) law and case law on in particular the right to collective bargaining, it is apparent that the right to collective is a fundamental right and that it should be enjoyed fully.

74 Such international and European standards are thus universally applicable to all workers and enterprises unless otherwise stipulated.

2. No limitation in relation to the size of the undertaking

75 The relevant ILO Conventions and the European Social Charter mentioned above, do allow for a certain flexibility by foreseeing the possibility to restrict or limit the right to collective bargaining for certain categories of workers, however none of them, including Article 6§2 which is at stake in this complaint, do foresee for such a flexibility based on the size of the undertaking.

76 As for SMEs, the European Social Charter provides in its Appendix that Member States may exclude from the scope of the information and consultation rights (in Article 21 and 22) those undertakings employing less than a certain number of workers, to be

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determined by national legislation or practice. However, such flexibility is not provided for in relation to the rights (and protection) provided by the Articles 5 and 6 dealing with the freedom of association and the right to collective bargaining which need to apply to all enterprises.

3. No limitation in relation to the prerogative of trade unions

77 Furthermore, it is also clear that from in particular the abovementioned international and European (case) law that the right to collective bargaining is and should remain the prerogative of trade unions (or workers' organisations as they are also referred to).

78 Member states should thus refrain from introducing measures that would undermine trade union prerogatives and activities via solidarist or other organisations, associations of persons or other obscure groupings of persons but which cannot be considered as duly elected workers' representatives. Also, agreements concluded by employers and employees directly are not in conformity with these labour standards.

B. Application of the above-mentioned principles

79 In relation to the case at hand, the ECSR has to assess the legislation and practice in relation to the requirements of Article 6§2. An important element in this respect is the the judgment of the Conseil d'État[36] upholding the alleged provisions. It is even more relevant as it deals in several respects with International and European Law and finds that there is no conflict. The following considerations will contrast the findings of the Conseil d'État with the principles described above.

80 From the outset, it should be recalled that the French Constitution provides for the priority of international standards in the following terms:

> **Article 55**
>
> Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.[37]

81 For interpretation purposes it should be recalled that interpretation has to be in accordance with customary international law as provided for in Articles 31 – 33 of the Vienna Convention on the Law of Treaties (VCLT)[38] which – in accordance with Article 55 just mentioned – prevails over domestic law. In its Article 31(3)(b) specific emphasis is put on 'any subsequent practice in the application of the treaty which establishes the

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[36] Conseil d'État, 1ère et 4ème chambres réunies, 01/04/2019, 417652, Inédit au recueil Lebon.
[37] Translation copied from https://www.refworld.org/docid/3ae6b594b.html.
[38] See e.g. ICJ Judgment 13 December 1999 *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999,1045, para. 18. For more recent authority, see Preliminary Objections, Judgment, 2 February 2017, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, , I.C.J. Reports 2017, 3, para. 63. In relation to the European level see i.a. ECtHR (Grand Chamber) judgment *Andrejeva v Latvia*, (App No 55707/00, 18 February 2009), para. 18; see also paras. 19–20; ECtHR (Third Section) judgment *Mirojubovs and others v Latvia*, (App No 798/05, 15 September 2009) para. 62; ECtHR (First Section) judgment *Rantsev v Cyprus and Russia*, (App No 25965/04, 7 January 2010) paras 273–4.

agreement of the parties regarding its interpretation'. The case law of the competent organs for interpreting the respective international standards has been accordingly recognised.[39] Accordingly, the Conseil d'État was not in the position to interpret international standards just on its own.

82 Against this constitutional background, it is particularly relevant that on the one hand this collective complaint is based on the alleged violation of Article 6§2 ESC which is to be interpreted – as mentioned earlier – in accordance with International and European standards. On the other hand, the arguments presented before the Conseil d'État were to a large extent also related to those provisions. Therefore, is particularly relevant to analyse the application of the above-mentioned principles in the national jurisprudence which deals in particularly with international standards.

1. Unjustified denial of unlimited scope in relation to the size of the undertaking

83 As regards the European level, the Conseil d'État examines three provisions jointy focusing in the first place on Article 11 ECHR while the two latter provisions (Article 6 ESC and Article 28 CFREU) are only dealt with as a consequence of the rejection of the former.[40] This approach is particularly problematic because no additional reasons are provided for those latter two provisions.

a) ECHR (Article 11)

84 From the outset, it appears important to note that the Conseil d'État does not start its examination by looking into the content of the right to collective bargaining in international standards as a whole nor even specifically into the content of Article 11 ECHR in particular by taking into account the ECtHR's case law (see above II.C.1.).

