EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 5 July 2023

Notification: 18 August 2023

Publicity: 19 December 2023

***Confédération française démocratique du travail* (CFDT) v. France**

Complaint No. 189/2020

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 335th session in the following composition:

Aoife NOLAN, President
Eliane CHEMLA, Vice-President
Tatiana PUIU, Vice-President
József HAJDÚ
Karin Møhl LARSEN
Yusuf BALCI
Paul RIETJENS
George THEODOSIS
Miriam KULLMANN
Carmen SALCEDO BELTRÁN
Franz MARHOLD
Alla FEDOROVA

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 5 July 2023,

On the basis of the report presented by George THEODOSIS,

Delivers the following decision adopted on this date:

PROCEDURE

1. The complaint lodged by the *Confédération française démocratique du travail* ("CFDT") was registered on 15 January 2020.

2. CFDT states that under Article 8 of Order No. 2017-1385 of 22 September 2017 on strengthening the collective bargaining process (ratified by Law No. 2018-217 of 29 March 2018), as incorporated into Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code, in companies with fewer than 11 workers, in which staff elections are not compulsory, and in companies of 11 to 20 workers in which there is no elected staff representative, employers may decide to put draft agreements directly to a vote by the workers. Once approved by a two-thirds majority of staff, such agreements have the same force and effects as a company-level agreement.

3. CFDT alleges that these provisions allow employers in small companies to avoid collective bargaining with trade union representatives, in breach of Article 6§2 of the Charter.

4. On 6 July 2020, the Committee declared the complaint admissible.

5. In its decision on admissibility, pursuant to Article 7§1 of the Additional Protocol to the European Social Charter providing for a system of collective complaints ("the Protocol"), the Committee invited the Government to make written submissions on the merits of the complaint by 9 October 2020.

6. The Committee also invited the States Parties to the Protocol and the States having made a declaration in accordance with Article D§2 of the Charter to submit any observations they may wish to make on the complaint by 9 October 2020.

7. In addition, pursuant to Article 7§2 of the Protocol, the Committee invited the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter to submit observations by 9 October 2020.

8. On 20 August 2020, the Government asked for an extension to the deadline for submitting its submissions on the merits. The President of the Committee extended this deadline to 26 October 2020. The Government's submissions on the merits were registered on 26 October 2020.

9. On 30 September 2020, the European Trade Union Confederation ("ETUC") asked for an extension to the deadline for submitting its observations. The President of the Committee extended this deadline to 29 October 2020. ETUC's observations were registered on 29 October 2020.

10. Pursuant to Rule 28§2 of the Committee's Rules, the Government and CFDT were invited, if they wished, to submit a response to ETUC's observations by 2 December 2020. On 6 November 2020, the Government asked for an extension to the deadline for submitting its response. The President of the Committee extended this deadline to 18 December 2020. The Government's response to ETUC's observations was registered on 18 December 2020.

11. Pursuant to Rule 31§2 of the Rules, CFDT was invited to submit a response to the Government's submissions on the merits by 22 December 2020. On 19 November 2020, CFDT asked for an extension to the deadline for submitting its response. The President of the Committee extended this deadline to 22 January 2021. CFDT's response to the Government's submissions on the merits was registered on 20 January 2021.

12. Pursuant to Rule 31§3 of the Rules, the Government was invited to submit a reply to CFDT's response by 11 March 2021. The Government's reply was registered on 11 March 2021.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

13. CFDT alleges that Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code enable employers in small companies to avoid collective bargaining with trade union representatives, in breach of Article 6§2 of the Charter.

B – The respondent Government

14. The Government invites the Committee to find that Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code are in conformity with Article 6§2 of the Charter.

THIRD PARTY OBSERVATIONS

European Trade Union Confederation (ETUC)

15. ETUC's observations focus on what it considers to be the core allegation of the complaint, namely that it is possible to bypass social partners and the right to collective bargaining, by concluding collective agreements through an "employers' referendum" (ratification of draft agreements by a two-thirds majority of workers), especially in very small companies where no staff elections are required and/or there are no elected staff representatives.

16. ETUC provides a detailed overview of international law instruments guaranteeing the right to bargain collectively, in particular conventions of the International Labour Organisation (ILO) (notably conventions Nos. 87, 98, 135 and

154), Article 6§2 of the European Social Charter, Article 8 of the International Covenant of Economic, Social and Cultural Rights as well as Article 28 of the EU Charter of Fundamental Rights and other EU texts. According to ETUC this right was established to regulate working conditions on a collective basis through negotiation between employers (or their organisations) and trade unions. This collective approach was intended to offset individual workers' lack of bargaining power. Moreover, these principles may not be limited or undermined by national legislation or practice, including through any kind of "flexibility" based on the size of companies.

17. ETUC goes on to analyse the judgment in which the Conseil d'Etat dismissed the applications lodged in 2018 by several trade unions, including the CFDT, calling for Decree No. 2017-1767 on the procedures for the approval of agreements in very small companies to be set aside (judgment No. 417652 of 1 April 2019).

