European Social Charter | Charte sociale européenne

COUNCIL OF EUROPE
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COMITÉ EUROPÉEN DES DROITS SOCIAUX

1 October 2022

Case Document No. 1

Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) c. France
Complaint No. 211/2022

COMPLAINT

Registered at the Secretariat on 2 May 2022

Complaint to the European Committee of Social Rights

(hereinafter the "Committee" or "the ECSR")

Department of the European Social Charter and the European Code of Social Security,
Directorate General of Human Rights and Rule of Law
Council of Europe F
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Complainant organisation:
Syndicat des Agrégés de l'Enseignement Supérieur (SAGES)

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Respondent State: FRANCE

Articles of the Charter and its Appendix relied on, either as having been infringed or as also warranting consideration:
- Articles 22, E, 10, N, G, H and Preamble of the Charter
- in Part II of the Appendix to the Charter, § 3 insofar as it relates to Articles 21 and 22 of the Charter; Part V of the Appendix, insofar as it relates to Article E of the Charter
Mention is also made of various relevant pieces of international law requiring consideration.

Done for the complainant trade union
at 8 rue Colbert 06110 Cannet (France), on 29 April 2022
by its President and authorised representative,

Denis ROYNARD.

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→ **A]** How hearing disciplinary cases against one's peers, directly or by proxy, is an essential form of participation in the determination of their working conditions and the working environment for French teachers in public higher education institutions; and falls, *ratione materiae*, within the scope of Articles 22 and 10 of the Charter, taken individually or together, and in combination with, in the light of and having regard to Article N of the Charter, its Preamble, and § 3 of the Appendix to the Charter insofar as it relates to Articles 21 and 22 of the Charter, and relevant international law

→ **B]** Relevant points of law and fact, national and international, to be considered in relation to the situations and differences in treatment at issue. Applicability, *ratione materiae*, of Article E of the Charter, taken in combination with Article 22, together with, having regard to, or in the light of Article 10 of the Charter

→ **C]** How and why the differences in treatment at issue are incompatible with the combination of Articles 22 and E of the Charter, read in conjunction with, having regard to or in the light of Article 10, and in the light of and having regard to other articles of the Charter and relevant international law

→ **D]** Basis on which this complaint should be considered admissible by the Committee. Additional considerations concerning requests for observations from third parties, as provided for in Rule 32A of the Committee's Rules.

→ **E]** Conclusions and requests

General introduction

As pointed in out in paragraph 10 of the **Final Report of the Global Dialogue Forum on Employment Terms and Conditions in Tertiary Education** [1] (INTERNATIONAL LABOUR ORGANIZATION, GDFTE/ 2018/9), academic freedom and the right to participate in a collegial manner in the governance of higher education institutions are essential and specific aspects of the working conditions of higher education teaching personnel. In addition, **the Court of Justice of the European Union, seeking to clarify the scope and content of Article 13 of the Charter of Fundamental Rights of the European Union** ("Academic freedom shall be respected"), **has had regard to, *inter alia*, the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel**[2] (1997) and has ruled (COMMISSION V. HUNGARY JUDGMENT OF 6 OCTOBER 2020, CASE C-66/18[3]*)* that "academic freedom also incorporates an institutional and organisational dimension".

More generally, the participation of higher education teachers in collective and individual decisions shaping their working conditions and working environment, and in the process of supervising the observance of regulations on these matters, represents the collective, institutional and organisational aspect of academic freedom that is vital if due regard is to be had to its individual aspect. **Any infringement of this right of participation** constitutes **not only a breach of academic freedom**, to the detriment of higher education teachers, whether one considers them collectively or individually, **but also a violation of Articles 22 and 10 of the Charter**. **The Committee, after all, has ruled** that account is to be taken of "any relevant rules of international law applicable in the relations between the parties" (DEFENCE FOR CHILDREN INTERNATIONAL V. THE NETHERLANDS, COMPLAINT NO. 47/2008, DECISION ON THE MERITS OF 20 OCTOBER 2009, § 35), **in interpreting the Charter**, "in harmony with other rules of international law of which it forms part" **(**DCI V. THE NETHERLANDS, COMPLAINT NO. 47/2008, DECISION ON THE MERITS OF 20 OCTOBER 2009, § 29; INTERNATIONAL FEDERATION OF HUMAN RIGHTS LEAGUES (FIDH) V. FRANCE, COMPLAINT NO. 14/2003, DECISION ON THE MERITS OF 8 SEPTEMBER 2004, § 26). **According to the United Nations Committee on Social, Economic and Cultural Rights moreover,** "the right to education[4] can only be enjoyed if accompanied by the academic freedom of staff […]" (§ 38 OF ITS GENERAL COMMENT NO. 13 OF 8 DECEMBER 1999 ON "THE RIGHT TO EDUCATION"[5]

[1] https://labordoc.ilo.org/discovery/delivery/41ILO_INST:41ILO_V2/1268429700002676
[2] https://unesdoc.unesco.org/ark:/48223/pf0000160495
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0066
[4] Of which the right to vocational training enshrined in Article 10 of the Charter is one component.
[5] https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiJ9aOVtcP4AhVjVeUKHWFVDzEQFnoECAUQAQ&url=https%3A%2F%2Fwww.right-to-education.org%2Fsites%2Fright-to-education.org%2Ffiles%2Fresource-attachments%2FCESCR_General_Comment_13_en.pdf&usg=AOvVaw3T-y7SG-Kg4jvnZsEI_EPD

ENSHRINED IN ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS).

Disciplinary action is one of those decisions that has both an individual and a collective dimension with respect to higher education teachers and that impinges on their academic freedom. **For that reason, decisions of this kind require the participation of an independent college of peers** (see reference to "an independent third-party hearing of peers" in § 48 of the aforementioned UNESCO Recommendation), such participation being a right, both on the part of the said peers and on the part of the teacher appearing before them, since he or she must answer for the conduct complained of. **What is at issue in this complaint, on the basis of the combination of Articles 22**, **10 and E of the Charter and its Appendix, in the light of and having regard to other articles of the Charter and relevant international law, is the fact** that within a college of peers who are otherwise treated entirely equally:

- some teachers are not represented on the higher education system's national peer disciplinary board, whereas others do in fact have the right to vote and stand in elections to the board, meaning that they are represented on it;
- under French law, a senior administrator can remove certain teachers in this college from the adjudicatory reach of their peers and decide alone what punishment should be imposed.

Admittedly, the differences in treatment at issue here do have some country-specific features, but the jobs of the teachers concerned working in French public higher education are also open to foreign nationals, including non-Europeans. **According to the UNESCO Recommendation,** moreover "similar questions arise in all countries with regard to the status of higher education teaching personnel and […] these questions call for the adoption of common approaches and so far as practicable the application of common standards". By its very nature, therefore, this complaint seems to us to call for third-party observations, pursuant to **Rule 32A of the Committee's Rules,** in particular from trade unions or groups of academics, both by virtue of the universality of the fundamental aspects at issue and by virtue of the very wide range of parties who will be directly affected, or have the potential to be affected, by what the Committee rules in its decisions on the admissibility and merits of this complaint.

Furthermore, as observed in **the European Parliament Recommendation of 29 November 2018 on defence of academic freedom in the EU's external action**[6] **under point P**:

- "violations of academic freedom are rarely addressed within a human rights framework, reflecting, in part, a lack of familiarity with issues of academic freedom among human rights advocates and, in part, the fact that claims often refer to other rights being violated [...]";
- "standards in this area are underdeveloped and violations of academic freedom underreported".

We have taken this on board, particularly in relation to any third-party observations that may be submitted, by setting the differences in treatment at issue here in their national and international context, both factual and legal.

[6] https://www.europarl.europa.eu/doceo/document/TA-8-2018-0483_EN.html

Below we explain:

- how the matter complained of **falls with the scope, *ratione materiae*, of Article 22 of the Charter**, taken alone or in conjunction with **Article 10 (§ A)**;
- **the differences in treatment at issue**, after having established the comparability, in law and in fact, of the situations of the teachers who are subject to this differential treatment **(§ B)**, **since Article E of the Charter is relied on here in conjunction with Article 22 of the Charter and having regard to or in the light of Article 10**;
- **how the differences in treatment at issue infringe the combination of Articles 22**, **E and 10 of the Charter**, in the light of and having regard to **other articles of the Charter**, **its Appendix and relevant international law -** in particular the right to academic freedom and the right to participate in a collegial manner in the governance of higher education institutions and the institutional autonomy of such institutions **(§ C)**;
- why this complaint should be considered admissible **(§ D)**.

Lastly, we set out our conclusions and requests (§ E).

List of exhibits attached to the SAGES complaint

Some of these exhibits are very large. Included here are the pertinent factual and legal elements taken from the exhibits and relied on in our complaint, and which are necessary and sufficient for it to be addressed by the Committee. They represent only a tiny part of the biggest documents, however.

These exhibits are therefore enclosed mainly for evidentiary and procedural purposes, as the complainant trade union is required to furnish "documents" and to corroborate its factual arguments. Some of the material not used here may prove relevant later, moreover.

No.	TITLE AND TYPE	FORMAT
No. 1	**Latest official figures on higher education teaching personnel** from the Ministry of Higher Education, Research and Innovation (France) (dated October 2021 and relating to 2020).	Electronic (PDF)
No. 2	**2016 report by the General Inspectorate, Education and Research Administration (IGAENR)**, entitled "**La place des agrégés dans l'enseignement universitaire**".	Electronic (PDF)
No. 3	**Full versions of the articles of the Education Code and the Research Code** cited in the complaint, which features only relevant extracts.	Electronic (PDF)
No. 4	**Guide to good practice on the use of contractual staff in the Ministry of Higher Education and Research (1 February 2013)**: first page of the Guide and pages on the disciplinary arrangements for contractual staff, including ATERs.	Electronic (PDF)
No. 5	**AEF Info dispatch No. 291559 (see § 77 of the complaint)** NB: subject to copyright and the right to be forgotten.	Paper
No. 6	**Article L 952-7 of the Education Code and the *Conseil d'État* ruling of 12 February 2021 (case no. 436379)** which clarified or modified its meaning and scope.	Electronic (PDF)
No. 7	**"Denis ROYNARD" ruling of the Paris Administrative Court of Appeal of 21 May 2021 (case no. 20PA03679) on the cancellation of the 2019 election to the CNESER[7] disciplinary board in College B**.	Electronic (PDF)
No. 8	**SAGES statutes in force since 14 October 2021**, showing *inter alia* that the president in office is the person entitled to represent the complainant organisation**.**	Electronic (PDF)
No. 9	**Proof of the composition of the SAGES bureau since 18 December 2021**, **and of Mr Denis ROYNARD's status as SAGES president**, showing, together with **Exhibit No. 8**, that the person submitting and signing the complaint is authorised to represent the complainant organisation.	Electronic (PDF)
No. 10	**Proof of the 2019 CNESER election data** used in the complaint to establish the representative nature of SAGES among PRAGs and PRCEs, with a copy of the official record of the election, followed by lists of candidates and manifestos (in order: UNSA, SNPTES, CGT, **SAGES**, QSF, SUD, CFDT, FO, SNESUP FSU) NB: partially subject to copyright.	Paper
No. 11	**AEF Info dispatch No. 629895**, **on the CNESER's review of France's Multi-Annual Research Planning Act**, **in particular the amendments proposed by SAGES for PRAGs and PRCEs**. NB: subject to copyright and the right to be forgotten.	Paper

[7] CNESER: Conseil National de l'Enseignement Supérieur et de la Recherche [National Council for Higher Education and Research].

List of international and European texts, case law, resolutions, recommendations, reports, findings and declarations relied on in this complaint, and references to the sections and paragraphs where they are invoked

Revised European Social Charter
- Articles 10, 22 and E (Introduction and throughout the complaint)
- Articles N (§ 1, § 85 and § 121 below),
- Article H (§ 14, § 85, § 121 and § 140 below),
- Article G (§ 85, § 111, § 112 and § 121 below),
- Preamble (§ 121 below)
- Article 27 § 2 (§ 146 below)

Appendix to the Revised European Social Charter, **§ 3 of the Appendix to the Charter, insofar as it relates to Articles 21 and 22 of the Charter**: § 1 and § 6 below

1995 Additional Protocol to the Revised European Social Charter providing for a System of Collective Complaints: § 124 and § 142 below

Rules of the European Committee of Social Rights:
- Rule 32A (Introduction and § 147 below)
- Rule 32-2 (§ 146 and § 147 below)
- Rule 29-4 (§ 148 below)

Decisions of the European Committee of Social Rights on the merits and admissibility of complaints
- Defence for Children International v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2009 (Introduction, and § 14 and § 52 below)
- International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004 (Introduction, § 14, § 52 and § 139 below)
- European Council of Police Trade Unions v. Portugal, Complaint No. 40/2007, Committee's decision on the merits of 23 September 2008 (§ 7 below)
- Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France, Complaint No. 26/2004, Committee's decision on the merits of 15 June 2005 (§ 26 below)
- European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No. 31/2005, Committee's decision on the merits of 18 October 2006 (§ 27 below)
- Associazione Nazionale Giudici di Pace v. Italy, Complaint No. 102/2013, Committee's decision on the merits of 5 July 2016 (§ 27, § 53, § 83 and § 103 below)
- OMCT v. Ireland, Complaint No. 18/2003, Committee's decision on the merits of 7 December 2004 (§ 52 below)
- International Association Autism-Europe (IAAE) v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003 (§ 83 below)
- Autism-Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003) (§ 115 and § 118 below)

- Syndicat national des professions du tourisme v. France, Complaint No. 6/1999, referred to in § 6 of the decision on admissibility of 6 November 2000 relating to Complaint No. 9/2000, Confédération française de l'Encadrement CFE-CGC v. France (§ 124 below)
- Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France, Complaint No. 26/2004, decision on admissibility of 7 December 2004 (§ 125 below)
- Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, Committee's decision on the merits of 1 July 2014 *(*§ 140 below)

Reports of the European Committee of Social Rights (§ 102 below)
- ECSR 31 May 2004, concl. Cyprus, No. 2004/def/CYP/12/EN, § 2 with regard to discrimination in employment
- ECSR, 6 December 2013, concl. Romania, No. 2013/def/ROU/3/2/EN
- ECSR, 6 December 2013, concl. Serbia, No. 2013/def/SRB/3/2/EN
- ECSR, 6 December 2013, concl. Bulgaria, No. 2013/def/BGR/3/2/EN

DIGEST of the case law of the European Committee of Social Rights, 2018 (p. 231, section on Article E of the Charter, "Principle that Article E must be read in conjunction with another article of the Charter", section on Article E of the Charter, page 43 et seq.): § 1, § 27 and § 28 below.

Vienna Convention on the Law of Treaties of 23 May 1969, in particular Article 31-3: § 52 below.

European Convention on Human Rights, Article 14: § 83, § 84 and § 115 below.

Judgments of the European Court of Human Rights
- ECtHR 23 June 1981 Le Compte, Van Leuven and De Meyere v. Belgium: § 19 below.
- ECtHR 19 June 2018 Kula v. Turkey, Application No. 20233/06: § 23 below.
- ECtHR Fábián v. Hungary [GC], 5 September 2017, § 121, No. 78117/13: § 28 and § 117 below.
- ECtHR Sorguk v. Turkey of 23 June 2009 (Application No. 17089/03): § 53 and § 138 below.
- ECtHR 6 April 2000 Thlimmenos v. Greece [GC], No. 34369/97: § 115 and § 118 below.
- ECtHR Mustafa Erdogan v. Turkey of 27 May 2014, Applications Nos. 346/04 and 39779/04: § 138 below.

Council of Europe (recommendations and resolutions)
- Recommendation 1762 (2006), adopted by the Parliamentary Assembly of the Council of Europe on 30 June 2006 and entitled "Academic freedom and university autonomy": § 15, § 53 and § 86 below.
- Resolution 2352 (2020) "Threats to academic freedom and autonomy of higher education institutions in Europe": § 53 and § 86 below.
- Recommendation CM/Rec (2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy: § 53 and § 86 below.
- Point No. 4 of Resolution 2180 (2017) on "The "Turin Process": reinforcing social rights in Europe": § 102 below.

Charter of Fundamental Rights of the European Union, **Article 13**: Introduction, § 15, § 52 and § 86 below.

Clause 4 ("Principle of non-discrimination") of the framework agreement on fixed-term work, concluded on 18 March 1999 (hereinafter "the framework agreement"), which appears in the appendix to Council Directive 1999/70/EC of 28 June 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP: § 94, § 96, § 97, § 98, § 100 and § 143 below.

Judgments of the Court of Justice of the European Union CJEU (formerly ECJ)
- **CJEU** Commission v. Hungary of 6 October 2020, Case C-66/18: Introduction, § 15, § 52 and § 53 below.
- **CJEU** 2 February 1988 Blaizot v. University of Liège and others, Case 24/86: § 4 below.
- **CJEU** 13 November 2003 Valentina Neri and European School of Economics v. Italy, Case C-153/02 § 39: § 4 below.
- **CJEU** Daniel Ustariz Aróstegui v. Departamento de Educación del Gobierno de Navarra of 20 June 2019, Case C-72/18: §§ 94-102 below.
- **CJEU** 7 April 2022, Case C-133/21, §§ 57-61: § 102 and § 141 below
- **CJEU** 19 March 2020, Sánchez Ruiz and Others, Cases C-103/18 and C-429/18: § 141 below.

European Parliament recommendation of 29 November 2018 on Defence of academic freedom in the EU's external action: Introduction and § 141 below.

International Covenant on Economic, Social and Cultural Rights, **Article 13:** Introduction and § 14 below.

UN Human Rights Committee
Views of the UN Human Rights Committee on Communication No. 1015/2001, Perterer v. Austria, U.N. Doc. CCPR/C/81/D/1015/2001 (2004): § 19 below.

International Labour Organization (ILO)
Final report, Global Dialogue Forum on Employment Terms and Conditions in Tertiary Education (International Labour Organization, GDFTE/2018/9): Introduction, and § 14 and § 15 below.

UNESCO
- UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997): Introduction, § 9, § 10, § 15, § 52 and § 86 below.
- Article "La marche vers la déclaration de 1997 de l'UNESCO sur la liberté académique" by Donald C. SAVAGE & Patricia A. FINN: § 15 below.

Others
- 2019 declaration of the Global Forum on Academic Freedom, Institutional Autonomy, and the Future of Democracy: § 135 below.
- Third party intervention of the Human Rights Centre of Ghent University and the Scholars at Risk Network in the case Telek, Şar and Kivilcim v. Turkey before ECtHR: § 138 below.

A] How hearing disciplinary cases against one's peers, directly or by proxy, is an essential form of participation in the determination of their working conditions for French teachers in public higher education institutions and falls, *ratione materiae*, within the scope of Articles 22 and 10 of the Charter, taken individually or together, having regard to relevant international law

We begin by explaining why French public higher education institutions and their teachers **should not be excluded from the scope of Article 22 of the Charter taken in conjunction with Article 10**, **having regard to Article N of the Charter and § 3 of the Appendix to the Charter insofar as it relates to Articles 21 and 22 of the Charter**, and in the light of relevant international law **(§ A-1 below)**.