85 Even assuming that the judgment recognises the right to collective bargaining as a fundamental principle, it does not take into account that this right has a material scope without any limitation to the size of the undertaking (see above III.A.2.).

86 Assuming further that a justification in relation to the size of the undertaking would be permissible, the reasons for justifying the limitations are formulated in the following terms:

> le législateur a entendu, afin de développer les accords dans les petites entreprises, pallier l'absence fréquente de représentants des salariés pouvant participer à leur négociation. Dans les entreprises de moins de onze salariés, auxquelles ne s'appliquent pas les obligations relatives aux institutions représentatives du personnel, ces dispositions ne prévoient la possibilité pour l'employeur de soumettre un projet d'accord à la consultation du personnel que si l'entreprise est dépourvue de délégué syndical.[41]

[39] See *Demir and Baykara*, note 25, § 85.
[40] Para. 8 of the judgment, note 36.
[41] Ibid.

87 These reasons are not pertinent. Firstly, it is more than questionable whether a 'legitimate aim' (Article 11§2 ECHR) exists. Secondly, concerning the compensation in the new legislation for the frequent absence of representatives, it denies the trade union prerogatives. Thirdly, the main features of collective bargaining are denied. In particular, the legislation allows employers to just submit a draft of the 'accord' to the vote, despite the lack of the following two elements:

88 *(No) representatives*: The totality of the workers is not a collective body for collective bargaining purposes. Here, a structure is needed. It is a disguised collectivisation of individual workers. No election process in which the candidates must stand for their conviction, their demands and their methods of achieving them is required. In the end only the individual worker has to decide on its own on the substance of the 'accord'. This organisation and structure is totally contrary to the very idea of collective bargaining.

89 *(No) negotiations*: The most serious problem arises from the total absence of negotiations. It is the text of the employer's draft on which the workers are demanded to give their consent. If collective bargaining has any sense, it must be possible to influence the content of such a draft in negotiations. But this is not possible because of lack of (trade union) representatives.

90 Finally, the Conseil d'État tries to justify the legislation by reference to the possibility of consulting representative trade unions:

> En dernier lieu, un délai de quinze jours au moins doit séparer la communication à chaque salarié du projet d'accord de l'organisation de cette consultation, de façon, notamment, à permettre aux salariés de consulter, s'ils le souhaitent, les représentants de l'organisation syndicale de leur choix.[42]

91 Again, this argument does not justify the limitation of the right to collective bargaining. Firstly, it is not clear to which provisions the Conseil d'État refers because there is no provision in French law explicitly recognising this right. Secondly, even if this right would exist, it is not at all compensating the lack of the right to collective bargaining. The consultation would provide the individual worker merely with information. But it does not compensate the individual worker's lack of power in the negotiation process.

b) ESC (Article 6§2)

92 In its reasoning, the Conseil d'État rejects any approach of an individual examination of Article 6 (§2) ESC[43]:

> à l'appui duquel sont invoqués tant les conventions mentionnées aux points 6 et 7 que l'article 6 de la charte sociale européenne (révisée) et l'article 28 de la charte des droits fondamentaux de l'Union européenne, doit être écarté.[44]

[42] Ibid.
[43] Because of the specificities of EU supranational law this source is not dealt with in detail here (but see above II.D.1.).
[44] Para. 8 of the judgment, note 36.

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93 The Conseil d'État should have examined in detail the case law of the ECSR (see above 1946) by taking into account also the other international standards. In any event, it is not sufficient to reject the pertinence of Article 6§2 ESC without giving any substantive reason.

94 In particular, this Court should have looked into the ECSR's case law in relation to the unilateral intervention of the employer into collective agreements which the Committee had found to be in violation of the right to bargain collectively (see in particular para. 51).

95 To the extent that an examination of a justification for the legislative intervention into the right to collective bargaining would be necessary the Committee's case law (46) would apply. In particular, it should be taken into account that the 'accords' are often used to provide for a lower level of protection by by-passing existing collective agreements, e.g. in relation to working time arrangements, and thus run against the aim of ensuring that the right to collective bargaining 'represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2) (…)'. (see above para. 47 (para. 109)). In any event, the same considerations as developed previously under Article 11 ECHR (see paras. 85 - 91) would apply.