18. Contrary to the Conseil d'Etat, ETUC considers it "more than questionable" whether the impugned legislation pursues a legitimate aim. According to ETUC, the new legislation denies trade unions their prerogatives. Moreover, the legislation effectively denies the main features of collective bargaining in allowing employers to put a draft "agreement" to a vote despite the lack of worker representatives and the absence of genuine negotiations. ETUC argues that the sum total of the workers in a company cannot be regarded as a collective body for collective bargaining purposes; in effect there is a "disguised collectivisation" of individual workers. ETUC takes the view that for collective bargaining to be meaningful, it must be possible to influence the content of a draft agreement in real negotiations and this is not the case where workers are simply called upon to vote on a draft text prepared by their employer and in the absence of trade union representatives.

19. ETUC adds that the period of fifteen days provided for in Article L. 2232-21 of the Labour Code ("the staff referendum shall take place after a minimum period of fifteen days […] from submission of the draft agreement to each worker") does not offset the individual worker's lack of bargaining power. This period cannot therefore justify the restriction to the right to collective bargaining.

20. ETUC also criticises the Conseil d'Etat for failing to conduct a detailed examination of the case law of the European Committee of Social Rights. In this connection it refers to the Committee's conclusions in which it considered that national legislation which enables employers to make unilateral decisions not to apply clauses agreed on in collective agreements was not in conformity with the right to collective bargaining enshrined in Article 6§2 of the Charter (Conclusions XX-3 (2014) and XXI-3 (2018) Spain).

21. Unlike the Conseil d'Etat, ETUC is also of view that these agreements by referendum are often used to provide a lower level of protection by deviating from existing (higher-level) collective agreements, for example with regard to working time arrangements, and thus run counter to the aim of ensuring that the right to collective bargaining "represents an essential basis for the fulfilment of other fundamental rights

guaranteed by the Charter, including for example those relating to just conditions of work (Article 2) …" (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §109).

22. In conclusion, ETUC asserts that it is clear from a variety of international labour standards as well from the case law of international treaty bodies that the right to collective bargaining is and should remain the prerogative of trade unions (workers' organisations). States should therefore refrain from introducing measures that would undermine trade union prerogatives such as measures allowing for and promoting agreements concluded directly between employers and workers without the involvement of trade unions. ETUC maintains that collective bargaining in the meaning of Article 6§2 of the Charter should not be limited, but instead better protected.

RELEVANT DOMESTIC LAW AND PRACTICE

23. In their submissions the parties make reference to the following domestic law:

A. 1946 Constitution (4th Republic)

24. Preamble

> "…
>
> All men may defend their rights and interests through union action and may belong to the union of their choice.
>
> […]
>
> All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place."

B. Labour Code (provisions as amended by Article 8 of Order No. 2017-1385 of 22 September 2017 on strengthening the collective bargaining process)

25. Legislative Part

> **Article L. 2142-1**
>
> "If it has several members in the undertaking or workplace, any trade union which is representative therein or affiliated to a representative trade union organisation at national and interprofessional level or any trade union organisation which meets the requirement that it must abide by republican values and act independently, and have been legally constituted for at least two years, and whose occupational and geographical scope covers the undertaking concerned, may establish within the undertaking or workplace a trade-union branch which represents the material and non-material interests of its members in accordance with Article L. 2131-1."
>
> **Sub-section 3: Procedures for negotiation in undertakings without a trade union representative or a works council (Articles L. 2232-21 to L. 2232-29-2)**

Paragraph 1: Procedures for the ratification of agreements in undertakings which usually have fewer than 11 workers (Articles L. 2232-21 to L. 2232-22-1)

Article L. 2232-21

“In undertakings with no trade union representative and which usually have fewer than eleven workers, the employer may submit to the workers a draft agreement or draft amendment covering any of the topics subject to collective bargaining under the Labour Code. The employee consultation process shall take place after a minimum period of fifteen days from submission of the draft agreement to each employee. The procedure for applying these provisions, in particular the arrangements for the employee consultation process, shall be provided for by decree of the Conseil d’Etat.”

Article L. 2232-22

“When the draft agreement or amendment referred to in Article L. 2232-21 is approved by a majority of two-thirds of the workforce, it shall be deemed to be a valid company agreement.

The agreement or the amendment thus approved may be terminated at the employer’s instigation in accordance with the provisions of the agreement or, in the absence of such express provisions, with Articles L. 2261-9 to L. 2261-13.

The agreement or amendment may also be terminated at the workers’ instigation in accordance with the provisions of the agreement or, in the absence of such express provisions, as above, with Articles L. 2261-9 to L. 2261-13, subject to the following conditions:
- the termination shall be notified to the employer jointly and in writing by workers representing two-thirds of the workforce;
- termination by the workers may only take place within a period of one month preceding each anniversary of the conclusion of the agreement.”

Article L. 2232-22-1

“The arrangements for amendment and termination provided for in Article L. 2232-22 shall apply to collective agreements regardless of how they were negotiated provided that the undertaking meets the requirements of Articles L. 2232-21 and L. 2232-23 at a later stage.”