Next we show how, **for French higher education teachers, hearing cases against one's peers**, **directly or by proxy**, whether through the institution's disciplinary body or through the national peer disciplinary body,[8] **is an essential means of taking part** in the determination of those teachers' working conditions and the working environment and in the supervision of the observance of regulations on these matters **(§ A-2 below)**.

We then supplement our submissions with **other relevant points of fact and law**, so as to articulate how this complaint relates to Article E of the Charter and how it relates to Articles 22 and 10, taken individually or together **(§ B and § C below)**.

A-1) The activities of teachers in French public higher education institutions are to be considered work "in the undertaking", within the meaning of Article 22 of the Charter, having regard to Articles 10 and N of the Charter and its Appendix insofar as it relates to Articles 21 and 22 of the Charter, and in the light of relevant international law

§ 1. According to Article N of the Charter, "the Appendix to this Charter shall form an integral part of it". **And as stated in the extract from this Appendix on Articles 21 and 22 of the Charter** (§ 3, p.4) "[f]or the purpose of the application of these articles, the term "undertaking" is understood as referring to a set of tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy". In addition, **the 2018 DIGEST of the case law of the European Committee of Social Rights** states, with regard to **Article 22 of the Charter**, that "[t]his provision applies to all undertakings, whether private or public" (p. 196).

[8] Ruling on appeal or at first and last instance (Article L 232-2 of the Education Code)

§ 2. **French public higher education institutions** are described in **France's Education Code** as "public institutions of a scientific, cultural and vocational nature". **They are universities and similar institutions** (*grandes écoles*, institutes) which have university status.[9] Such institutions have legal personality and are made up of a set of tangible and intangible components intended for the provision of services, in particular educational ones, including vocational training, whether initial training or continuing professional development.

§ 3. These state-run universities do not receive enough public funding to enable them to accomplish all their tasks. In the reports produced on behalf of the National Assembly and Senate finance committees, **any revenue earned by universities in addition to public funding** is referred to as "**own resources**". Such resources account for more than 16% of funding across the university sector as a whole. They are steadily growing[10] and represent an even higher proportion of total funding in the case of France's state-run engineering schools. The services which enable universities to earn "own resources" include notably those covered by **Article 10 of the Charter**, on vocational training, in particular services in the form of continuing education and diploma courses specific to the institutions concerned, whose content and fees are not set through national regulations; the activities are thus carried on in the open market, in competition with the private sector, and the fees which the universities charge are comparable with or in some instances, if the institution's reputation or the added value provided by the excellence of its teachers so warrants, higher than those charged by private institutions. The activities are pursued by the various categories of teachers working in these institutions, as can be seen from numerous university websites.

§ 4. Such institutions thus also operate in competition with private and other public institutions, and not only French ones, when it comes to attracting undergraduates, or employees and companies in the case of in-service training. **Article 10 of the Charter,** moreover, makes no distinction between specialised and general higher education **when it treats university education as a type of vocational training**. **The European Court of Justice has taken a similar position, relying on Article 10 of the Revised European Social Charter and on the practices and legislation of various states** (§§ 10-20 OF THE CJEU JUDGMENT OF 2 FEBRUARY 1988, BLAIZOT V. UNIVERSITY OF LIÈGE AND OTHERS, CASE 24/86[11]). Against the backdrop of this open market for vocational training, moreover, **the European Court of Justice** has ruled that "the organisation for remuneration of university courses is an economic activity" (CJEU 13 NOVEMBER 2003, VALENTINA NERI AND EUROPEAN SCHOOL OF ECONOMICS V. ITALY, CASE C-153/02[12] § 39).

Since any economic activity is obviously undertaken for **financial gain**, **French public universities may be said to have several such economic goals**:

[9] According to Article D 711-2 of the Education Code, full version in exhibit no. 3, as for all articles of the Code invoked in this complaint.
[10] https://www. assemblee-nationale. fr/dyn/15/rapports/cion_fin/l15b1302-tiii-a34_rapport-fond#_Toc256000009 and https://www. senat. fr/rap/r19-130/r19-1306.html
[11] EUR-Lex - 61986CJ0024 - EN - EUR-Lex (europa.eu)
[12] https://curia.europa.eu/juris/showPdf.jsf?text=&docid=48399&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10685204

- **the economic goals associated with their need for** "**own resources**", to supplement their public funding with various forms of private funding (see above);
- **the economic goals assigned by French law**. **According to Article L 123-2 of the Education Code**, "the public higher education service shall contribute [...] to the growth and competitiveness of the economy and to the implementation of an employment policy sensitive to economic needs [...]" **and according to Article L 123-5 of the same Code**, "the public higher education service [...] shall strengthen the links with the public and private socio-economic sectors [...]".

§ 5. **The universities in question are also autonomous and have the power to determine their own higher education market policy**, both in relation to prospective students and in relation to companies or other public or private institutions (for the purpose of engaging in co-operation).

§ 6. The economic goals of French public higher education institutions **vary from one teaching activity to another, but overall, each institution and, to a greater or lesser degree, each member of their teaching staff, does have such a purpose. In the section on Articles 21 and 22 of the Appendix to the Charter** (§ 4, p. 4), furthermore, it is stated that: "religious communities and their institutions may be excluded from the application of these articles, even if these institutions are "undertakings" within the meaning of paragraph 3" and that "[e]stablishments pursuing activities which are inspired by certain ideals or guided by certain moral concepts, ideals and concepts which are protected by national legislation, may be excluded from the application of these articles to such an extent as is necessary to protect the orientation of the undertaking". **The rule, then, is that Article 22 applies whenever there is an economic goal, even if it is not the only goal, and non-applicability is the exception, one that is to be interpreted strictly according to a centuries-old general principle of law that is universal in nature. There is, therefore, no general exclusion of public higher education institutions from the scope of Article 22 of the Charter**, even if they must also be regarded as "pursuing activities which are inspired by certain ideals or guided by certain moral concepts".

§ 7. Not only is there nothing in French law that might justify not applying **Article 22 of the Charter** in order to protect the orientation of French public higher education institutions, but **Articles L 123-2 and L 123-5 of the Education Code, *inter alia*, go so far as to assign them an economic goal** (see above). The institutions in question, moreover, openly acknowledge this, in some instances even taking out adverts in the media in an effort to maximise their "own resources". In this respect, universities differ from police forces (EUROPEAN COUNCIL OF POLICE TRADE UNIONS V. PORTUGAL, COMPLAINT NO. 40/2007, COMMITTEE'S DECISION ON THE MERITS OF 23 SEPTEMBER 2008, § 42), which have no economic goal assigned to them by law and which, unlike universities, are not autonomous and do not provide services for remuneration, acting instead solely on the orders of the government or in response to requests from the judiciary.

Universities, on the other hand, particularly when it comes to activities designed to generate "own resources" (see above), are akin to state-owned undertakings within the **meaning of Article 22 of the Charter**. Consequently, **neither these French public higher education institutions**,

nor their teachers, whether civil servants or employees working under a contract, nor the French "public higher education service" as a whole can be considered to be excluded from the scope of Article 22 of the Charter for the purposes of the present complaint.

A-2) How hearing cases against one's peers, directly or by proxy, whether through the institution's disciplinary body or through the national peer disciplinary body,[13] constitutes, for French higher education teachers, an essential means of taking part in the determination of those teachers' working conditions and the working environment and in the supervision of the observance of regulations on these matters

§ 8. **Neither national legislation nor Article 22 of the Charter** defines or delimits what is meant by "**working conditions"**, "**working environment"**, or "**supervision of the observance of regulations on these matters"**. There is no reason for the Committee to construe these terms narrowly, therefore, when dealing with the present complaint.

§ 9. **Disciplinary power can be defined as** "a form of legal authority the object of which is to impose on the members of the group, by means of specific sanctions, a rule of conduct with a view to compelling them to act in accordance with the collective-interest objective which is the purpose of that group".[14] Although, in practice, sanctions are imposed only on a few members who constitute a minority within a particular group, those sanctions do nevertheless, therefore, also have **the aim and effect of** "**compelling them to act in accordance with the collective-interest objective which is the purpose of that group"**. Hence the attention given by **the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel**[15] **(1997)**, to "discipline" affecting a "member of the academic community" (see **paragraph 48**, **p. 62**), in **§ D** ("Discipline and dismissal") **and in Part IX** ("Terms and conditions of employment").

§ 10. Higher education teachers, unlike civil servants governed by ordinary law, enjoy academic freedom and the right to take part in the governance of their own structures in universities and similar institutions. So, whereas in the case of ordinary civil servants disciplinary power is exercised by the administrative authority, which is hierarchical in nature, **in the case of teachers in universities and similar institutions it is exercised by bodies composed of their peers. Paragraph 48 of the above-mentioned UNESCO Recommendation emphasises, moreover, the need for "an independent third-party hearing of peers"** to assess the misconduct in question. The disciplinary procedure applicable to higher education teachers thus relates **not only to "conditions of employment"**, which, in this complaint, also includes working

[13] Ruling on appeal or at first and last instance (Article L 232-2 of the Education Code)
[14] LEGAL (A.) et BRETHE de la GRESSAYE (J.), *Le pouvoir disciplinaire dans les entreprises privées*, Sirey, Paris, 1938, p. 18, quoted by Frédéric Laurie in "La constitutionnalisation du droit disciplinaire", VIe Congrès français de droit constitutionnel, A. F. D. C., Montpellier, 9-11 June 2005, Workshop 2 - Constitutional Law and Fundamental Rights.
[15] https://unesdoc.unesco.org/ark:/48223/pf0000160495

conditions, **but also to participation in the determination of such conditions**, **and hence to Article 22 of the Charter**.

§ 11. In view of the foregoing considerations, which are an inherent aspect of universities and their teaching staff, the oversight provided by the *Conseil d'État*, the final court of appeal in disciplinary matters, is narrower than for other civil servants **(see § A-2-a below)**.

§ 12. In France, as in other countries, each university or group of universities has its own peer disciplinary board. In France, however, there is also a national body of peers which rules either on appeal against the decisions of local, university-level boards or at first and last instance.[16] **It is important, therefore, to clarify the respective roles of university-level peer bodies** and of this national peer body **(§ A-2-b below)**, in order to make it clear how and why **the national body makes a specific and essential contribution to determining the working conditions of higher education teachers (§ A-2-c below)**. **Both the local boards and the national one also adjudicate in cases against students**, especially when their behaviour is deemed to impair teachers' working conditions: **participation in the adjudication of cases involving students is also, therefore, a way of taking part in the determination of working conditions and the working environment, and in the "supervision of the observance of regulations on these matters".**

A-2-a) In recognition of the academic freedom and participation in governance that are specific features of higher education, the disciplinary arrangements for higher education teachers differ from those for ordinary civil servants

§ 13. According to **Article L 952-2 of France's Education Code**, "teacher-researchers, teachers and researchers shall enjoy full independence and complete freedom of expression in carrying out their teaching duties and research activities, provided that they respect the principles of tolerance and objectivity, in accordance with academic traditions and the provisions of the present Code. **Academic freedoms shall be a guarantee of excellence in French higher education and research.** [...]".

§ 14. More broadly**, academic freedom**, in the singular or in the plural as in the above-mentioned Article L 952-2, concerning the higher education sector, is **an essential and specific component of the working conditions of higher education teaching personnel**, **along with the right to participate collegially in the governance of higher education institutions.**[17] More generally, these rights, and the legal safeguards that accompany them, are inherent in the status of teachers in universities and similar institutions, and include the right to participate in **any decision-making that affects the determination of the working conditions of higher education teachers**. **That is what the United Nations Committee on Economic**, **Social and Cultural Rights meant when, in § 38 of its General Comment No. 13 of 8 December 1999 on**

[16] See Article L 232-2 of the Education Code, in exhibit no. 3.

[17] See in particular § 10 of the Final Report of the Global Dialogue Forum on Employment Terms and Conditions in Tertiary Education (Geneva, 18-20 September 2018), International Labour Organization, Sectoral Policies Department, GDFTE/2018/9.

the "right to education"[18] **enshrined in Article 13 of the International Covenant on Economic, Social and Cultural Rights, it stated**: "the right to education can only be enjoyed if accompanied by the academic freedom of staff [...]".

All these academic freedoms are therefore also inherent in Article 10 of the Charter, since the "right to vocational training" referred to therein is a component part of **the "right to education" enshrined in Article 13 of the International Covenant on Economic, Social and Cultural Rights**.

The beneficiaries of this right to vocational training in universities can only fully enjoy it, therefore, if their teachers fully enjoy all the academic freedoms, including the right to participate in governance, institutional autonomy and, hence, the right to be judged in disciplinary matters only by one's peers and, by the same token, to hear disciplinary cases against one's peers.

This right can also be seen as an extension to higher education teachers of the right enshrined in **Article 22 of the Charter** in conjunction with, or having regard to, **Article 10**, with due account being taken, on the basis or in the light of **Article H of the Charter**, of "any relevant rules of international law applicable in the relations between the parties" (DEFENCE FOR CHILDREN INTERNATIONAL V. THE NETHERLANDS, COMPLAINT NO. 47/2008, DECISION ON THE MERITS OF 20 OCTOBER 2009, § 35), in particular with regard to academic freedom, participation in governance and institutional autonomy, **by interpreting the Charter "in harmony with other rules of international law of which it forms part"** (DCI V. THE NETHERLANDS, COMPLAINT NO. 47/2008, COMMITTEE'S DECISION ON THE MERITS OF 20 OCTOBER 2009, § 29; INTERNATIONAL FEDERATION OF HUMAN RIGHTS LEAGUES (FIDH) V. FRANCE, COMPLAINT NO. 14/2003, COMMITTEE'S DECISION ON THE MERITS OF 8 SEPTEMBER 2004, § 26).

§ 15. In the handling of this complaint, **the Charter must, in particular, be interpreted in harmony with Article 13 of the Charter of Fundamental Rights of the European Union** ("Academic freedom shall be respected"). Accordingly, the Committee should have regard to what **the Court of Justice of the European Union** has ruled in respect of academic freedom, notably in its COMMISSION V. HUNGARY JUDGMENT OF 6 OCTOBER 2020 (CASE C66/18[19]) where it held that**:**

- consideration should be given to "the content of Recommendation 1762 (2006), adopted by the Parliamentary Assembly of the Council of Europe on 30 June 2006 and entitled "Academic freedom and university autonomy",[20] from which it is apparent that academic freedom also incorporates an institutional and organisational dimension";
- "also relevant is point 18 of the Recommendation concerning the status of higher-education teaching personnel"[21] (1997)

This is all the more true as the UNESCO Recommendation was drawn up in collaboration with the International Labour Organization, which played an important role throughout the drafting process (see "LA MARCHE VERS LA DÉCLARATION DE 1997 DE L'UNESCO

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[18] General Comment 13 The Right to Education |
[19] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0066
[20] https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en
[21] https://unesdoc.unesco.org/ark:/48223/pf0000160495

SUR LA LIBERTÉ ACADÉMIQUE" BY DONALD C. SAVAGE & PATRICIA A. FINN[22]). **For that reason it includes topics that fall within the purview of the International Labour Organization**[23] **and, hence too, in our view, the European Committee of Social Rights**.

§ 16. This explains and justifies the differences that exist in France between the disciplinary arrangements for ordinary civil servants and the ones governing higher education teachers.

§ 17. In France, **in the case of ordinary civil servants**:

- the administrative authorities, not peers, impose disciplinary sanctions, and the ordinary administrative courts (administrative courts and administrative courts of appeal), in which no higher education teachers are represented, have full jurisdiction to hear any appeals against those sanctions;
- the *Conseil d'État*, as the supreme administrative court, acts as a final court of appeal, checking to ensure not only that the actions complained of do in fact constitute misconduct, but also that any sanction imposed is appropriate to the offence (CONSEIL D'ÉTAT DECISION OF 13 NOVEMBER 2013, APPLICATION NO. 347704). The *Conseil d'État* acts as a court of final appeal when ordinary civil servants challenge decisions handed down by the administrative court of appeal: "Whereas it is for the court dealing with abuses of authority, when presented with submissions to this effect, **to investigate whether the offence allegedly committed by a public official** on whom a disciplinary sanction has been imposed **constitutes misconduct such as to warrant a sanction, and whether the sanction adopted is proportionate to the seriousness of this misconduct**". Only the lower courts, however, have the authority to make a sovereign assessment of the facts.

§ 18. In the case of higher education teaching personnel, however, to ensure that their academic freedom, both individual and collective, is respected:

- the president or director of the institution has no authority to impose disciplinary sanctions. **He or she can merely refer the matter to a peer disciplinary board, which has sole authority to impose a disciplinary sanction or**, **on appeal**, **to increase or reduce it**;
- **the *Conseil d'État*, as a court of final appeal, considers that it has no competence to deal with cases that are specifically a matter for teachers' peer disciplinary boards and academia**; **in particular**, **it does not review sanctions imposed by such bodies to determine whether they are appropriate to the offence** (CONSEIL D'ÉTAT DECISION OF 19 MARCH 2008, APPLICATION NO. 296984). In effect, the Conseil d'État acts as a court of final appeal when a higher education teacher challenges a ruling by the national peer disciplinary board and "it is not for the court of cassation to review the appropriateness of the sanction to the wrong committed"). Once again, it for the lower courts alone, in this case the national peer disciplinary board, to make a sovereign assessment of the facts.

[22] https://www.caut.ca/sites/default/files/unesco_fr_insidepages_final2017-09-11.pdf

[23] See § 10 of the above-mentioned Final Report of the International Labour Organization's Global Dialogue Forum on Employment Terms and Conditions in Tertiary Education.

A-2-b) Respective roles of universities' peer disciplinary boards and of the national peer disciplinary board

§ 19. In France, the peer-elected bodies of peers which hear disciplinary cases involving higher education teachers are as follows:

- **the peer-elected peer disciplinary boards that operate in individual higher education institutions** (universities, *grandes écoles*, institutes, etc.) and make decisions at first instance (see **§ B-1-f**, below). **Proceedings are not conducted in public so the decisions handed down by these boards cannot be regarded as respecting the right to a fair trial enshrined in Article 6 paragraph 1 of the European Convention on Human Rights and Article 14 § 1 of the International Covenant on Civil and Political Rights (ICCPR). Yet the right to a fair trial does apply to disciplinary proceedings** (see in particular THE UN HUMAN RIGHTS COMMITTEE'S VIEWS ON COMMUNICATION NO. 1015/2001, PERTERER V. AUSTRIA,[24] U. N. DOC. CCPR/C/81/D/1015/2001 (2004)), especially when the right to practise a profession is directly at stake (see in particular ECtHR 23 JUNE 1981 LE COMPTE, VAN LEUVEN AND DE MEYERE V. BELGIUM[25]), which is always the case in academic disciplinary proceedings;
- **a national peer-elected body of peers which acts as a court of appeal, or in some instances as a court of first and last instance,[26] namely the CNESER disciplinary board**. Proceedings are conducted in public, and the board also rules on requests from the teacher in question or the president or director of the institution to refer cases which would normally be dealt with at local level to the disciplinary board of a different institution when there are concerns about the objective or subjective impartiality of certain peers on the local disciplinary board.[27]

§ 20. If the *Conseil d'État* quashes a decision of the CNESER disciplinary board for failure to comply with a legal provision, in particular a procedural breach, it will send the case back to the CNESER for adjudication, without requiring any change in the composition of the panel hearing the case, except in those rare instances where the decision of the CNESER disciplinary board is quashed a second time, in which case the merits of the case will ultimately be decided by the *Conseil d'État* (see PARAGRAPH 3 OF THE CONSEIL D'ÉTAT DECISION OF 3 MAY 2017, CASE NO. 384113[28]). In the case of ordinary civil servants, however, if the *Conseil d'État* quashes a judgment handed down by the administrative court of appeal, it will either settle the case on the merits in the same judgment, or refer it to another administrative court of appeal, or send it back to the same court but with a differently constituted bench.