2. Unjustified denial of the prerogative of trade unions

a) ILO Convention No. 98 (Article 4)

96 In relation to international standards, the Conseil d'État deals first with Article 4 of ILO Convention No. 98[45] containing the obligation of promotion of collective bargaining (see above II.B.2.b)). Without going into any substance, it rejects its pertinence because of a lack of direct effect.[46] This argument is as such not pertinent because at least the relevant part of this provision can obviously have direct effect. Indeed, the total denial of the right as such directly violates the promotion obligation. Accordingly, no intermediate legislation is necessary. Therefore, at least this part should have been considered to have direct effect.

97 But even assuming that this provision would be deprived of a direct effect, the impact of international standards is not limited to this sole consequence. Indeed, international obligations of the ratifying State require that the judiciary take duly into account these requirements in interpreting domestic law.[47]

98 Accordingly, the Conseil d'État should not have rejected the relevance of this provision. The case law to which these Observations refer clearly demonstrates the framework which has to be recognised, in particular the prerogative of trade unions (see above

[45] Para. 6 of the judgment, note 36.
[46] Ibid. ‚Ces stipulations requièrent l'intervention d'actes complémentaires pour produire des effets à l'égard des particuliers et sont, par suite, dépourvues d'effet direct'.
[47] A timid reference is found in relation to ILO Recommendation No. 91 (see above para. 28): 'Une telle recommandation, si elle peut être prise en considération, le cas échéant, pour l'interprétation d'une convention à laquelle elle se rapporterait (…)', para. 6 of the judgment, note 36.

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III.A.3). In this context, it should (as one example) be recalled that the CFA has highlighted the prerogative of trade unions in the following terms:

> Collective agreements with the non-unionized workers should not be used to undermine the rights of workers belonging to the trade unions. (see above para. 35)

b) ILO Convention No. 135 (Article 5)

99 In the second place, the Conseil d'État refers to Article 5 of ILO Convention No. 135[48] prohibiting the undermining of trade unions' prerogatives (see above II.B.2.d)). It rejects its relevance on the basis that the criticised provisions would not apply in the case of double representation (trade union and non-trade union representatives):

> Les dispositions des articles L. 2232-21 à L. 2232-23 du code du travail et celles du décret attaqué ne peuvent trouver à s'appliquer dans des entreprises comptant à la fois des représentants syndicaux et des représentants élus du personnel. Par suite, elles ne méconnaissent pas, en tout état de cause, les stipulations de l'article 5 de la convention internationale du travail n° 135.[49]

100 This more formal approach is not in line with the findings of the CEACR stating i.a.:

> Emphasizing that collective bargaining is a fundamental right recognized in many national constitutions, and therefore accorded a high legal ranking, the Committee calls on governments to take measures to prevent direct agreements with non-unionized workers being used for anti-union purposes, as is still the case in certain countries. It has accordingly criticized, for example, the clear disproportion between the high number of direct agreements concluded with non-unionized workers, and the low number of collective agreements with trade unions. (see above para. 33 (para. 239)).

101 Accordingly, the Conseil d'État should have analysed the actual impact of the new legislation in relation to the weakening of trade unions.

c) ICESCR (Article 8)

102 The Conseil d'État does not refer at all to the ICESCR. However, it should have done so because it was the CESCR which examined specifically the French situation and came to the following conclusion:

> **It also urges the State party to ensure that the collective bargaining process is effective and to uphold the right to union representation in accordance with international standards as a means of protecting workers' rights in terms of working conditions and social security.**[50]

103 Thus, the collective bargaining should not be limited but, instead, better protected.

3. Intermediate Conclusions

104 The Conseil d'Etat did not treat the relevant international standards in harmony with the international obligations entered into by France. Each of the elements mentioned

[48] Para. 7 of the judgment, note 36.
[49] Ibid.
[50] See above para. 13.

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above show that the principle of promotion of collective bargaining was violated. Even more, in their combination these elements lead to serious violation.

IV. Conclusions

105 In this sense and given all the arguments and material provided above, the ETUC considers that France is not in conformity with and does not fulfil its commitments assumed under Article 6§2 RESC to provide to a satisfactory extent the performance of one of the fundamental trade union rights, i.e. the right to collective bargaining.

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