In fact, as in law, therefore, it is ultimately for the CNESER disciplinary board, a national body of peers, elected by peers, to decide whether or not to impose a disciplinary sanction

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[24] https://juris.ohchr.org/en/Search/Details/1124

[25] https://hudoc.echr.coe.int/fre#{%22display%22:[%220%22],%22languageisocode%22:[%22ENG%22],%22appno%22:[%226878/75%22,%227238/75%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-57521%22]}

[26] See § B-2-b below and Article L 232-2 of the Education Code.

[27] Article R 712-27-1 of the Education Code.

[28] https://www.legifrance.gouv.fr/ceta/id/CETATEXT000034570956

on higher education teaching personnel, and to provide the appropriate justification for the decision:

- its decisions and accompanying explanations may echo those issued by the university's own board, but they may also supersede them, and indeed often do;
- decisions are rendered after public hearings and then published on the Internet in an official gazette; it is these **CNESER disciplinary board** decisions that enjoy the authority of res judicata throughout the country, in compliance with the right to a fair trial, so they are the ones that are binding on all higher education institutions, both their teaching staff and their administrators, and not the decisions handed down by local disciplinary boards. To some extent, even the *Conseil d'État*, the court of final appeal for these decisions rendered on appeal or at first and last instance, is required to abide by the decisions of the CNESER disciplinary board, as the latter **has overriding discretion to assess the facts of the case and the appropriateness of the disciplinary sanction imposed (see above)**.

A-2-c) The CNESER disciplinary board makes a specific and essential contribution to the determination of the working conditions and working environment of higher education teachers

§ 21. The participation of all higher education teachers in the drafting of laws and regulations, particularly in matters relating to working conditions, is ensured *inter alia* through consultation with their elected representatives on various councils, committees and commissions (see **§ B-1-b** below for further details). **Such consultative participation, however, is not the only way in which higher education teachers contribute to the determination of their working conditions**. The decisions of the CNESER disciplinary board, like all case law, complements the laws and regulations as part of the legal framework within which higher education teaching personnel operate. **And if, in the case of such staff, this task has been entrusted to a peer disciplinary body, it is to distinguish it from ordinary administrative case law relating to other public officials who**, **unlike higher education teachers**, **do not enjoy academic freedoms**. After all, what may be deemed to constitute misconduct for an ordinary civil servant may fall within the ambit of academic freedom and so not be deemed to constitute misconduct when committed by a higher education teacher; at the same time, academia has its own scientific and ethical requirements, failure to comply with which may amount to misconduct warranting disciplinary action. **The task of the CNESER disciplinary board is not only to hear cases against specific higher education teachers**, **and to judge individual conduct, but also, beyond that**, **to make all the other teachers aware of what does or does not constitute a disciplinary offence** (and of the seriousness of the sanctions incurred, where applicable); **and to remind any presidents and directors of higher education institutions who infringe on the academic freedom of their teaching staff or flout other ethical standards specific to academia of their duties**, so as not to have to adjudicate in future on conduct which, on the part of a higher education teacher, is not improper but rather falls within the boundaries of academic freedom.

The ramifications of the CNESER disciplinary board's decisions thus go far beyond the individual cases concerned and extend, through its explanatory statements, its various general considerations and *obiter dicta*, to all higher education teachers.

§ 22. The decisions handed down by the CNESER disciplinary board are thus an autonomous and essential means for elected staff representatives to **determine** the working conditions of higher education teaching personnel and their working environment and to supervise the observance of regulations on these matters.

Making those decisions, however, requires creative thinking, for two reasons:

- firstly, there is no legal definition of disciplinary misconduct. **Case law determines what constitutes such misconduct**, in the light of the ethical obligations specific to higher education, since French law merely lays down the scale of penalties applicable. **The CNESER disciplinary board**, moreover, cannot simply transpose the case law of the ordinary administrative courts to the higher education sector, **as it is the only fully competent judicial body that is called upon, and able, to deal adequately and effectively with the issue of academic freedom and breaches of university ethics**;
- secondly, **the board must keep pace with the changing nature of the higher education environment**, **redefining over time what is and is not acceptable behaviour on the part of a higher education teacher**, **in particular vis-à-vis colleagues**, **students and various third parties outside the institution**.

§ 23. Our assessment is borne out by, *inter alia*, **the European Court of Human Rights**, which has already ruled that **a disciplinary sanction** imposed on a higher education teacher, however minimal, **is liable to have an impact on the exercise of that teacher's freedom of expression (in particular academic freedom)**, **and even to have a chilling effect in that regard** (see § 39, ECtHR 19 June 2018, Kula v. Turkey,[29] Application no. 20233/06), and hence on the way in which he or she conducts his or her professional activity and related matters, including outside his or her institution. More generally, too, a disciplinary sanction imposed on a teacher **may have an impact on other higher education teachers**, as the decisions of the CNESER disciplinary board are published in the national official gazette for the higher education sector, and are therefore known to all and enforceable against all.

§ 24. In higher education, the "working environment" within the meaning of **Article 22 of the Charter** includes the disciplinary context in which teachers operate, even if they are not directly, immediately and personally subject to disciplinary proceedings. **This disciplinary context therefore falls within the scope of Article 22 of the Charter in conjunction with Article 10**, whether the Committee considers it to be a matter of "working conditions" or "working environment" or of supervision of the observance of regulations on these matters. Our earlier comments about the disciplinary procedure and context also apply, therefore, whether the Committee regards these as coming under the heading of "working conditions" or the "working environment" or of supervision of the observance of regulations on these matters.

The CNESER disciplinary board thus makes a specific and essential contribution to the determination of the working conditions and working environment of higher education teachers, both in the context of their own institutions and in that of France's "public higher education service" as a whole. **Including as regards the "supervision of the observance of**

[29] https://hudoc.echr.coe.int/eng?i=001-184289

regulations" referred to in Article 22 § d of the Charter, and especially where respect for academic freedom and ethics by universities' own disciplinary boards is concerned.

A-2-d) On the contribution to hearing cases against students as a form of participation in the determination of working conditions or the working environment

§ 25. The higher education system's peer disciplinary boards **also sit in judgment on students.**[30] Indeed, hearing disciplinary complaints against students is their main activity, measured in terms of volume of cases. Notable examples of student misconduct include disrespectful behaviour towards teachers, defamation, making audio or video recordings and posting them online without permission, infringement of teachers' copyright and related rights, plagiarism, etc.

Taking part in the process of hearing cases against students, at local or national level, is thus a way of participating in the determination of the working conditions or working environment of higher education teachers, and in the supervision of the observance of regulations on these matters.

B) Points of law and fact, national and international, to be considered in relation to the situations and differences in treatment at issue. Applicability, *ratione materiae*, of Article E of the Charter, taken in combination with Article 22, and together with or having regard to or in the light of Article 10 of the Charter

§ 26. **Articles 10 and 22 of the Charter** do not in themselves require any particular arrangements for taking part in the determination of the working conditions of higher education teachers. States enjoy a margin of appreciation in this area. Nevertheless "a measure which in itself is in conformity with the substantial provision concerned may infringe this provision when read in conjunction with **Article E** for the reason that it is of a discriminatory nature" (SYNDICAT DES AGRÉGÉS DE L'ENSEIGNEMENT SUPÉRIEUR (SAGES) V. FRANCE, COMPLAINT NO. 26/2004, COMMITTEE'S DECISION ON THE MERITS OF 15 JUNE 2005, § 34).

This complaint, therefore, is based not on a positive obligation on the part of the French State **arising from Articles 10 and 22 of the Charter alone, but rather on Articles 10 and 22 read in conjunction with Article E of the Charter, and with due regard being had to relevant international law**. **It is a distinction in the enjoyment of the rights recognised in Article 22 of the Charter taken in combination with Article 10 that is at issue here**.

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[30] https://www.enseignementsup-recherche.gouv.fr/fr/bo/22/Hebdo3/ESRS2138991S.htm

§ 27 The expression "**or other status"** means that the list [which appears in Article E of the Charter] is not exhaustive **(**2018 DIGEST OF THE COMMITTEE'S CASE LAW, P. 231, SECTION ON ARTICLE E OF THE CHARTER). Furthermore, **according to the part of the Appendix to the Charter which concerns Article E**, "[a] differential treatment based on an objective and reasonable justification shall not be deemed discriminatory". Conversely, if differential treatment is not to be deemed discriminatory, it must be based on an objective and reasonable justification (EUROPEAN ROMA RIGHTS CENTRE (ERRC) V. BULGARIA, COMPLAINT NO. 31/2005, COMMITTEE'S DECISION ON THE MERITS OF 18 OCTOBER 2006, § 41; ASSOCIAZIONE NAZIONALE GIUDICI DI PACE V. ITALY, COMPLAINT NO. 102/2013, COMMITTEE'S DECISION ON THE MERITS OF 5 JULY 2016, § 82).

§ 28. **Article E** draws its inspiration from **Article 14 of the European Convention on Human Rights** (INTERNATIONAL ASSOCIATION AUTISM-EUROPE (IAAE) V. FRANCE, COMPLAINT NO. 13/2002, COMMITTEE'S DECISION ON THE MERITS OF 4 NOVEMBER 2003, § 52), and has a similar function ("PRINCIPLE THAT ARTICLE E MUST BE READ IN CONJUNCTION WITH ANOTHER ARTICLE OF THE CHARTER", SECTION OF THE COMMITTEE'S 2018 DIGEST OF CASE-LAW ON ARTICLE E OF THE CHARTER, P. 43 ET SEQ.) **And the European Court of Human Rights** has ruled that the elements that characterise different situations and determine their comparability [having regard to the Court's case law on Article 14 of the European Convention on Human Rights] must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question (ECtHR, FÁBIÁN V. HUNGARY [GC], 5 SEPTEMBER 2017, § 121, NO. 78117/13). **In this section, therefore, we set out relevant points of law and fact specific to the subject-matter concerned**, which complement those already set out in § **A** above, and which should be **taken into account in relation to the situations in question and their comparability** (see **§ B-1** below). For the Committee needs to be able to assess whether or not **the differences in treatment at issue** (see **§ B-2** below) are based on an objective and reasonable justification, in particular whether or not they pursue a legitimate aim, and, if so, whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see **§ C** below).

B-1) Relevant points of law and fact to be considered in relation to the situations at issue, in order to determine their comparability

The following points of law and fact (**§ B-1-a to B-1-g)** expand on or clarify those set out above in § **A**.

B-1-a) The different categories of permanent tenured teachers in French public higher education institutions[31]

§ 29. In the legislative part of the **French Education Code**:
- **Book IX** is devoted to "education personnel";
- **Part V** of this **Book IX** is devoted to "higher education personnel";

[31] See exhibit no. 1 for details of the number of teachers per category in higher education together with a general overview.

- Chapter II of this Part V is devoted to "teacher-researchers", "teachers" and "researchers" (**Articles L 952-1** to **L 952-14-2 of the Education Code).**

§ 30. **Article L 952-1 of the Education Code states that**, "subject to the provisions of **Article L 951-2** [on contractual teachers], the teaching personnel shall include teacher-researchers belonging to higher education, other teachers also having civil servant status [...]".

§ 31. According to this legislative provision, "**teacher-researchers**"[32] belong to higher education, because as permanent tenured staff – holding a "normal position of employment" to use the official phrase - they can only be assigned to a higher education institution. They may, however, work elsewhere (e.g. in an administration) on a temporary basis, while continuing to belong to their civil service corps, but in that case they are placed on secondment or, at their request, assigned non-active status.

§ 32. **As regards "other teachers also having civil servant status":**[33]

- a small proportion of these are civil servants who do not belong to a teaching corps but have been temporarily seconded to a higher education institution where they perform teaching duties (e.g. state civil administrators lecturing in public administration, public-sector engineers teaching in state-run engineering schools, judges lecturing in law, etc.*)*. We will not refer again to teachers of this type in the remainder of the complaint;
- for the most part, they are **teachers belonging to a teaching corps**, **the vast majority of whom work in a "normal position of employment"**, **i.e. as permanent tenured staff.** Within each of these teaching corps, persons working in higher education institutions represent a minority of the total number of teachers in the corps,[34] with most of the rest working in schools, mainly secondary schools. Hence the Administration's habit of referring to them as "secondary level teachers" (see **exhibit no. 1**). **The term "secondary level" is used to describe the jobs held by or offered to such teachers in higher education institutions**. **In practice, however**, the instruction that they provide is most definitely of the kind and level required of universities, and not secondary school teaching delivered in a higher education setting (see below). Also, **the statutory provisions governing such persons are very different from those applicable to their colleagues from the same corps who work in schools,** whether in terms of their duties and tasks (they may even be granted a leave of absence to carry out research) or the disciplinary arrangements that apply to them (see below), since they are in fact "higher education personnel" according to French law (Part V of Book IX of the Education Code, see above).

Hereinafter, when we refer to "other [higher education] teachers also having civil servant status" we primarily mean ***professeurs agrégés*** [teachers who have passed the *agrégation* examination] **working in a public institution of higher education**, **commonly known as**

[32] Approximately 90 000 at the last count, see exhibit no. 1.

[33] Approximately 13 000 at the last count, see exhibit no. 1

[34] Approximately 7 200 *professeurs agrégés* working in higher education (see exhibit no. 1); out of a total of approximately 58 000, i.e. approximately 14% of the total; and approximately 5 800 *professeurs certifiés* working in higher education out of a total of approximately 225 000, i.e. approximately 2.5% of the total.

PRAGs (for *PRofesseur AGrégé*). **The assessments, conclusions and requests set out in this complaint also apply, however, to teachers in the other corps concerned,** in particular certified teachers or **PRCEs** (for *PRofesseur CErtifié*) (see **D-2** below), because, even though there are specific statutory provisions for each of these other corps, the statutory provisions specific to higher education that concern them are the same as those applicable to **PRAGs**.

B-1-b) Tasks and duties of the different categories of permanent tenured teachers in French public higher education institutions, and comparison with those of French teacher-researchers

§ 33. The legislative part of the Education Code contains provisions on the tasks of higher education teachers. **According to Article L 952-2-1 of the Education Code**, "**the personnel mentioned in Article L 952-1** [so not only teacher-researchers, but also PRAGs] **shall participate in the tasks of the public higher education service, as set out in Article L 123-3"**. **Article L 952-1,** furthermore, states that these "personnel [...] **shall participate in the administration of institutions and shall contribute to the development and dissemination of knowledge and research**".

§ 34. According **to Article L 123-3 of the Education Code**, "the tasks of the public higher education service [and hence also of PRAGs, when the provision is read in conjunction with **Article L 952-2-1** above] shall be as follows:

"1° **initial and continuing lifelong training**;

2° **scientific and technological research and the dissemination and exploitation of its results for the benefit of society**. The latter shall be based on the development of innovation, technology transfer where possible, the capacity for expertise and support for associations and foundations recognised as being of public utility, and public policies designed to meet societal challenges and social, **economic** and sustainable development needs;

3° **guidance**, **social advancement and occupational integration**;

4° **the dissemination of humanist culture**, **in particular through the development of human and social sciences**, **and scientific**, **technical and industrial culture**;

5° **participation in the construction of the European Higher Education and Research Area**;

6° **international co-operation".**

§ 35. The tasks and duties of the various civil service corps are generally specified in decrees setting out their conditions of service.

§ 36. **Article 2 of Decree No. 84-431 on the conditions of service of teacher-researchers** accordingly states that "teacher-researchers shall have a dual teaching and research mission", that "they shall contribute to the performance of the tasks of the public higher education service, as provided for in **Article L 123-3 of the Education Code**, and also to the performance of the public research tasks mentioned in **Article L 112-1 of the Research Code**". The only material addition

which this **Article L 112-1 of the Research Code**[35] makes to the tasks already listed in **Article L 123-3 of the Education Code** is **"training in research and through research"**. **Article 3 of this Decree 84-431 reiterates, clarifies or illustrates the tasks set out in Article L 123-3 of the Education Code** - advising, mentoring and guiding students; organising instruction within teaching teams; teacher training and lifelong learning; participation in examination and competition boards; and "the use of information and communication technologies" – without adding anything to what is already essentially there or inherent in the role of higher education teacher, irrespective of the legal status associated with the position in question. The same can be said for the duties of teacher-researchers as set out **in Article L 952-3 of the Education Code**.[36]

§ 37. **In the case of PRAGs, on the other hand**, **the decrees setting out their conditions of service contain only the following provisions concerning their tasks in public higher education institutions**:

- **Decree No. 72-580, as amended,**[37] **and which relates to all *professeurs agrégés***, details the tasks **of those working in schools**, and the number of hours of service they are required to complete. **It does not, however, deal with the activities of PRAGs whose job**, **being based in a university, is not comparable to that of a teacher employed in a school**. Article 4 of this Decree No. 72-580, for example, merely states that *professeurs agrégés* "may also be assigned to higher education institutions".
- **Decree No. 93-461, as amended,**[38] **is concerned purely with teachers employed in universities** and sets out in Article 2 **the precise extent of the service obligations which PRAGs are required to fulfil**, stating in particular that "tenured or trainee secondary level teachers to whom the provisions of this decree apply shall be required to deliver, in the course of the academic year, 384 contact hours of teaching in the form of tutorials or practical work", and that they may be asked to give lectures.

§ 38. **Other regulations deal specifically with certain aspects of the work to be performed by PRAGs (among others) other than lectures**, **tutorials or practical work**:

- equivalence in terms of tutorial hours of other teaching activities, including mentoring, supervision or monitoring of internships, etc.;
- equivalence in tutorial hours of administrative activities (departmental management, studies, internships, in-service training, etc.);
- the annual leave of absence that may be taken by certain PRAGs (among others) to carry out doctoral or post-doctoral research.

In law, **the tasks of PRAGs in higher education are thus essentially the same as those of teacher-researchers**, **at least where undergraduate, and even some post-graduate, teaching is concerned. Some PRAGs, too, even engage in research. The tasks and duties of PRAGs are not, however, comparable to those of *professeurs agrégés* working in schools**.

[35] See exhibit no. 3 for the full version.
[36] See exhibit no. 3.
[37] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000500138/ for the full version.
[38] https://www. legifrance. gouv. fr/loda/id/JORFTEXT000000347402/ for the full version.

§ 39. In effect, the teaching duties of PRAGs in public higher education institutions **are not comparable to those of *professeurs agrégés* working in schools**, **but they are similar or functionally equivalent to those of teacher-researchers.** One proof of this can be found in a 2016 report by the General Inspectorate of the National Education and Research Administration (IGAENR), entitled "the role of *professeurs agrégés* in university education"[39] (see exhibit **no. 2**). **Containing factual observations on the status of such teachers**, **in particular PRAGs**, **in universities and other higher education institutions, the report is of interest on three counts**:

- the findings were made by third parties, the Inspectorate General officials who authored the report, operating under the authority of the government but with no links to the complainant trade union. Furthermore, and by deliberate decision of the Inspectorate General, no trade union representative was interviewed: no trade union, therefore, was in any way able to influence the findings, or the assessments and recommendations made by the report's authors on the basis of those findings. The report did, however, take full account of the views of the heads of institutions (in particular heads of universities) and chief education officers [*rectorats*];
- the findings were compiled through visits to and interviews with chief education officers, universities and other higher education institutions, and supplemented by feedback from questionnaires sent to chief education officers, universities and other higher education institutions;
- the authors of the report and their representatives interviewed the various actors concerned ("management teams" and "teacher panels" (see the first page of the summary inserted at the beginning of the report by its authors).

According to the authors of the report, it thus "provides a fairly detailed picture of the **reality of the duties performed by secondary level teachers**, their involvement in teaching and the responsibilities they carry" (see the first and third pages of the summary at the beginning of the report).

§ 40. **There are several points to note from the IGAENR report where PRAGs are concerned:**

- **they account for a significant proportion**[40] **of the total number of tenured teachers working in higher education institutions**; and an even higher proportion of the total number of teaching hours delivered across the higher education sector as a whole, since their teaching load is double that of teacher-researchers, there being no requirement for PRAGs to carry out research (see p. 14 of the report);
- **their "high level of integration and involvement** in the running of institutions" (see page 2 of the summary at the beginning of the report), their **"participation in training provision"** which is judged to be "**generally very extensive**" (see § 2.2.1. of the report, p. 39 et seq.); the fact that **they "have numerous pedagogical and administrative responsibilities"**, "which vary in nature from one institution to another" (see § 2.2.2. of the

[39] https://cache.media.enseignementsup-recherche.gouv.fr/file/2016/27/4/2016_053_place_agreges_ens_sup_618274.pdf and which is exhibit no. 2.
[40] About 20% of the total number of higher education teachers according to the first page of the summary inserted at the beginning of the report.

report, p. 46 et seq.), including notably those of director of studies, or even "corporate relations officer" (see § 2.2.2. of the report, p. 47);

- **they are "eligible**, **in the same way as teacher-researchers**, **for the teaching responsibilities bonus and the administration and administrative duties bonus"** (see 1.2.1. p. 15 of the report);
- "some presidents [of universities] explicitly subscribe to a policy of "non-discrimination", **eschewing any division between corps** and emphasising the contribution that secondary level teachers make and their commitment" (see pp. 45 and 46 of the report);
- **"almost all the institutions had, in effect, extended the "job reference framework" (*le référentiel d'activités*) for teacher-researchers to secondary level teachers, usually in an identical manner"** (see p. 50 of the report); "**that most of the reference frameworks did not make any distinction,** in the texts approved by the governing boards examined, **between categories of teachers"** (i.e. between PRAGs and *maîtres de conférences* [university lecturers]) (see p. 50 of the report);
- **Decree No. 93-461 "which sets out [...] the service obligations of [PRAGs]" is** "**modelled on the one [Decree No. 84-431] applicable to teacher-researchers**, **with double the teaching load since secondary level teachers are not required to carry out research"** (see final paragraph on p. 14 of the report);
- "it is clear from the interviews conducted by the [inspection] mission that **the choice between recruiting a secondary level teacher or a teacher-researcher** is not dictated by financial considerations, but instead **is about striking a balance** – one that varies from university to university and even within universities - **between enhancing research potential and the need for pedagogical support"** (see § 2.1.1 p. 34 of the report).

§ 41. **Both in law and in practice**, **when it comes to teaching in higher education institutions, the occupational activities in which PRAGs engage:**

- **are thus not functionally different, to any substantial degree, from those of teacher-researchers**. **The work is either identical, similar or equivalent. And at the very least comparable within the meaning of Article E of the Charter and Article 14 of the European Convention on Human Rights and the case law of the European Court of Human Rights and the ECSR relating to these articles**;

- **functionally differ, to a substantial degree, from those of other *professeurs agrégés* employed in schools**.

B-1-c) Contractual teachers in French public higher education institutions. Their tasks and duties

§ 42. **The presence in universities and similar institutions of contractual staff to carry out teaching or teaching and research duties is provided for in Article L 954-3 of the Education Code** ("The president may recruit, for a fixed or indefinite period, contractual staff [...] to perform [....] teaching, research or teaching and research duties") **and in Article L 951-2 of the same**

Code, by reference to the provisions of the State Civil Service Act.[41] **These Articles L 951-2 and L 954-3 can also be found in Part V of Book IX of the Education Code on "higher education personnel"**. There are approximately 22 000 contractual teachers in higher education, sub-divided into a number of categories (see **exhibit no. 1**).

§ 43. **As regards temporary teaching and research attachés (ATERs for short)** in public higher education establishments,[42] who are one such category, **Decree No. 88-654**[43] sets out, **in Article 10**, their tasks and duties in relation to teaching: they are the same as those of teacher-researchers (same number of hours to be completed in terms of lectures or tutorials or practical work. The article specifies that they "shall also perform tasks related to their teaching activities"). It is further stated in **§ 3° of Article 2 of the decree that "teachers or researchers of foreign nationality who have been employed in teaching or research positions in foreign higher education or research institutions for at least two years, and who hold doctorates" may likewise be recruited as ATERs.** This clearly demonstrates that the teaching duties of these ATERs are no different from those which, in another country, may be assigned to a university teacher, tenured or non-tenured.

§ 44. These duties are also the same, or at least comparable, in the case of contractual staff recruited to perform teaching duties only.

§ 45. Both in law and in practice, when it comes to teaching in higher education institutions, the work performed by ATERs and other contractual teachers in universities is not substantially different, therefore, from that of teacher-researchers, and is comparable to it within the meaning of Article E of the Charter and Article 14 of the European Convention on Human Rights and the case law of the European Court of Human Rights and the ECSR.

B-1-d) Like treatment of the different categories of teachers within College B for the purposes of representation on the various consultative bodies of universities and similar institutions in France, including where the consultative role of the CNESER is concerned

§ 46. According to **Article D 719-4 of the Education Code**, "**for the purpose of electing** members of councils in educational and research units, [...] members of councils in internal schools and institutes, **voters from the different categories shall be divided into colleges"**:

- **"College A** consisting of *professeurs* [*d'université*] and equivalent personnel";
- **"College B** consisting of "**other teacher-researchers**, **teachers and equivalent personnel"**.

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[41] Article L 951-2 of the Education Code: "The provisions of Law No. 84-16 [...] introducing statutory provisions relating to the State civil service, defining the conditions under which permanent civilian positions in the State and its public institutions are to be filled and allowing the integration of non-tenured staff holding such positions, shall apply to public scientific, cultural and vocational institutions. The rules governing fixed-term contracts shall be laid down in Articles 4 and 6 of the above-mentioned Law No. 84-16 of 11 January 1984".

[42] Who make up approximately 20% of contractual teachers, i.e. 4 400, see exhibit no. 1.

[43] https://www. legifrance. gouv. fr/loda/id/LEGITEXT000006066732/

College B includes (**Article D 719-4 of the Education Code**):

- "**teacher-researchers not belonging to College A** (**or "*maîtres de conférences*"**) or equivalent, and associate or visiting teachers, who do not belong to College A";
- "**other teachers**";
- **"contractual staff recruited [...] to carry out teaching, research or teaching and research duties** and who do not belong to college A".

§ **47**. **For the purposes of representation on "councils in training and research units"**, *maîtres de conférences*, PRAGs, ATERs, and other teachers with civil servant status, tenured or non-tenured, are thus treated in identical fashion, **within a single electoral college, College B**.

§ **48**. **They are also treated alike for the purposes of:**

- **the "research commission of the academic council or scientific council or of the body acting in its stead";**[44]
- **the "training and university life commission of the academic council or of the studies and university life council or of the body acting in its stead";**[45]
- **electing members of the governing board.**[46]

§ **49**. ***Maîtres de conférences*, PRAGs, ATERs and other teachers with civil servant status, tenured or non-tenured, are thus treated in identical fashion, within a single electoral college, College B, in all matters pertaining to representation on and elections to the consultative bodies of universities and similar institutions**.

§ **50**. **Furthermore**, "the representatives of the staff [...] of public scientific, cultural and vocational institutions [universities and similar institutions]" who serve on the CNESER are elected on a college basis with [...] "ten representatives of other teacher-researchers, teachers and researchers within the meaning of college B, as defined in I of Article D. 719-4".[47]

§ **51**. **The like treatment, within College B, of *maîtres de conférences,* PRAGs, ATERs and other teachers with civil servant status, tenured or non-tenured, thus also applies to the CNESER in its consultative role.**

B-1-e) Consideration by the Committee of the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel[48] (1997), and Council of Europe recommendations

§ **52**. Since it is not a treaty, this **UNESCO Recommendation** is not in itself binding. It introduced a standard (see the **Preamble of the Recommendation**), not an official legal text. **It does nevertheless represent an attempt to accommodate various states' objections to the**

[44] Article D 719-6 of the Education Code.
[45] Article D 719-6-1 of the Education Code.
[46] Article D 719-5 of the Education Code.
[47] Article D 232-3 of the Education Code.
[48] https://unesdoc.unesco.org/ark:/48223/pf0000160495

original draft so as to arrive at a compromise that would be acceptable to all ("All the participants [including the representatives of the states and hence, notably, France] supported the adopted text, which became the recommendation considered and adopted by the General Conference of UNESCO on 11 November 1997, **with no dissenting voices**"[49]**).** This explains, too, why **the Court of Justice of the European Union** (CJEU) **and**, **before it**, **its Advocate General** (CASE C66/18-, COMMISSION V. HUNGARY, JUDGMENT OF 6 OCTOBER 2020), addressing the issue of academic freedom, and in particular its collective and organisational aspects, **referred**[50] not only to a Council of Europe Recommendation, but also to this **UNESCO Recommendation**, in order to clarify the nature and scope of the right enshrined in (*inter alia*) **Article 13 of the Charter of Fundamental Rights of the European Union ("Academic freedom shall be respected")**. Although the **UNESCO Recommendation** concerning the Status of Higher-Education Teaching Personnel is not binding as such, **regard must nevertheless be had to its provisions,** as in the above-mentioned CJEU judgment, **in order to elucidate or clarify any matters relating to the right of teachers in universities and similar institutions to take part**, **without discrimination**, **in the determination of their working conditions.**

This is because:

- full and effective enjoyment by teachers in universities of all academic freedoms (including institutional autonomy, participation in governance, and the right to judge and be judged by one's peers) is a prerequisite for effective enjoyment of the right to vocational training enshrined in **Article 10 of the Charter** (see **§ 14** in § **A** above);
- **"the Charter must be interpreted so as to give life and meaning to fundamental social rights"** (FIDH V. FRANCE, COMPLAINT NO. 14/2003, COMMITTEE'S DECISION ON THE MERITS OF 8 SEPTEMBER 2004, § 29);
- **"The Committee interprets the Charter** in the light of the rules set out in **the Vienna Convention on the Law of Treaties of 23 May 1969**, among which its Article 31§ 3(c), which indicates **that account is to be taken of "any relevant rules of international law applicable in the relations between the parties**". Indeed, the Charter cannot be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it forms part" (DEFENCE FOR CHILDREN INTERNATIONAL V. THE NETHERLANDS, COMPLAINT NO. 47/2008, COMMITTEE'S DECISION ON THE MERITS OF 20 OCTOBER 2009, § 35);
- **"the Committee considers […] that a teleological approach should be adopted when interpreting the Charter, i.e. it is necessary to seek the interpretation of the treaty that is most appropriate in order to realise the aim and achieve the object of this treaty, not that which would restrict the Parties' obligations to the greatest possible degree"** (DEFENCE FOR CHILDREN INTERNATIONAL (DCI) V. BELGIUM, COMPLAINT NO. 69/2011, COMMITTEE'S DECISION ON THE MERITS OF 23 OCTOBER 2012, § 30); **"It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter"** (FIDH V. FRANCE,

[49] See "La marche vers la déclaration de 1997 de l'UNESCO sur la liberté académique" BY DONALD C. SAVAGE & PATRICIA A. FINN, cited above.
[50] See § A-2-a above.

COMPLAINT NO. 14/2003, COMMITTEE'S DECISION ON THE MERITS OF 8 SEPTEMBER 2004, §§ 27-29).

§ 53. **For the same reasons**, **the Committee must also have regard to what is stated in the recommendations and resolutions of the Council of Europe** (as it did, for example, in § 76 OF ITS DECISION OF 5 JULY 2016 ON THE MERITS OF COMPLAINT NO. 102/2013, NAZIONALE GIUDICI DI PACE V. ITALY) in order to elucidate or clarify any matters relating to the working conditions of higher education teaching staff, in particular what is stated in the following:

- **Recommendation 1762 (2006) of the Council of Europe**[51] **on academic freedom and university autonomy**.

Extracts:

- "**Academic freedom** in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction" **(§ 4-1)**;

- "**To grant universities academic freedom and autonomy** is a matter of trust in the **specificity and uniqueness** of the institution, which has been reconfirmed throughout history**"** (**§ 10)**;

- "[…] academic freedom and university autonomy as a fundamental requirement of any democratic society" **(§ 14**).

- **Recommendation 1762,** which has already been taken into account **by the Court of Justice of the European Union in its above-mentioned judgment of 6 October 2020** and **by the European Court of Human Rights in § 1** of its JUDGMENT IN SORGUK V. TURKEY OF 23 JUNE 2009 (APPLICATION NO. 17089/03[52]) as a relevant element of international law.

- **Resolution 2352 (2020) on "Threats to academic freedom and autonomy of higher education institutions in Europe**".[53]

Extracts:

- "Academic freedom and institutional autonomy of higher education institutions are not only crucial for the quality of education and research; they are **essential components of democratic societies**" (§ 1);

- "The fundamental values of higher education **apply to all member States, without exception**.**"** (§ 2).

- **Recommendation CM/Rec (2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy.**[54]

Extracts:

- The Committee of Ministers considers "academic freedom and institutional autonomy as intrinsic values of higher education which are essential to the overarching values and goals of the Council of Europe – democracy, human rights and the rule of law" (Appendix, § 4);

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[51] https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=enileid=17469&lang=FR
[52] https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2217089/03%22],%22itemid%22:[%22001-93216%22]}
[53] https://pace.coe.int/en/files/28883/html
[54] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805ca6f86

- "it is primarily the responsibility of public authorities **to establish and maintain the required environment and framework to guarantee institutional autonomy and academic freedom**" (Appendix, § 4);
- "Academic freedom and institutional autonomy are **essential values of higher education, and they serve the common good of democratic societies**" (Appendix, § 4);
- "Academic freedom […] is **an essential condition for the search for truth** […] by both academic staff […] and **should be applied throughout Europe"** (Appendix, § 5);
- "university staff […] **should be free to teach, learn and research without the fear of disciplinary action, dismissal or any other form of retribution"** (Appendix, § 5);
- "[...] institutional autonomy […] should be a dynamic concept evolving in the light of good practice" (Appendix, § 6);
-"Institutional autonomy **should not impinge on the academic freedom of staff and students"** (Appendix, § 8);
- "[…] **Only in a climate of confidence can higher education fully serve open democratic societies and encourage their development through freedom of thought and critical and creative thinking"** (Appendix, § 8);
- "this recommendation **sets out principles which should be observed** regardless of how education systems are organised, and which apply to all higher education institutions, whether public or private, non-profit or for-profit" (Appendix, § 9).

B-1-f) Parallels and distinctions drawn between the various categories of teachers in College B for the purposes of representation on the university's disciplinary board, and disciplinary procedure at this level of jurisdiction

§ 54. For teachers working in universities, the rule is that members of the institution's disciplinary board are elected "within the research commission and the training and university life commission of the academic council, by and from among the elected representatives of the college to which they belong"[55] - i**.e.**, **as far as we are concerned here**, **within College B**, **with no distinction being made between *maîtres de conférences* and other teachers** (in particular PRAGs and ATERs). One possible outcome of such an election is that a particular category of tenured or contractual teachers ends up with no representation on the university's disciplinary board. In that event, "the elected representatives of the teacher-researchers and teachers on the academic council shall likewise elect, according to their respective electoral colleges", "a representative [...] of each of the corps or categories of teaching staff of the same rank present in the institution, who are not represented on the disciplinary board, from among the elected representatives of those staff on the academic council, or, failing that, from among the staff employed in the institution, or, failing that, in another public higher education institution".[56]

§ 55. **Article R 712-13 of the Education Code states that** "the disciplinary section of the academic council competent with respect to teacher-researchers and teachers shall comprise […] "**four *maîtres de conférences* or equivalent personnel"** (§ 2° of the article) **to hear cases**

[55] Article R 712-15 of the Education Code.
[56] Article R 712-20 of the Education Code.

against *maîtres de conférences* and "two representatives of tenured staff with teaching responsibilities belonging to a different civil service corps" (§ 3° of the article) **to hear cases against other teachers** (including PRAGs and ATERs). The local disciplinary section hearing cases against students likewise includes College B teachers other than *maîtres de conférences*.

§ 56. **Article R 712-25 of the Education Code also introduces a procedural mechanism to ensure that, whenever the disciplinary section hears a case against a person belonging to a particular corps** (the *professeurs agrégés* corps in the case of a PRAG, for example) **or category** (ATERs, for example), **a representative of that corps or category is among those sitting on the panel**.

§ 57. **At the level of individual universities, there is thus a legal requirement**, **with an obligation to achieve results, to the effect that all categories of tenured and contractual teachers must be represented on the disciplinary body, and *maîtres de conférences* are treated in identical fashion to other teachers** (including PRAGs and ATERs) in elections to achieve such representation.

§ 58. **At university level, the distinctions that exist within College B have to do with the composition of the disciplinary body which may include only *maîtres de conférences* and equivalent personnel when hearing a case against a *maître de conférences*,**[57] **whereas it will include *maîtres de conférences* and "other teachers" when hearing a case against one of these "other teachers"** (PRAGs and ATERs, for example).

§ 59. This distinction is based on a hierarchy of corps and categories within the civil service, but does not amount to a denial of the right of other teachers (such as PRAGs or ATERs) to be represented on universities' own disciplinary boards. **It is not this distinction that is at issue in the present complaint**, **but rather the discriminatory ones described in § B-2 below**.

B-1-g) PRAGs may also, like *maîtres de conférences*, be elected as university presidents. One of them has even been re-elected to this position

§ 60. **A *professeur agrégé*** (PRAG) of philosophy, Mr Matthieu GALLOU, **was elected and then re-elected president of a university.**[58]

§ 61. **His eligibility in the first election was challenged by one of his colleagues**, a **teacher-researcher**, **before the administrative court of Rennes** (but not by the ministry or its regional representative, the chief education officer). **The case hinged on the interpretation of Article L 712-2 of the Education Code**, which states that "the president of the university shall be elected by an absolute majority of the members of the governing board **from among the teacher-researchers**, **researchers**, ***professeurs*** **or *maîtres de conférences***, **associate or visiting, or any other equivalent personnel"**. **The administrative court**, **in its judgment of 29 July 2016 (case no. 1601615) ruled that "any other equivalent personnel" within the meaning of this Article**

[57] Articles R 712-13 and R 712-24 of the Education Code
[58] https://www.univ-brest.fr/Zoom_sur//Matthieu-Gallou-reelu-President-de-l_UBO.cid205183

L712-2 does not imply "strict similitude, **in particular of the statutory kind, with the corps of teacher-researchers and researchers"** [listed] in this provision, "for the purpose of holding the office of university president", and that the "equivalent personnel" mentioned by name in the provision must be deemed to include PRAGs.

§ 62. As university president, moreover, this PRAG, like other university presidents, enjoys all the powers enshrined in, *inter alia*, Article **L 712-2 of the Education Code** (see **exhibit no. 3**), as well as:

- the right to bring teachers working in his university, including *professeurs d'université*, before the university's disciplinary board (**Article R 712-11 of the Education Code**, see exhibit no. 3);
- the right to decide on behalf of the university to lodge an appeal with the CNESER disciplinary board against decisions handed down by the university's own disciplinary board (**Article R 712-43 of the Education Code**, see exhibit no. 3); and to appeal to the *Conseil d'État* against decisions of the CNESER disciplinary board in cases to which his university has been a party.

§ 63. The practice of treating PRAGs and ATERs (among others) in the same way as *maîtres de conférences*, and more broadly, of treating the different teachers in College B as being in relevantly similar situations thus extends to the highest echelons of academia. It could even be said to be the rule, with the differences in treatment described below in § **B-2**, which prompted this complaint, being among the very few exceptions to that rule.

B-2) Differences in treatment at issue

§ 64. **Several differences in treatment are at issue in this complaint.**

- **Within College B**, ***maîtres de conférences*** **have the right to vote and stand in elections to the disciplinary board of the CNESER while other teachers (including PRAGs and ATERs) do not**. **The latter are thus deprived of one of the essential guarantees of participation in the determination of working conditions enshrined in Article 22 of the Charter taken in conjunction with Article 10**, or having regard to the latter. This inequality of treatment between the different categories of College B teachers is expanded on in **§ B-2-a below**. It means that, whenever the CNESER disciplinary board rules at first and last instance,[59] or whenever it refers a case that would normally be heard by the university's own disciplinary board to another university's disciplinary board,[60] some cases involving College B teachers who are not *maîtres de conférences* fall completely outside the adjudicatory reach of the representatives of those teachers, including notably PRAGs and ATERs (**§ B-2-b below)**;
- **French law, moreover, allows senior administrators,** without them having to justify their actions to anyone, to completely exclude College B teachers who are not *maîtres de conférences* from the academic peer disciplinary system, not only depriving those teachers

[59] Article L 232-2 of the Education Code (see exhibit no. 3).

[60] Article R 712-27-1 of the Education Code (see exhibit no. 3).

of the right to be judged by peers who represent them but also depriving those peers of the right to judge them, and **so denying them one of the essential guarantees of participation in the determination of working conditions enshrined in Article 22 of the Charter taken in conjunction with, or having regard to, Article 10 of the Charter (§ B-2-c below)**.

B-2-a) Differences in treatment affecting all College B teachers other than *maîtres de conférences*: unlike *maîtres de conférences*, these teachers have neither the right to vote nor the right to stand in elections to the CNESER disciplinary board

§ 65. According to Article **L 232-3 of the Education Code** (for the full version, see **exhibit no. 3**), "the National Council for Higher Education and Research [CNESER] operating as a disciplinary body [...] shall include only teacher-researchers of a rank equal to or higher than that of the person subject to disciplinary proceedings before it". And according to **Article R 232-28 of the same Code** (see **exhibit no. 3** for the full version), "the adjudicatory panel [of the CNESER operating as a disciplinary body] shall include all full members who are teacher-researchers or equivalent personnel of a rank equal to or higher than that of the person before it"; **Article L 232-3**, **however, being legislative in nature**, **takes precedence over Article R 232-28**, **a regulatory provision, with the result that teachers who are in other respects treated, within College B**, **as equivalent to *maîtres de conférences* (see** § **B-1 above) are not so treated when it comes to eligibility for election to the CNESER disciplinary board.**[61]

§ 66. **According to Article R 232-24 of the Education Code** (see **exhibit no. 3)**, "the members of the National Council for Higher Education and Research operating as a disciplinary body shall be elected by the elected representatives of teacher-researchers serving as full or alternate members of the National Council for Higher Education and Research [CNESER], divided according to their respective electoral colleges". Yet the *maître de conférences* teacher-researchers who were elected to the CNESER were elected within College B, which includes other categories of teachers, notably PRAGs and ATERs. **Strictly speaking, therefore, they are not the "elected representatives of teacher-researchers"**, **contrary to what this Article R 232-24 states**, **but rather elected representatives of College B on the CNESER and hence, ultimately, of the whole of College B**; **all the more so, indeed, as most of them were elected from lists that also included PRAGs and/or ATERs**. **The Administration, however, interprets and implements this article as conferring the right to vote in elections to the CNESER disciplinary board solely on *maîtres de conférences*, and as denying it to other College B teachers,** including those who have been elected to the CNESER. **This interpretation was challenged by the head of the complainant trade union** before the administrative courts, including on appeal, but the courts interpreted the article in question in the same way as the Administration. **The head of the complainant trade union also contested – through a "priority question of constitutionality" (QPC for short) - the constitutionality of Article L 232-3 of the Education Code, insofar as it deprives other College B teachers of the right to stand for election to the CNESER disciplinary board, but the administrative courts declined**

[61] This is confirmed by Article R 232-23 of the Education Code (see exhibit no. 3).

to refer the QPC to the Constitutional Council. In the case of both eligibility to vote and eligibility to stand for election, the administrative courts, like the French Administration, held that the difference in situation constituted by the fact that other College B teachers do not belong to the *maîtres de conférences* corps was sufficient to justify the differences in treatment in question (*see* **§ C-2** below).

§ 67. **Unlike *maîtres de conférences*, therefore, other College B teachers**, **including those already elected to the CNESER, have neither the right to vote nor the right to stand in elections to the CNESER disciplinary board. These other teachers**, **in particular PRAGs and ATERs**, **are thus deprived of representation on that board. The difference in treatment also extends to participation in the adjudication of cases against students by the CNESER disciplinary board. These other College B teachers are accordingly deprived of an essential means of participation in the determination of working conditions and the working environment**, **and in the supervision of the observance of regulations on these matters (see § 24 of § A above)**.

B-2-b) The differences in treatment cited in § B-2-a above engender others

§ 68. **According** to **Article L 232-2 of the Education Code**, **in principle**, "the National Council for Higher Education and Research shall rule on appeal and at last instance on disciplinary decisions taken by the university authorities competent with respect to teacher-researchers and teachers". "However, it shall be called upon to rule at first and last instance where no disciplinary section has been formed or where no judgement has been issued six months after the date on which proceedings were instituted before the competent disciplinary body". Accordingly, **College B teachers who are not *maîtres de conférences* have been, or may in the future be, judged at first and last instance by the CNESER disciplinary board**, **without having anyone, at any stage of the proceedings, to represent their category on the disciplinary body hearing the case.**

§ 69. **Some cases involving College B teachers who are not *maîtres de conférences* thus fall completely outside the adjudicatory reach of the representatives of those teachers**, **notably PRAGs and ATERs**. For there is no requirement in French law for such teachers to be represented on the CNESER disciplinary board, even where it is called upon to rule at first and last instance. **The teachers in question are thus deprived of an essential means of participation in the determination of working conditions and the working environment**, **and in the supervision of the observance of regulations on these matters**.

B-2-c) French law, moreover, allows senior administrators, without them having to justify their actions, to completely exclude College B teachers who are not *maîtres de conférences* from the academic peer disciplinary system

§ 70. Contractual teachers in universities, in particular ATERs, are governed both by general civil service law relating to contractual staff and by the specific law applicable to higher education

teachers. Likewise, PRAGs are governed both by the general law applicable to *professeurs agrégés* and by the specific rules applicable to higher education teachers.

§ 71. The institutional autonomy of universities and the right of teachers in such institutions to participate in governance and to enjoy academic freedom **constitute special law which, according to a centuries-old legal principle, ought to have overridden the general law** applicable to contractual staff or *professeurs agrégés*, particularly in disciplinary matters, for the reasons stated above.

§ 72. In the case of both contractual staff and *professeurs agrégés*, however, the practice of the Administration and of the *Conseil d'État*, France's highest administrative court, has been to allow senior administrators to wholly remove College B teachers who are not ***maîtres de conférences*** from the reach of higher education's peer disciplinary boards.

As regards contractual teachers in higher education

§ 73. In its "**Guide to good practice on the use of contractual staff"**[62] **(p. 54)**, the French Ministry of Higher Education and Research spells out the law as regards the disciplinary arrangements applicable to such staff:

- **"Specific case of temporary teaching and research attachés (ATER)**: **in disciplinary matters, ATERs are subject to both the general disciplinary arrangements and to the disciplinary arrangements specific to higher education" [...]**
- **"The president of the university who recruited the individual concerned may choose to institute "general" disciplinary proceedings himself or herself [...] or, alternatively, to apply the disciplinary rules specific to higher education**. In this last event, disciplinary power is exercised in the first instance by the disciplinary section of the university's governing board".

§ 74. **The presidents and directors of the higher education institutions where these contractual teaching staff work thus have the power to exclude them from the disciplinary arrangements specific to higher education, thereby creating a fundamental difference in the way such staff are treated**:

- under the "general" disciplinary procedure (see **§ A-2** above), any sanctions are imposed not by a body of peers but rather by the president or director of the institution concerned; the person's elected peers are merely consulted, without the president or director being under any obligation to heed the opinion of this disciplinary board, in terms of either the sanction imposed or the reasoning behind it. The participation of the said peers is therefore far more limited than under the disciplinary regime specific to higher education, as they do not act as judges but merely give their opinion, one which carries no decisive weight and which the president or director is at liberty to disregard;
- in the event that the sanction imposed by the president or director should be contested, the appeal is heard not by the CNESER disciplinary board, but rather by the administrative

[62] See https://www.galaxie.enseignementsup-recherche.gouv.fr/ensup/pdf/Guide_DGRH_contractuels_fevrier_2013.pdf for the full version of the guide and exhibit no. 4 attached to this complaint for the relevant extracts.

court and then the administrative court of appeal; at no stage of the proceedings, therefore, will the staff in question have an opportunity to be judged by peers with a heightened sensitivity to academic freedom, whether it be their elected representatives or other College B teachers (notably *maîtres de conférences* and PRAGs).

§ 75. **The participation of these contractual teachers in the disciplinary aspect of determining working conditions and the working environment and in the supervision of the observance of regulations on these matters may therefore**, **by decision of a university president**, **be very different from that of *maîtres de conférences***, **and above all far less favourable for contractual teachers who are subject to disciplinary action.** In practice, such teachers must be careful not to upset their presidents and directors, including when making decisions that normally fall within the ambit of academic freedom and should never be hindered by fear or reticence. Also, where the sanctions imposed on such staff under this "general" disciplinary procedure are challenged, the administrative courts and administrative courts of appeal hearing the case treat the individuals concerned not as teachers entitled to academic freedom, but as contractual staff like any other.

This right on the part of university presidents and directors of *grandes écoles* or institutes to deny College B contractual teachers access to certain procedures thus deprives all the teachers in this college (including *maîtres de conférences*) of effective participation in the determination of working conditions and the working environment, and in the supervision of the observance of regulations on these matters. It accordingly creates, at the discretion of a senior administrator, working conditions the determination of which is exempt from any kind of peer involvement, and subject to a form of judicial review that is entirely beyond the reach of those peers.

As regards PRAGs and other categories of tenured higher education teachers in College B who are not *maîtres de conférences*

§ 76. In the section of the Education Code on "higher education personnel", **Article L951-4** states that "the minister responsible for higher education may suspend higher education personnel for a period not exceeding one year, without loss of pay".

§ 77. Such suspension by the Minister for Higher Education may even extend to a university president, which is what happened on 19 October 2009, as AEF dispatch[63] Info No. 291559 attests. To avoid breaching the copyright associated with this dispatch, and the right of this university president, who was suspended and later dismissed from the civil service, to be forgotten, we have enclosed a copy of this dispatch (see **exhibit no. 5**) in paper form only, so that it can be consulted only at the Committee secretariat **(Rule 30-8 of the Committee's Rules**) and so that the Committee can decide itself on a case-by-case basis, under **Rule 37 of its Rules**, which third parties should have access to the document.

§ 78. A disciplinary case involving a "secondary level teacher" (in this case a *professeur certifié* [certified teacher]), who was not only a tenured civil servant but also the head of his

[63] Agence Éducation & Formation (French press agency specialising in education and research).

institution, was eventually settled in cassation proceedings before the *Conseil d'État*. The judgment, handed down on 12 February 2021 (case no. 436379,[64] **exhibit no. 6**), is embodied in an article of the Education Code whose meaning and practical scope the *Conseil* modified. The *professeur certifié* in question had initially been suspended, a measure that he challenged before the *Conseil d'État* (see above). The Administration could have suspended him pursuant to **Article L 951-4 of the Education Code** (as was the case for the suspension referred to in **§ 77** of the present complaint and which is the subject of **exhibit no. 5)**, prior to the teacher-cum-director being referred to his institution's disciplinary board or, to preserve the subjective impartiality of the individuals sitting in judgment, to the disciplinary board of a different institution. In the event, however, a senior administrator[65] suspended him not under Article L 951-4 of the Education Code but rather under the ordinary rules governing civil servants from his "parent" corps. The individual in question, a civil servant, accordingly challenged the legality of the suspension before the administrative court, then the administrative court of appeal and finally before the *Conseil d'État* as the administrative court of cassation. In its judgment of 12 February 2021, ***the Conseil d'État*** did not simply uphold the suspension in question (which in French law is classed not as a disciplinary sanction but rather as an interim measure): setting out its considerations in very broad terms in paragraph 5 of the judgment and going far beyond what was necessary to confirm that the suspension was lawful, **it held that the Administration could bring College B teachers who were not *maîtres de conférences* before the disciplinary bodies provided for in the statutes applicable to all civil servants in the relevant corps, with no account being taken, therefore, of the nature of their teaching**, **the place where the alleged acts were committed and the disciplinary arrangements specific to higher education**.

§ 79. **The *Conseil d'État* referred**, ***inter alia*****, in paragraph 5 of its ruling**, to **Article L 952-7 of the Education Code**: "[...] The sanctions imposed on teachers [from College B who are not *maîtres de conférences*] by the disciplinary section shall not prevent such teachers from being brought, for the same offences, before the disciplinary bodies provided for in the statutes applicable to them in their parent corps".

§ 80. Prior to this *Conseil d'État* ruling of 12 February 2021, **Article L 952-7** had been construed and implemented in such a way that a tenured College B teacher who, as a punishment, was sent back to teach in a school (effectively involving a change of profession) by an academic disciplinary board, and so after being heard by a panel of his academic peers, could be given an additional sanction, under the ordinary rules applicable to civil servants from the same corps. **Following this ruling**, **the law now allows the Administration to discipline tenured, College B teachers other than *maîtres de conférences* and to exclude them from the academic peer disciplinary system altogether.**

§ 81. **College B teachers' participation in the disciplinary aspect of the determination of working conditions is thus very different from that of *maîtres de conférences***, **and above all**

[64] https://www.legifrance.gouv.fr/ceta/id/CETATEXT000043240917?init=true&page=1&query=436379&searchField=ALL&tab_selection=all

[65] In this case, the chief education officer at the academy where the university was based.

far less favourable. In fact and in law, since the Conseil d'État decision of 12 February 2021, such teachers, like contractual teachers, no longer enjoy one of the essential guarantees of the exercise of their academic freedom. Furthermore, the fact that the Administration can impose disciplinary sanctions on them without having to refer them to higher education's peer disciplinary boards deprives all College B teachers (not only PRAGs and ATERs, but also *maîtres de conférences* and *professeurs d'université*) of effective participation in the determination of working conditions and the working environment, and in the supervision of the observance of regulations on these matters.

§ 82. Furthermore, where these teachers are brought before the ordinary disciplinary bodies provided for in their statutes, the elected members of their college who sit on these bodies do so by virtue of having been elected by all the voters in that corps. It may be the case, therefore, that none of those elected members works in a higher education institution, meaning that there are no peers from higher education on the disciplinary board. And even when there are, those peers from higher education are always in a minority on such bodies compared with teachers working in schools.

C) How and why the differences in treatment at issue are incompatible with the combination of Articles 22 and E of the Charter, read in conjunction with, having regard to or in the light of Article 10, and in the light of and having regard to other articles of the Charter and relevant international law

§ 83. In **§ A and B** above, we have established that:

- serving as a judge on or electing judges to an academic disciplinary board, in particular the disciplinary board of the CNESER, constitutes, **for College B higher education teachers** (notably PRAGs and ATERs), **an essential means of participating**, **directly** (as an elected judge) **or indirectly** (as a voter), **in the determination of their working conditions or their working environment**, **and in the exercise of academic freedoms**; hence **the applicability**, ***ratione materiae***, of **Articles 22 and 10 of the Charter to the present complaint, and of the two articles taken together**;
- the differences in treatment in question lead to **some College B teachers being deprived of representation on the CNESER disciplinary board**; **and even to the complete exclusion of some College B teachers from the disciplinary jurisdiction of their peers,** with a senior political figure (minister or chief education officer) or administrator (president or director) being granted sole power to determine what punishment should be imposed, and the ordinary administrative courts sole authority to hear any appeals that may be lodged against those sanctions;
- **PRAGs and ATERs (in particular) are**, **as higher education teachers**, **in a situation comparable, if not identical**, **similar or essentially equivalent**, **both in fact and in law,**

to that of *maîtres de conférences*; that we therefore satisfy the evidential requirement relating to Article 14 of the European Convention on Human Rights (§ 52 of the ECtHR's Guide to Article 14 dated April 2022:[66] "when bringing a complaint under Article 14, the applicant has to show that he or she has been treated differently from another person or group of persons placed in a relevantly similar situation"), **and hence, too, the evidentiary requirement relating to Article E of the Charter (**§§ 74-76 of the Committee's decision of 5 July 2016 on the merits of COMPLAINT NO. 102/2013 "ASSOCIAZIONE NAZIONALE GIUDICI DI PACE V. ITALY")**, which draws inspiration from this Article 14 of the Convention and has a similar function;**[67]

- the duties performed by PRAGs and contractual teachers in universities do, however, **differ from those of ordinary civil servants and contractual staff**, in particular the duties performed by teachers employed in schools; they are in a different situation **within the meaning of the case law applicable to Article 14 of the European Convention on Human Rights and Article E of the Charter**; for that reason, disciplinary cases against higher education teachers of this type need to be heard by their peers (see **A** and **B** of the complaint).

§ **84**. Furthermore, " [w]hen deciding cases of discrimination, the Court will apply the following test":[68]

1.	**2.**
Has there been a difference in treatment of persons in analogous or relevantly similar situations [...]?	If so, is such difference – or absence of difference – objectively justified? In particular, a. Does it pursue a legitimate aim? b. Are the means employed reasonably proportionate to the aim pursued?"

§ 85. It can only be assumed that the Committee's answer to question 1 will be a clear "yes". That much has already been established in § **B** above. It remains here to show how and why:

- **there is no aim capable of justifying the differences in treatment at issue (§ C-1** below);
- the argument relied on against the complainant trade union, based solely on membership of a particular civil service corps or contractual worker status, **cannot be considered an objective and reasonable justification in the light of the Charter**, **its Appendix** and **the relevant international law (§ C-2** below);
- **there is no reasonable relationship of proportionality between the means employed and the aim pursued** (**§ C-3** below);

[66] https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiCyIeb8oH5AhUM_qQKHeoqC14QFnoECA4QAQ&url=https%3A%2F%2Fwww.echr.coe.int%2FDocuments%2FGuide_Art_14_Art_1_Protocol_12_ENG.pdf&usg=AOvVaw0mc-f3G9jBXAxeGTR_ztTE
[67] International Association Autism-Europe (IAAE) v. France, Complaint No. 13/2002, Decision on the merits of 4 November 2003, § 52.
[68] See § 51 of the ECtHR's Guide on Article 14 of 30 April 2022, cited above.

- **the margin of appreciation enjoyed by states in relation to Articles 22 and 10 of the Charter taken in conjunction with Article G cannot justify the differences in treatment at issue** (**§ C-4** below),

and to conclude that the respondent State has failed to comply with the combination of Articles 22, **E and 10 of the Charter and its Appendix**, **in the light of and having regard to its Preamble**, **Articles G**, **H and N**, **and the relevant international law relied on in the present complaint (§ C-5** below).

C-1) Aim sought to be achieved by the differences in treatment at issue

§ 86. Despite extensive investigation, the complainant union has failed to find any evidence that the differences in treatment in question pursue an explicit aim that might justify them, either in the French Constitution, or in French legislation, or in the accompanying explanatory statements or parliamentary debates; nor has it found any evidence of such an aim in French regulations, or in the case law of the Constitutional Council or the *Conseil d'État*. Nor is there any mention of such an aim in a reservation regarding the interpretation or application by the French State of **Article 13 of the Charter of Fundamental Rights of the European Union**, **of the above-mentioned recommendations and resolutions of the Council of Europe and UNESCO** (*see* **A** and **B** above), **or of Articles 22 and 10 of the Charter**.

§ 87. Even in the case before the Paris Administrative Court of Appeal, in which some of these differences in treatment were challenged, neither the respondent Administration nor the Administrative Court, in its judgment of 21 May 2021,[69] invoked the slightest legitimate aim, either in the Administration's defence or in the court's explanation for its ruling rejecting the appeal. *A fortiori*, the complainant trade union has found nothing that might justify the differences in treatment at issue here, other than the power vested in Parliament to make laws or the power vested in the government to issue regulations.

C-2) In what respect and why the argument relied on against the complainant trade union, based solely on membership of a particular civil service corps, cannot be considered an objective and reasonable justification in the light of the Charter, its Appendix and the relevant international law

C-2-a) Ground relating to the lack of representation on the CNESER disciplinary board of College B teachers other than *maîtres de conférences*

§ 88. No specific reasons for the differences in treatment at issue can be found in the **French Constitution**, or in **French legislation**, or in the accompanying explanatory statements and parliamentary debates; nor are any to be found in **French regulations,** in the case law of the

[69] Exhibit no. 7 and https://www.legifrance.gouv.fr/ceta/id/CETATEXT000043534372?init=true&page=1&query=20PA03679+&searchField=ALL&tab_selection=all

Constitutional Council, or in a reservation regarding the interpretation or application by the French State of **Article 13 of the Charter of Fundamental Rights of the European Union** or of the **above-mentioned** recommendations and **resolutions of the Council of Europe and UNESCO**.

§ 89. In the absence of a legitimate aim (see **§ C-1** above), the respondent Administration in the case before the Administrative Court of Appeal and the latter in its ruling did nevertheless raise a ground which, in their view, justified the fact that College B teachers other than *maîtres de conférences* may neither vote nor stand in elections to the CNESER disciplinary board.

§ 90. **This ground is stated in § 7 of the court ruling,**[70] and forms the basis for what follows therein: "The principle of equal treatment is applicable only between officials belonging to the same corps".

The fact that PRAGs and ATERs (among others) do not belong to the *maîtres de conférences* corps thus constitutes, in the eyes of the court, a difference in situation which, in its view, justifies the differences in treatment in question, **even though it acknowledges, in § 10 of its judgment**, that "the tasks and duties of *professeurs agrégés* [...] employed in higher education institutions […] are similar to those of *maîtres de conférences* and even though certain provisions of the Education Code apply to both categories of staff", on the ground that "*professeurs agrégés*, when they are employed in an institution of higher education, do not thereby cease to belong to this corps".

§ 91. This ruling by the Paris Administrative Court of Appeal, furthermore, omits everything in our complaint pertaining to ATERs, distorts some of the arguments put forward by the president of the complainant union, and fails to address others. What we are concerned with here, however, is not a violation of the right to a fair trial, or a misinterpretation and misapplication of national law by the court in question, **but rather an infringement of the Charter**.

§ 92. There is no question in this complaint of examining the relevance of this argument in the light of national law alone, having regard *inter alia* to the principle of equality before the law enshrined in the French Constitution: to do that would have required a cassation appeal but any plea premised on the academic freedoms recently introduced by French law (see § **13** of **A** above) and what the Court of Justice of the European Union ruled in its judgment of 6 October 2020 (see **§ 15** of **§ A** and **§ 52** of **§ B** above) would have been deemed inadmissible for not having been raised in the application to the administrative court in 2019; also, some of the differences in treatment complained of here only came to light in the *Conseil d'État* ruling of 12 February 2021 (see **exhibit no. 6**).

[70] https://www.legifrance.gouv.fr/ceta/id/CETATEXT000043534372?init=true&page=1&query=20PA03679+&searchField=ALL&tab_selection=all

Accordingly, the objective and reasonable nature of the argument relied on against the trade union is examined below solely under the articles of the Charter invoked in the present complaint, having regard to or in the light of relevant international law.

§ 93. **Nor, of course, is there any question in this complaint of asking the Committee to determine whether the differences in treatment at issue are in conformity with European Union law**. **We are, however, entitled to ask the Committee to have regard to the case law of the Court of Justice of the European Union** as it relates to academic freedom and differences in treatment between higher education teachers, where that case law is based on legal provisions equivalent to **Articles 22, 10 and E** of the Charter taken together, and on principles for assessing the comparability of the situations in question which apply to the present complaint, for the reasons set out below.

§ 94. It so happens that, in its JUDGMENT IN DANIEL USTARIZ ARÓSTEGUI V DEPARTAMENTO DE EDUCACIÓN DEL GOBIERNO DE NAVARRA OF 20 JUNE 2019, CASE C72/18,[71] the Court of Justice of the European Union was called upon to rule on a matter concerning discrimination in the employment conditions of higher education teachers, notably on the basis of Clause 4 ("Principle of non-discrimination") of the Framework Agreement on fixed-term work concluded on 18 March 1999 (hereinafter the "Framework Agreement"), which is appended to Council Directive 1999/70/EC[72] of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43): "1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds. [...]".

§ 95. The applicant, Mr Ustariz Arostegui, was a teacher employed by a state-run university under a fixed-term public law contract, and as such was in a situation comparable to that of French ATERs. The case hinged on additional remuneration paid to teachers with civil servant status but not to contractual staff. In its considerations, the CJEU goes far beyond the question of inequalities in pay. And although the case before the CJEU was concerned with conditions of employment, **the following assessments also hold true for participation in the determination of working conditions or the working environment.**

§ 96. **The CJEU held, in § 28 of its judgment**, that "the principle of non-discrimination, **of which clause 4(1) of the Framework Agreement is a specific expression**, requires that comparable situations should not be treated differently […] unless such treatment is objectively justified". **In essence, therefore, the Court ruled on the basis of Article E of the Charter taken in conjunction with Article 22, having regard to Article 10 of the Charter** (academic freedom being inherent in this article, see **§ 14** of **A** above).

§ 97. In **§ 31** of the judgment, the CJEU held that "it follows from the wording of clause 4(1) of the Framework Agreement that it is sufficient for the fixed-term workers at issue to be treated

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[71] https://curia.europa.eu/juris/document/document.jsf?text=&docid=215250&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2145750

[72] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31999L0070

in a less favourable manner than permanent workers in a comparable situation in order for those fixed-term workers to claim the benefit of that clause". **That is tantamount to considering**, **by analogy**, **for the purposes of the present complaint**, **that ATERs and other contractual teachers are entitled to claim** the benefit of Article 22 of the Charter read in conjunction with Articles 10 and E with respect to the differences in treatment at issue here; **and also PRAGs** (*inter alia*), **since Articles 22**, **10 and E of the Charter cover not only contractual workers**, **but all the workers concerned**.

§ 98. The CJEU also ruled, in **§ 34** of its judgment, that "[i]n order to assess whether the workers are engaged in the same or similar work, **for the purposes of the Framework Agreement**, it must be determined […] whether, in the light of a number of factors such as the nature of the work, training requirements and working conditions, those workers can be regarded as being in a comparable situation". It was on the basis of such an assessment that we showed, in § **B** above, that other College B teachers are in a situation comparable to that of *maîtres de conférences*.

§ 99. The CJEU further ruled, in **§ 40** of its judgment, that "**According to the settled case-law of the Court, the concept of 'objective grounds'** requires the observed unequal treatment to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose."

§ 100. In addition, in **§ 41** of the judgment, the CJEU held that:

- "reliance on the mere temporary nature of the employment of staff employed under a public law contract […] does not meet those requirements and is therefore not, of itself, capable of constituting an objective ground within the meaning of clause 4(1) of the Framework Agreement";
- "[i]f the mere temporary nature of an employment relationship were to be held to be sufficient to justify a difference in treatment between fixed-term workers and permanent workers, **the objectives of Directive 1999/70 and the Framework Agreement would be rendered meaningless** and it would be tantamount to perpetuating a situation that is disadvantageous to fixed-term workers".

§ 101. In **§ 44** of the judgment, the CJEU held that "an abstract and general condition to the effect that a person must have the status of a public official in order to benefit from an employment condition such as that at issue in the main proceedings, with no account being taken, in particular, of the specific nature of the tasks to be performed or their inherent characteristics, **does not correspond to the requirements set out in paragraphs 40 and 41 of the present judgment".**

§ 102. **According to the Parliamentary Assembly of the Council of Europe** (paragraph 4 of Resolution 2180 (2017): The "Turin Process": reinforcing social rights in Europe[73]), it is important to avoid "a lack of coherence between the legal systems and case law related to different

[73] https://pace.coe.int/en/files/23993/html

European organisations, in particular the Council of Europe and the European Union" because such lack of coherence "has the capacity to undermine the effectiveness of the respective instruments". All the more so since **what the CJEU ruled in the "Ustariz Aróstegui" judgment is an acquis communautaire** in its eyes (a point forcefully reiterated in its ORDER OF 7 APRIL 2022[74] IN CASE -C133/21, §§ 57-61, ECLI:EU:C:2022:294**), and should also be treated as an acquis communautaire by the Committee**, **in line with what it has held in the past when dealing with other cases where reference was made to European Union directives** (see in particular:[75] ECSR 1 JULY 2001, CONCL. SLOVAK REPUBLIC, NO. XV-2/DEF/SVK/11/3/EN, § 9 CONCERNING THE PROTECTION OF HEALTH AGAINST THE ADVERSE EFFECTS OF NOISE AND VIBRATION; ECSR 31 MAY 2004, CONCL. CYPRUS, NO. 2004/DEF/CYP/12/EN, § 2 CONCERNING DISCRIMINATION IN EMPLOYMENT; ECSR, 6 DECEMBER 2013, CONCL. ROMANIA, NO. 2013/DEF/ROU/3/2/EN, § 6 CONCERNING UPKEEP OF WORKPLACES; ECSR, 6 DECEMBER 2013, CONCL. SERBIA, NO. 2013/DEF/SRB/3/2/EN, §§ 1, 2, 4 AND 5 CONCERNING OCCUPATIONAL RISKS AND UPKEEP OF WORKPLACES; ECSR, 6 DECEMBER 2013, CONCL. BULGARIA, NO. 2013/DEF/BGR/3/2/EN, § 7 CONCERNING PROTECTION FROM MACHINES AND THE USE OF DISPLAY SCREEN EQUIPMENT**).**

Considerations 40, **41 and 44 of the "Ustariz Aróstegui" judgment apply in dealing with the present complaint**, not only **for ATERs and other contractual teachers**, **but for all College B teachers other than *maîtres de conférences***, and not only on an individual basis, as persons appearing before academic disciplinary boards, but also collectively, as academic peers responsible for passing judgment on other academic peers (**under Article 22 of the Charter, combined with Articles 10 and E, having regard to relevant international law):**

- in the absence of justification by the existence of precise and concrete factors, characterising the situations at issue in the present complaint, in the specific context in which they occur and on the basis of objective and transparent criteria in order to ensure that the unequal treatment responds to a genuine need, and is necessary for that purpose, **the unequal treatment at issue here cannot be considered to be based on an objective and reasonable justification**;
- reliance on the mere temporary nature of the employment of staff employed under a public law contract (in particular ATERs) **is not capable of constituting the requisite objective and reasonable justification for the differences in treatment in question; the same can be said for the fact that PRAGs (among others) do not belong to the same civil service corps as *maîtres de conférences***;
- the abstract and general condition to the effect that a higher education teacher must have a particular civil servant status (that of *maître de conférences*), with no account being taken, in particular, of the specific nature of the tasks to be performed or their inherent characteristics, **does not correspond to the requirements set out above, still less if one considers the specific requirements relating to academic freedoms,** with reference, in

[74] https://curia.europa.eu/juris/document/document.jsf?text=&docid=257702&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=535700

[75] References borrowed from Ms Sarah TABANI's thesis defended on 6 December 2021, "Les rapports de systèmes juridiques européens" (§ 474, but see also §§ 475-477 to extend and contextualise our analysis), freely downloadable at https://tel.archives-ouvertes.fr/tel-03591047/document

particular, to participation in the governance of university bodies and the institutional autonomy enjoyed by PRAGs and ATERs, as well as *maîtres de conférences* (see A and B of the present complaint).

§ 103. Our assessment is borne out, moreover, by the Committee's decision on the merits of COMPLAINT NO. 102/2013 (ASSOCIAZIONE NAZIONALE GIUDICI DI PACE V. ITALY**)**, where the situations taken into account, it being a case of "persons whose functional equivalence has been recognised", differed to a far greater degree than the situations at issue in this new case: "The Committee considers that these arguments concern mere modalities of work organisation and **do not constitute an objective and reasonable justification of the differential treatment** of persons whose functional equivalence has been recognised" (**§ 82** of the Committee's decision in relation to **Complaint No. 102/2013**).

§ 104. Lastly, it **is neither reasonable nor objective** to consider that the *maîtres de conférences* who elect the CNESER disciplinary board are the "elected representatives of teacher-researchers serving as full or alternate members of the National Council for Higher Education and Research, divided according to their respective electoral colleges", **contrary to what is stated in Article R 232-24 of the Education Code**, as they were elected **within College B, which also includes PRAGs and/or ATERs** (see **§ B-2-a** above). This alone is sufficient proof that the justification for denying the other teachers in College B (PRAGs and ATERs in particular) the right to vote in elections to the CNESER disciplinary board, as enjoyed by *maîtres de conférences*, **is neither objective nor reasonable**.

There is, therefore, no objective and reasonable justification for the lack of representation on the CNESER disciplinary board of College B teachers other than *maîtres de conférences* that could be relied on against the complainant trade union.

C-2-b) Ground relating to the fact that a senior political figure [76] or administrator [77] can wholly remove certain teachers in this college from the disciplinary reach of their peers and decide alone what punishment should be imposed on them, with the administrative courts having sole authority to hear any appeals against those sanctions

§ 105. As regards this second difference in treatment:

- **with respect to tenured teachers in College B**, the *Conseil d'État* ruling of 12 February 2021 **(exhibit no. 6**) and the article of the Education Code to which it referred (see **§ 79** of **§ B** above) are grounded solely in the fact that the persons concerned belong to a corps other than that of *maîtres de conférences*, and so are based on an abstract and general condition that takes no account of the specific nature of the tasks to be performed or their inherent characteristics. **That does not constitute an objective and reasonable justification,** for the reasons given above, in particular in **§ 100**; this difference in treatment, moreover, totally deprives all tenured teachers in College B, including *maîtres de*

[76] Minister in the case of *professeurs agrégés*, or chief education officer in the case of *professeurs certifiés*.
[77] University president or director in the case of contractual teachers, in particular ATERs.

conférences, of the possibility of being judged in disciplinary matters by some of their tenured peers from that college;

- **with respect to contractual teachers in College B,** the difference created by the national law in question is based solely on their status as contractual staff, thereby totally depriving all College B teachers, including *maîtres de conférences*, of the possibility of being judged in disciplinary matters by some of their non-tenured peers from that college, and, for the same reasons, **lacks an objective and reasonable justification.**

§ 106. These grounds are neither objective nor reasonable, therefore, for the same reasons as those set out in **§ C-2-a**.

C-3) Relationship of proportionality between the means employed and the aim sought to be achieved

§ 107. The disciplinary procedure before the boards that operate within individual universities is effectively a compromise between the right to participate in the determination of working conditions or the working environment and the right to be judged only by peers of equal or higher rank. The disciplinary boards which hear cases against PRAGs or ATERs or students include PRAGs or ATERs, while *maîtres de conférences* are not judged by PRAGs or ATERs (see in particular **§ B-2-a** above). Had a similar compromise approach been adopted with regard to the CNESER disciplinary board ruling on appeal or at first and last instance (see in particular **§ B-2-b** above), then it would have to be considered that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In the event, however, the measures which the respondent State opted for are disproportionate, depriving PRAGs and ATERs, among others, of the right to vote and stand in elections to the CNESER disciplinary board. **For the staff in question, indeed, the choice made amounts to a complete and utter denial**, **and a discriminatory one at that, of their right** to take part in the decisions of the CNESER disciplinary board, as **derived from the combination of Article 22 of the Charter with Articles 10 and E**, in the light of **other provisions of the Charter or its Appendix** and relevant international law. Such denial **serves no legitimate purpose or necessity (see C-1 above)**, **is not based on any objective and reasonable justification** (see **C-2 above) and is disproportionate in its effects**.

§ 108. To wholly remove certain tenured and contractual **College B** teachers from the adjudicatory reach of their peers in disciplinary matters (see **§ B-2-c** above) not only amounts to an abuse of procedure, but is also disproportionate in relation to the aim pursued.

§ 109. **There is, therefore, no reasonable relationship of proportionality between the means employed (the differences in treatment at issue) and the aim pursued by all the differences in treatment at issue in the present complaint, meaning that they are disproportionate**.

C-4) Analysis of the differences in treatment at issue having regard to the margin of appreciation available to States under Articles 22 and 10 of the Charter, and under Article G of the Charter

§ 110. While States enjoy a margin of discretion in the implementation of Articles 22 and 10 of the Charter, the criteria for compliance with Article E of the Charter taken in conjunction with Articles 22 and 10 are those set out in the preamble of section C of this complaint. We have just shown, however, that these were not met by the national law in question, in the absence of a legitimate aim and an objective and reasonable justification, and bearing in mind the disproportionate nature of the differences in treatment in question, to the detriment of the College B teachers concerned.

The margin of discretion available to states in the implementation of Articles 22 and 10 of the Charter cannot therefore legitimise and justify the differences in treatment in question if they are of a discriminatory character that is proven and unjustified.

§ 111. **It follows from Article G of the Charter,** furthermore, that the rights and principles set out in **Part I**, **explicitly in Article 22**, **and implicitly but necessarily in Article 10** (academic freedoms of teachers providing vocational training inherent in the right enshrined in this article), “shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”. The fact is, however, that there is **no necessity in a democratic society** to deprive PRAGs and ATERs of the right afforded to maîtres de conférences to vote and stand in elections to the CNESER disciplinary board, or to wholly remove certain College B teachers from the adjudicatory reach of their peers in disciplinary matters, whether in order to protect public interest, national security, public health or morals, or to protect the rights and freedoms of others.

§ 112. **Neither the margin of discretion available to states under Articles 22 and 10 of the Charter taken separately and in combination**, **nor the restrictions permitted under these articles when read in conjunction with Article G of the Charter are capable, therefore, of legitimising and justifying the differences in treatment at issue in the light of the legal and factual objections raised against them in the present complaint**.

C-5) The differences in treatment at issue constitute a breach by the respondent State of the combination of Articles 22, E and 10 of the Charter and its Appendix, in the light of and having regard to its Preamble, Articles 10, G, H and N, and the relevant international law relied on in the present complaint

§ 113. **The purpose of Article 22 of the Charter** is and should be “to ensure the effective exercise of the right of workers to take part in the determination […] of the working conditions”, without discrimination **when combined with Article E of the Charter.**

§ 114. **The purpose of Article 10 of the Charter** is, and the effect of Article 10 should be, to provide vocational training together with full academic freedom for the teachers providing such training in universities, without discrimination between those receiving the training depending on whether they receive it from a particular College B teacher, **if this Article 10 is taken in conjunction with Article E of the Charter**. Also included among those entitled to vocational training and who receive such training in universities are the people who teach in institutions of this kind: the failure to respect the academic freedom of certain College B teachers set out in this complaint affects not only these teachers, but also, by extension, all those to whom they provide vocational training, including those who enjoy full academic freedom.

§ 115. The respondent State can be considered to have taken measures **to help *maîtres de conférences* make an effective contribution to the determination of their working conditions under Article 22 of the Charter and**, **more generally**, **to enjoy all the academic freedoms inherent in Article 10 of the Charter**, in particular "supervision of the observance of regulations on these matters". Furthermore, by making them entirely subject to disciplinary arrangements different from those applicable to ordinary civil servants, in order to ensure that they enjoy the full range of academic freedoms, the respondent State has accorded different treatment to persons, in this case *maîtres de conférences*, who are in a different situation from that of ordinary civil servants. This is one of the requirements inherent in **Article 14 of the European Convention on Human Rights** and hence in **Article E of the Charter** (SEE § 44 OF ECtHR 6 APRIL 2000 THLIMMENOS V. GREECE [GC], NO. 34369/97, CITED BY THE COMMITTEE IN § 52 OF ITS DECISION "AUTISM-EUROPE V. FRANCE", COMPLAINT NO. 13/2002, DECISION ON THE MERITS OF 4 NOVEMBER 2003).

§ 116. As we demonstrated in **§ A and § B** above, however, **the same cannot be said for other College B teachers**, **notably PRAGs and ATERs**, **even though their situation is comparable to that of *maîtres de conférences* and different from that of *professeurs agrégés* employed in schools and contractual staff who do not perform teaching duties in higher education**. For these higher education teachers, there is no effective exercise of the right to participate either through their representatives or directly (in the case of those elected to serve on the CNESER in a non-disciplinary role) in all decisions of a disciplinary nature, including notably the decisions of the CNESER disciplinary board, whether rendered on appeal or at first and last instance. More generally, **in the case of such staff, there is no effective and full respect for all the academic freedoms inherent in Article 10 of the Charter**. **They are thus deprived of the enjoyment of the combination of Articles 22**, **10 and E of the Charter**, with respect to a crucial part of their working conditions, since it impinges on their academic freedom, in particular their right to participate in the governance of universities, institutional autonomy, and more generally all matters inherent and specific to the status of higher education teacher and to universities.

§ 117. We ask the Committee, as the European Court of Human Rights did in FÁBIÁN V. HUNGARY (JUDGMENT OF 5 SEPTEMBER 2017, §121, APPLICATION NO. 78117/13), to assess the elements which characterise the situations of *maîtres de conférences* and other College B teachers and which determine their comparability, in the light of the subject-matter concerned, higher

education, and the purpose of the measures in question, which in no way justify the differences in treatment at issue.

§ 118. In addition, "[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different" (§ 44 OF THE ECtHR JUDGMENT 6 APRIL 2000 THLIMMENOS V. GREECE [GC], NO. 34369/97, CITED BY THE COMMITTEE IN § 52 OF ITS DECISION IN "AUTISM-EUROPE V. FRANCE", COMPLAINT NO. 13/2002, COMMITTEE'S DECISION ON THE MERITS OF 4 NOVEMBER 2003). "In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality" (§ 52 OF THE COMMITTEE'S DECISION OF 4 NOVEMBER 2003 ON THE MERITS OF COMPLAINT NO. 13/2002 "AUTISM-EUROPE V. FRANCE").

§ 119. In terms of the disciplinary arrangements applicable to such persons, therefore, the respondent State ought to have:

- taken full account of the fact that **PRAGs** are in a different situation from that of *professeurs agrégés* employed in schools and done likewise for **other tenured teachers with civil servant status who are not *maîtres de conférences* and who belong to other corps of teachers with civil servant status**;
- taken full account of the fact that **contractual teachers in universities are in a situation different from that of contractual staff carrying out administrative or technical duties.**

The respondent State should therefore have accorded, and should therefore now accord, such teachers a different disciplinary treatment from the one that applies to ordinary civil servants and contractual staff, so as to reflect the need for academic freedom, institutional autonomy and participation in governance, including the associated practice of judging and being judged by one's peers in disciplinary matters, **not least under Article 10 of the Charter**, **taken individually and in combination with Article 22 and together with the relevant international law referred to in § B above.**

§ 120. National law, however, allows the Administration, without any objective and reasonable justification, to exclude such higher education teachers from the disciplinary arrangements for teachers working in universities and to subject them instead to the ordinary disciplinary arrangements applicable to civil servants and contractual staff (see **§ B-2-c** above). **Here, too, the respondent State is in breach of Articles 22**, **10 and E of the Charter**, **taken together.**

§ 121. The differences in treatment in question within College B and the lack of differential treatment firstly among *professeurs agrégés* (*inter alia*) and secondly among contractual staff thus amount to an infringement of **Article 22 of the Charter** taken in conjunction with **Articles 10 and E and its Appendix**, and of **Article 10 of the Charter taken in conjunction with Article 22 and E and its Appendix**, in the light of and having regard to its **Preamble, Articles G**, **H**, **and N of the Charter**, and the **relevant international law** relied on in this complaint.

D) Basis on which this complaint should be considered admissible by the Committee
Additional considerations concerning requests for observations from third parties, as provided for in Rule 32A of the Committee's Rules

§ 122. **France considers itself bound by (*inter alia*) all the articles of the Charter and its Appendix relied on in the present complaint**, **as well as by the Additional Protocol to the European Social Charter providing for a system of collective complaints**.

§ 123. The current **SAGES statutes were** adopted by its General Assembly on 14 October 2021 (**exhibit no. 8**). **According to Article 20 of those statutes, the President of the complainant trade union** "shall represents the trade union in dealings with third parties", and **according to Article 16,** he or he shall have "full power to take legal action on behalf of the trade union, without him or her being required to provide evidence of any mandate whatsoever, from whomsoever, to whomsoever" and "only the Bureau [of the trade union] may require the President to discontinue litigation commenced on behalf of the trade union". **The General Assembly of the trade union held on Saturday 18 December 2021**, furthermore, elected the only list of candidates for positions on the SAGES Bureau, in particular for the office of President (**exhibit no. 9**). As a result of this ballot, Mr Denis ROYNARD was re-elected President for the next five years. He is thus "fully empowered to take legal action on behalf of the trade union, without him being required to provide evidence of any mandate whatsoever, from whomsoever, to whomsoever" and to represent the union in its dealings with third parties.

Mr Denis ROYNARD, **President of SAGES**, **is in fact the person authorised to represent the complainant organisation**. **It has thus been shown that the person submitting and signing the complaint is entitled to represent the complainant organisation**.

§ 124. The complainant trade union is also required to provide proof that it is representative for the purposes of the present collective complaints procedure, having regard to what the Committee ruled in § 6 and § 7 of its decision on the admissibility of Complaint No. 6/1999, "SYNDICAT NATIONAL DES PROFESSIONS DU TOURISME V. FRANCE" (REITERATED IN § 6 OF ITS DECISION ON ADMISSIBILITY OF 6 NOVEMBER 2000 CONCERNING COMPLAINT NO. 9/2000, CONFÉDÉRATION FRANÇAISE DES ENCADREMENT CFE-CGC V. FRANCE):

- "as regards the representative character of the trade union as referred to in **Article 1 para. c** [of the 1995 Additional Protocol to the European Social Charter providing for a system of collective complaints], […] the representativity of national trade unions **is an autonomous concept**, beyond the ambit of national considerations as well the domestic collective labour relations context";
- the Committee shall decide on the admissibility of the complaint "**having made an overall assessment of the documents in the file"**. **For that reason this part D on the admissibility of the complaint appears after parts A to C**.

§ 125. It seems to us that, in assessing the admissibility of the present complaint, the Committee must have regard to, *inter alia*:

- **the relevant evidence and arguments set out in § A**, **B and C above**, **including the documents referred to therein** (extracts quoted in the text, links, all the exhibits) in which the complainant trade union indicates the areas where the respondent State is in breach of the Charter or is applying it in an unsatisfactory manner and, in particular, explains in what respect the respondent State has failed to put in place a legal framework for the implementation of the Charter and in what respect the existing framework and/or its implementation is/are not compliant with the Charter;
- **the fact that the Committee found an earlier SAGES complaint to be admissible** (SYNDICAT DES AGRÉGÉS DE L'ENSEIGNEMENT SUPÉRIEUR (SAGES) V. FRANCE, COMPLAINT NO. 26/2004, DECISION ON ADMISSIBILITY OF 7 DECEMBER 2004), **one authored and signed by the same president and supported by Articles 16 and 20 of the SAGES statutes, which in 2004 already featured the extracts replicated in § 123 above.** Accordingly, the present complaint could only be declared inadmissible if one of the key factors that led to the previous finding of admissibility was missing here, which is not the case;
- **the membership base** of the complainant trade union **(§ D-1 below)**;
- **the very high level of support for SAGES** among tenured teachers with civil servant status in College B other than *maîtres de conférences* **and the fact that a member of SAGES was elected to the CNESER (§ D-2 below)**;
- **the action already taken in support of ATERs** and other contractual teachers in universities, to put an end to the differences in treatment in question **(§ D-3 below)**;
- **all the harms** caused by the differences in treatment at issue to the College B teachers concerned and **SAGES's** remit, as set out in its statutes **(§ D-4 below)**;
- **the roles assigned to higher education teaching unions and Council of Europe bodies** by the 2019 Declaration of the Global Forum on Academic Freedom, Institutional Autonomy and the Future of Democracy **(§ D-5 below)**;
- **the particular vulnerability of the contractual higher education teachers** whose interests are at stake here, and the importance of the proper administration of justice **(§ D-6 below)**.

D-1) Membership base of the complainant trade union

§ 126. **According to Article 1 of its statutes**,[78] "the *syndicat des agrégés de l'enseignement supérieur* (SAGES) is a trade union whose members, whether serving or retired, full or probationary, working, on secondment or on leave, shall be recruited from among *professeurs agrégés*, *professeurs de chaire supérieure*, ENSAM teachers, and, in higher education or in preparatory classes for entrance to grandes écoles (CPGEs), from among other civil servants who hold the same positions as the *professeurs agrégés* assigned thereto".

[78] https://le-sages.org/fiches/statuts2021.html and exhibit no. 8.

The SAGES membership base thus includes:

- **PRAGs** (*professeurs agrégés* employed in universities and similar institutions);
- **other tenured civil servants employed in the same type of job** in the same institutions and performing the same duties as *professeurs agrégés* working there, **in particular PRCEs** (*professeurs certifiés* employed in universities and similar institutions);
- ***maîtres de conférences*,** who in higher education perform the same teaching role as PRAGs (*see* **§ B-1** of this complaint);
- **civil servants** studying for a PhD or post-doctoral degree or preparing to sit a higher education recruitment competition, **who may be recruited as ATERs** (**Article 2 of Decree No. 88-654, as amended**) **or to another contractual teaching post in higher education**, and who perform the same teaching role as PRAGs (see **§ B-1** above).

D-2) The very high level of support for SAGES among PRAGs and PRCEs, and the fact that SAGES secured a seat (until the next elections in 2023) on the CNESER in 2018-2019

§ 127. **According to the official statistics,**[79] in 2018 there were a total of 13 100 "secondary level teachers" employed in higher education, 55% of whom belonged to the *professeurs agrégés* corps (i.e. 7 205 PRAGs), 44% to the *professeurs certifies* corps (i.e. 5 764 PRCEs) and 1% (i.e. 131) to other categories. There were thus 12 969 (7 205 + 5 764) PRAGs and PRCEs among College B voters, who numbered 61 658 in total in 2018-2019 (see **exhibit no. 10**).

Together, therefore, PRAGs and PRCEs represented, in 2018-2019, **21% of all voters in College B**, i.e. around one fifth. **In 2019**, **SAGES won 6.5% of the votes cast and had a candidate elected to the CNESER from College B** (see **exhibit no. 10**).

The list of candidates fielded by SAGES included only PRAGs and PRCEs and its manifesto was of relevance only to PRAGs and PRCEs (see **exhibit no. 10**), making it safe to assume, despite the secret nature of the ballot, that **only PRAGs and PRCEs voted for SAGES in 2019**.

If we consider the number of College B voters who were PRAGs or PRCEs, **and if we assume a uniform participation rate** across the different categories of voters in College B, **the percentage of votes won by SAGES in this election therefore needs to be multiplied by roughly 5** in order to determine how it performed among PRAG and PRCE voters**, giving a figure of more than 30%.**

Having won more than 30% of their votes, **SAGES can objectively claim a high degree of representativity among PRAGs and PRCEs, therefore.**

§ 128. The complainant trade union must therefore be considered by the Committee **as sufficiently representative among PRAGs and PRCEs for the present complaint to be**

[79] https://www.enseignementsup-recherche.gouv.fr/sites/default/files/content_migration/document/Note_DGRH_n9_septembre_2019_Annee_2018_1183816.pdf

deemed admissible insofar as it concerns the differences in treatment at issue affecting PRAGs and PRCEs:
- the lack of representation of PRAGs and PRCEs on the CNESER disciplinary board (as enshrined in Articles **L 232-3**, **R 232-23**, and **R 232-24 of the Education Code**, **see § 65-69** of **§ B-2-a** and **§ B-2-b** above); and, by the same token, the lack of representation on the CNESER disciplinary board of ATERs and other contractual teachers who are tenured *professeurs agrégés* or *professeurs certifiés* temporarily employed in such posts while continuing to belong to their civil service corps;
- the fact that the Administration can deny a PRAG or PRCE the possibility of being judged by his or her fellow PRAGs or PRCEs in disciplinary matters (see **§ 76-82, § B-2-c** above);
- the fact that the Administration can deny an ATER or other contractual teacher the possibility of being judged by his or her PRAG or PRCE colleagues in disciplinary matters (see **§§ 70-75 in § B-2-c** above).

D-3) Action already taken in support of ATERs and other contractual teachers in universities

§ 129. **As an elected member of the CNESER's College B since 2019** (until the next elections in 2023), **the President of SAGES has been able**, **in this capacity and on behalf of SAGES**, **to put forward amendments to the LPPR bill (**Multi-Annual Research Planning Act, introducing various provisions relating to research and higher education, which became, in its final version as promulgated and published in the official gazette, Law No. 2020-1674[80] of 24 December 2020 on research planning for the period 2021-2030 and introducing various provisions relating to research and higher education) **and to comment on the different versions of those sections of the bill put to the vote at the CNESER meeting on 18 June 2020**. **Exhibit no. 11** is a copy (the original being covered by copyright) of AEF Info dispatch no. 329865 (Agence de presse Éducation et Formation) which reports on this meeting and SAGES's proposed amendments to the bill (and which provides only a partial record because the general press then picks up only on what is relevant to the big trade unions, so the AEF effectively focuses on the latter).

§ 130. At this meeting, and later, at the invitation of a National Assembly committee in charge of the said law,[81] the SAGES representative on the CNESER **worked hard to ensure that, among other things, all College B teachers who were not already eligible to vote and stand in elections to the CNESER disciplinary board became eligible**, not only those covered by **Article 1 of the SAGES statutes**, but also all the contractual teachers **in College B**, all of whom

[80] https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000042137953/
[81] https://www2.assemblee-nationale.fr/content/download/313939/3049861/version/1/file/Calendrier+rapporteurs+PJL+programming+research+week+of+31+ao%C3%BBt-rectifi%C3%A9.pdf and https://www2.assemblee-nationale.fr/content/download/313693/3047283/version/1/file/Calendrier+rapporteurs+PJL+programming+research+week+of+31+ao%C3%BBt.pdf

are entitled to be represented on that body, for the same reasons as those set out in **§ A, B and C** above.

D-4) Harms caused by the differences in treatment at issue to the College B teachers concerned and SAGES's remit, as set out in its statutes

§ 131. **The present complaint is primarily based on the violation of the Charter by the differences in treatment at issue**, **as enshrined in particular in**:

- **Articles L 232-3**, **R 232-23 and R 232-24 of the Education Code (**see **§§ 65-69 of § B-2-a** and **§ B-2-b** above and exhibit no. 3)**;**
- the **"Guide to good practice on the use of contractual staff"** (see **§§ 70-75 of § B-2-c** above and exhibit no. 4)**;**
- **Article L 952-7 of the Education Code as interpreted by the *Conseil d'État*** (see **§§ 79-82** of **§ B-2-c** above and **exhibit no. 6**), **Articles 22**, **E and 10 of the Charter, taken together.**

It is therefore primarily based **on a collective grievance on the part of certain College B teachers**, the ones who are not represented on the CNESER disciplinary board, and **indeed of all higher education teachers**: the fact that some College B teachers are completely excluded from the jurisdiction of higher education's peer disciplinary boards **effectively creates working conditions which are decided *ad nutum* by the university president, chief education officer or minister acting alone**, and which are different from the working conditions and specific disciplinary guarantees that exist for College B teachers (see **§ A** and **§ B** above, and in particular **§§ 52-53 of § B-1-e)**. Such persons are excluded from the adjudicatory reach of their peers and so denied the opportunity to participate in the determination of working conditions and the working environment and in the supervision of the observance of regulations on these matters (see **§ B** and **§ C** above). **Peer participation cannot be reduced merely to participation in the election of a single peer who**, **once elected president of the university**, **has discretionary powers and is not subject to academic disciplinary oversight in matters relating to the determination of certain teachers' working conditions. Still less can it be reduced to participation in political elections and appointments**, **outside the working environment**, **leading to the appointment of the minister or chief education officers.**

§ 132. The differences in treatment at issue are therefore also personally and directly detrimental to any **College B teachers who come before, or are liable to come before,** the CNESER disciplinary board without having an elected representative on that body, **or who are disciplined or liable to be disciplined** after being excluded from the jurisdiction of the peer disciplinary boards specific to higher education.

§ 133. The complainant union has set itself the task of defending **both the individual and the collective interests** of the teachers in its membership base and, beyond that, of **collectively promoting and defending** the transfer-of-knowledge mission, "both in itself and in terms of the manner in which that mission is performed" (see **Preamble of the SAGES statutes**).

§ 134. The defence of academic freedom in its broadest sense, **in its collective and individual dimensions**, is thus part of SAGES's statutory remit, beyond the interests of its members alone.

D-5) Roles assigned to higher education teaching unions and Council of Europe bodies by the 2019 Declaration of the Global Forum on Academic Freedom, Institutional Autonomy and the Future of Democracy

§ 135. In their 2019 Declaration of the Global Forum on Academic Freedom, Institutional Autonomy and the Future of Democracy,82 the Council of Europe and other institutions invite the Council of Europe, other international institutions and organisations, and other partners co-operating in the democratic mission of higher education, including trade unions:

"to make academic freedom and institutional autonomy key elements of their work to further democracy, human rights, and the rule of law, through normative standards as well as policy";

"to continue their work to strengthen the role of higher education in developing, maintaining, and sustaining democratic societies" and

"to continue to highlight the importance of academic freedom and institutional autonomy in furthering higher education's democratic mission as well as to develop policy proposals and engage in public advocacy to more fully achieve that mission".

§ 136. The complainant trade union is one of the watchdogs of academic freedom, institutional autonomy and their collective and democratic character (participation in governance, in the determination of working conditions and the working environment, and in supervision of the observance of regulations on these matters). **Its action**, initiated at national level and pursued through this complaint to the Committee, **is therefore in line with the roles assigned to trade unions by the recommendations and objectives of this declaration of the Global Forum on Academic Freedom, Institutional Autonomy and the Future of Democracy.**

§ 137. On conducting an overall assessment of the case file, the Committee will observe that the complainant union is **the only one to have,** rather than simply lamenting and complaining about the situation, taken various steps to tackle the differences in treatment in question, **even though the other national trade unions** were aware of the differences and of the complainant trade union's efforts in this area. At the CNESER meeting on 18 June 2020, **some representatives of those unions voted in favour of the amendments proposed by SAGES** with a view to abolishing the differential treatment in question: the amendments were adopted by a majority of CNESER members but were rejected by the Minister for Higher Education and Research at the meeting, without giving a reason. **Still, even though they broadly approved of what SAGES**

[82] https://rm.coe.int/global-forum-declaration-global-forum-final-21-06-19-003-/16809523e5

was asking for, the other unions, whether by default or design, left SAGES to pursue the matter on its own. That may be because of the technical and legal difficulties attendant on any such action, as noted by the European Parliament (see the Introduction to this complaint), and because of the specific competences developed by SAGES since it was formed on 13 January 1996. **The Committee should note, therefore, that, de facto, the complaint which SAGES is asking it to consider reflects the aspirations of the majority of the national academic community, but that SAGES is the only effective defender of the interests in question**. And that as such, SAGES, for the purposes of the present complaint, **must be considered sufficiently representative** for its complaint to be declared admissible.

§ 138. In addition, having been adopted by the Council of Europe and being addressed not only to States but also to its own bodies, the recommendations and objectives of the 2019 Declaration of the Global Forum should also, in our view, be taken into account by the Committee, a Council of Europe body, in the examination of the merits of this complaint, thereby implying that it is admissible, especially since, although the European Court of Human Rights has had occasion to rule on academic freedom in the past, notably in its judgments in MUSTAFA ERDOGAN V. TURKEY OF 27 MAY 2014 (APPLICATIONS NOS. 346/04 AND 39779/04), SORGUÇ V. TURKEY OF 23 JUNE 2009 (NO. 17089/03, § 35) AND KULA V. TURKEY OF 19 JUNE 2018 (NO. 20233/06, § 38), **it was concerned purely with the individual aspect of academic freedom** (see in particular "THIRD PARTY INTERVENTION OF THE HUMAN RIGHTS CENTRE OF GHENT UNIVERSITY AND THE SCHOLARS AT RISK NETWORK IN THE CASE TELEK, ŞAR AND KIVILCIM V. TURKEY BEFORE ECtHR"[83]) or **the interest of society as a whole**, whereas the concern here is with its collective aspect, which is of relevance to the academic community as a whole beyond freedom of expression, and bearing in mind that "the Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights", and "**the rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention on Human Rights**" (INTERNATIONAL FEDERATION OF HUMAN RIGHTS LEAGUES V. FRANCE, COMPLAINT NO. 14/2003, COMMITTEE'S DECISION ON THE MERITS OF 8 SEPTEMBER 2004, § 27).

§ 139. In the handling of this complaint, it is with respect to the collective aspect of academic freedom, institutional autonomy, participation in governance, determination of working conditions and the working environment, and supervision of the observance of regulations on these matters that the Charter and the Committee are called upon to complement the European Convention on Human Rights and the case law of the European Court of Human Rights, by interpreting the Charter "so as to give life and meaning to fundamental social rights" and by taking the view "that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter" (INTERNATIONAL FEDERATION OF HUMAN RIGHTS LEAGUES V. FRANCE, COMPLAINT NO. 14/2003, COMMITTEE'S DECISION ON THE MERITS OF 8 SEPTEMBER 2004, § 29).

[83] https://afp.hypotheses.org/files/2019/03/Human-Rights-Centre-of-Ghent-University.Third-party-intervention-final.pdf

§ 140. We also ask the Committee to **focus on the close connection between the individual and collective aspects of the rights and freedoms at issue**, and to continue to refer to **Article H of the Charter** (CONFERENCE OF EUROPEAN CHURCHES (CEC) V. THE NETHERLANDS, COMPLAINT NO. 90/2013, COMMITTEE'S DECISION ON THE MERITS OF 1 JULY 2014, § 69) in dealing with the present complaint. In effect, the principle that "[t]he provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected" should also apply to academic freedom, institutional autonomy, participation in governance, the determination of working conditions and the working environment and supervision of the observance of regulations both within the institutions concerned and, more broadly, within the public higher education system.

D-6) With regard to the particular vulnerability of contractual higher education teaching personnel whose interests are at stake here and the importance of the proper administration of justice

§ 141. **Contractual staff in universities, especially teachers, are in a precarious position,** especially if they are not also civil servants who retain membership of their corps. **They are a highly vulnerable group, and not only in France** (see in particular the findings of Education International calling on the International Labour Organization and governments to improve employment conditions in higher education, and the documents cited therein[84]). They only stay for a short time in a given job and are understandably anxious not to upset their presidents or directors (or any future presidents or directors, in the same institution or a different one), for fear that their contract might be terminated or not renewed, or in the hope of securing a better contract or being recruited as a permanent staff member.

Furthermore, **according to the CJEU** (see § 60 OF ITS ORDER OF 7 APRIL 2022 [85] IN CASE -C133/21, §§ 57-61, ECLI: EU: C: 2022: 294), **the purpose of the framework agreement on fixed-term work, referred to above in § C** (§§ 94-102):

- is to "**improve the quality of fixed-term work by setting out minimum requirements in order to ensure the application of the principle of non-discrimination to fixed-term workers**";
- is "based implicitly but necessarily on the premise that workers, as a result of their position of weakness vis-à-vis employers, are likely to be victims of discriminatory treatment because of the temporary nature of their contracts, even though they freely consented to the establishment of those contracts and conditions of employment";
- and "**that position of weakness may dissuade a worker from explicitly claiming his rights vis-à-vis his employer, in particular, where doing so could expose him to measures taken by the employer likely to affect the employment relationship in a**

[84] https://www.ei-ie.org/fr/item/22598:lie-appelle-loit-et-les-gouvernements-a-ameliorer-les-conditions-demploi-dans-lenseignement-superieur

[85] https://curia.europa.eu/juris/document/document.jsf?text=&docid=257702&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=535700

> **manner detrimental to the worker"** (see, by analogy, THE JUDGMENT OF 19 MARCH 2020, SÁNCHEZ RUIZ AND OTHERS, C-103/18 AND C-429/18, EU: C: 2020: 219, PARAGRAPHS 112 AND 113)".

This makes it very difficult and risky for contractual teachers to take action individually, at national or local level, with respect to the differences in status at issue here.

Also, as the European Union Parliament has noted (extracts quoted in the Introduction to this complaint), **taking any such action requires extensive knowledge and practice** in matters relating to academic freedom, human rights and judicial procedure. Such know-how can be acquired only by teaching staff who have had the chance to become actively involved in defending their colleagues over a long period of time, and not by a group of temporary staff whose members change frequently and who are too busy looking for a permanent position to come together to form an active organisation that would qualify as sufficiently representative for the Committee to deem their complaint admissible. **Until now, therefore, it has not been possible for contractual teachers to take collective action at national or local level to tackle the differences at issue here. Doing so would also have affected the work situation of those contractual teachers willing to risk acting as representatives in any such collective action.**

§ 142. **These contractual teachers** are therefore, de facto, dependent on the policy choices made by the representative trade unions within the meaning of the **Additional Protocol to the Charter providing for a system of collective complaints and, within those unions, by the choices made by tenured teaching staff.** Some tenured higher education teachers, however, believe that the only way to preserve the guarantees associated with their employment and ensure the basic peace of mind required for the proper discharge of their teaching and research duties is by not extending certain occupational guarantees to contractual teachers. **As for the other unions represented on the CNESER**, they deliberately chose not to support, through legal action, the demands of contractual teachers and PRAGs (among others) to be represented on the CNESER disciplinary board and to be granted the right to be judged in disciplinary matters only by their peers. **A finding that the present complaint is admissible** insofar as it relates to all contractual teachers in College B, and not only insofar as it relates to PRAGs and PRCEs or *professeurs agrégés* or *professeurs certifies* employed in contractual teaching posts, **would also provide what we consider to be an important opportunity to supplement it with third-party interventions and observations from organisations. Thus set in an appropriate legal framework, such input, which would be made easier or even simply possible by this complaint,** could focus on certain specific aspects that were only touched on here, giving full meaning to the term "collective complaint".

§ 143. **To conclude that the present complaint is not admissible insofar as it relates to certain contractual teachers in College B would be tantamount to depriving them of the effective enjoyment of the combination of Articles 22, E and 10 of the Charter**. When the fact is, too, that whatever the Committee rules on the merits of the complaint with respect to PRAGs and ATERs, who continue to belong to the corps of *professeurs agrégés*, must, ultimately and in essence, **also apply to all contractual teachers in College B and not only to the ones who make up SAGES's membership base**. In the case of these contractual teachers, the complainant

trade union would have the option of widening the scope of its membership and instituting domestic proceedings while seeking a reference for a preliminary ruling by the Court of Justice of the European Union, to remedy the differences in treatment in question, **on the basis of clause 4 of the framework agreement on fixed-term work appended to Directive 1999/70/EC (see § 94 et seq. in § C-2** above); the criteria used for the recognition of an interest in bringing proceedings are less restrictive, in fact, than those required by the concept of representativity. However, it is in the interests of the proper administration of justice, in the interests of the contractual teachers in question, and in the interests of all teachers working in universities (see below) that the Committee should declare the present complaint admissible with regard to the interests of contractual teachers too. Or, at the very least, that it rule, obiter dictum, explicitly or implicitly, through a broadly-worded explanatory statement, that for these contractual teachers too, the differences in treatment in question constitute **an infringement of the Charter and its Appendix**. The aim being to facilitate any proceedings that may be instituted in the domestic courts, with a request for a reference for a preliminary ruling by the Court of Justice of the European Union on the scope and interpretation of **clause 4 of the Framework Agreement on fixed-term work** appended to **Directive 1999/70/EC** (so that the differences in treatment in question are treated from the outset by the French courts as constituting differences in conditions of employment or working conditions within the meaning of that text).

§ 144. Lastly, **the fact that contractual teachers in higher education, in particular ATERs, can be sanctioned under the ordinary (i.e. non-academic) disciplinary procedure (see § B-2-c above) effectively deprives them of the independence and freedom of expression in the performance of their duties that are inherent and necessary to the status of higher education teacher, bearing in mind that such teachers have the power to elect, and are themselves sometimes elected to, the various collegial bodies of peers. The infringement of their collective and individual academic freedoms is also therefore, we believe, detrimental to their tenured colleagues in College B, in particular PRAGs and *maîtres de conférences***, as while serving on the various elected boards, they may be forced to espouse views they do not share but which they feel obliged to adopt for fear of upsetting their presidents or directors.

§ 145. For these reasons, we ask the Committee to declare the present complaint admissible also insofar as it concerns all matters affecting contractual teachers, even if they do not belong to a civil service corps.

With regard to third-party interventions and observations

§ 146. As we stated in our Introduction, addressing this complaint naturally demands that third-party interventions and observations be sought from various organisations and institutions with an interest in the issues at stake and, above all, in what the Committee ultimately rules in its decisions on the admissibility and the merits. It also calls for observations from specialists or groups of specialists (research centres in particular) on issues affecting the specific rights of higher education teachers. Academics have participated in the past in proceedings before other international courts and committees in cases where academic freedoms were not at issue. All the more reason, therefore, for them to be able to have their say in this case, where their rights are in

point of fact at stake. **Rule 32-2 of the Committee's Rules of Procedure** on third-party interventions prevents them from doing so, however, since it restricts the exercise of this right to the international organisations of employers and trade unions referred to in **Article 27 § 2 of the Charter**.

§ 147. **If it wishes to ensure that such third-party observations are taken on board by the Committee, therefore, the only options open to the complainant trade union are as follows:**

- **rely on the Rapporteur in charge of the complaint** to call on the President of the Committee to invite certain organisations, institutions or persons specialising in the specific rights of higher education teachers to submit observations, pursuant to Rule 32A of the Committee's Rules; and indeed we are counting on him to do so;
- **suggest that the Committee** (or rather its Rapporteur) invite certain organisations, institutions or persons specialising in the specific rights of higher education teachers to submit third-party observations relating to the handling of the present complaint, pursuant to **Rule 32A of the Committee's Rules**; for although the power to invite comments enshrined in that rule rests solely with the Rapporteur, there is nothing in the Rules to prevent us from making suggestions to him; the Rule would not be infringed, therefore, if the Rapporteur were to propose that the President of the Committee issue an invitation for comments at the suggestion of the complainant trade union, whether this proposal were seen to be based on our suggestion or not; normally, we would ask the Rapporteur to solicit comments from various third parties *after* the Committee declares the complaint admissible, unless the defence submissions concerning its admissibility made it advisable to do so at an earlier stage;
- **ourselves solicit** observations from various organisations, institutions or persons specialising in the specific rights of higher education teachers, and include the comments received in our written submissions, in reply to the respondent government or to third-party interveners listed in **Rule 32-2 of the Committee's Rules**; in our view, this option is less preferable than the one mentioned above about making a suggestion to the Committee, which would give any third parties wishing to submit observations greater legitimacy, visibility and independence. The independence of all the academics involved in the debate, including those who disagree with some of our arguments, is something we value very highly;
- **invite, and this is something we wish to do here, the organisations entitled under Rule 32(2) of the Committee's Rules** to submit observations to the Committee as third parties to contact us direct, so that we can suggest that they canvas certain specialists or groups of specialists (research centres in particular) for comments on issues relating to the specific rights of higher education teachers.

E) Conclusions and requests

§ 148. We ask the Committee:

- on the basis of **Rule 29(4) of its Rules, to declare that the admissibility conditions for this complaint are manifestly fulfilled**, without the respondent State concerned (France) having first been invited to submit observations; and in the alternative, to declare our complaint admissible after having invited the respondent State concerned (France) to submit observations and received any reply we may furnish;
- to find, in its declaration on the merits of the present complaint, **that the respondent State has failed to comply with the combination of Articles 22, E and 10 of the revised European Social Charter,** in the light of and having regard to **all the relevant international law** relied on in our complaint; alternatively, to find that **the respondent State has failed to comply with the combination of Articles 22 and E** of the revised European Social Charter, in the light of and having regard to **Article 10 and all the relevant international law relied on in our complaint;**
- **to accordingly invite the respondent State:**

  - **to grant the right to vote and stand as a candidate in elections to the CNESER disciplinary board to all College B teachers who do not yet possess that right, in particular PRAGs, PRCEs and ATERs**, by amending its laws and regulations to this effect in order to put an end to this practice which results in discriminatory treatment within College B;
  - **to no longer allow presidents and directors of universities, as well as ministers and chief education officers, to discipline certain College B teachers directly, without recourse to the peer disciplinary procedure specific to higher education**, by amending its laws and regulations to this effect in order to put an end to this practice which results in discriminatory treatment within College B.

Done for the complainant trade union at 8 rue Colbert 06110 Cannet (France), on 29 April 2022, by its President and authorised representative,

Denis ROYNARD.