Paragraph 2: Procedures for negotiation in undertakings which usually have 11 to 50 workers (Articles L. 2232-23 to L. 2232-23-1)

Article L. 2232-23

“In undertakings which usually have between eleven and twenty workers, where there is no elected member of the staff delegation to the social and economic committee, Articles L. 2232-21, L. 2232-22 et L. 2232-22-1 shall apply.”

Article L. 2232-23-1

“I. – In undertakings which usually have between eleven and fewer than fifty workers, if there is no trade union representative within the company or establishment, company or workplace agreements may be negotiated, concluded or revised:

1° Either by one or more workers specifically designated to do so by one or more representative trade unions in the sector or, in their absence, by one or more representative trade unions at national or interprofessional level, whether or not they are a member of the staff delegation to the social and economic committee. Each trade union may only designate a single employee for this purpose;

2° Or by one or more members of the staff delegation to the social and economic committee.

Agreements negotiated, concluded or revised in this way may relate to all measures which may be negotiated by company or workplace agreements on the basis of this Code.

II. – The validity of agreements or amendments concluded with one or more members of the staff delegation to the social and economic committee, whether union-designated or not, shall be subject to their signature by members of the social and economic committee representing the majority of votes cast at the most recent staff elections.

[…]

The validity of agreements or amendments concluded with one or more union-designated workers who are not members of the staff delegation to the social and economic committee shall be subject to approval by a majority of the votes cast in a vote by the workers under conditions determined by decree and with due regard for the general principles of electoral law."

Article L. 2314-5

"The trade union organisations that meet the criteria of respect for republican values and independence, that have been legally constituted for at least two years and whose professional and geographical scope covers the company or establishment concerned, shall be informed, by any means, of the organisation of the elections and invited to negotiate the pre-electoral agreement and to draw up the lists of their candidates for the functions of member of the staff delegation.

The trade union organisations recognised as representative in the company or establishment, those that have set up a trade union section in the company or establishment, as well as the trade unions affiliated to a representative trade union organisation at national and interprofessional level are also invited by letter.

[...]

[5] By way of derogation from the first and second paragraphs, in undertakings with between eleven and twenty workers, the employer shall invite the trade union organisations mentioned in the same paragraphs to this negotiation on condition that at least one employee has applied for the elections within thirty days of the information provided for in Article L. 2314-4.

[…]."

26. Regulatory section

Article R. 2232-10

"The procedure for the employer to garner the approval of workers pursuant to Articles L. 2232-21 to L. 2232-23 shall be subject to the following conditions:

1° Consultation shall take place in all its forms during working hours. Employers shall be responsible for the practical organisation thereof;

2° The privacy and confidentiality of consultation shall be guaranteed;

3° The result shall be brought to the employer's attention after the consultation, which shall take place in his/her absence;

4° The result of the consultation shall be set out in a report, which shall be made public within the undertaking by any means available. The report shall be appended to the approved agreement when it is filed."

C. Case law

a) *Conseil d'Etat*

27. On 13 November 2017, CFDT filed an application for judicial review of Article 8 of Order No. 2017-1385 of 22 September 2017. In its decision of 1 June 2018, the Conseil d'Etat stated that there was no reason to rule on this application because Order No. 2017-1385 had been fully ratified by parliament and therefore its legality could no longer be questioned in a judicial review procedure.

28. On 28 February 2018, CFDT filed an application with the Conseil d'Etat requesting that Decree No. 2017-1767 on the procedures for the approval of agreements in very small undertakings be set aside. This application was dismissed on 1 April 2019 (Conseil d'Etat judgment No. 417652).

29. In the above-mentioned judgment, the *Conseil d'Etat* made inter alia the following observation:

> "8. Sixthly, according to Article 11, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". It follows from these stipulations, as construed by the European Court of Human Rights, that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of one's interests, set forth in this article. Through the provisions of Articles L. 2232-21 to L. 2232-23 of the Labour Code for the implementation of which the impugned decree was issued, the legislature sought, with a view to promoting agreements in small undertakings, to compensate for the frequent absence of employee representatives capable of negotiating such agreements. In undertakings with fewer than 11 employees, which are not subject to the requirements relating to staff representation bodies, these provisions allow the employer to subject a draft collective agreement to staff consultation only if the undertaking does not have a union representative. In undertakings with between 11 and 20 employees, it follows from the combined provisions of Articles L. 2232-23 and L. 2232-23-1 of the same code that this option is available only if there is no union representative and no elected member on the staff delegation to the social and economic committee and that it does not prevent a company-level agreement from being negotiated and concluded either by one or more employees specifically designated to do so by one or more representative trade unions in the sector or, in their absence, by one or more representative trade unions at national or interprofessional level. Company-level agreements adopted in this way must, in the areas listed in Article L. 2253-1 of the Labour Code and, where the sectoral agreement so stipulates, in those listed in Article L. 2253-2 of the same code, provide guarantees at least equivalent to those laid down in the sectoral agreement applicable to the undertaking. Lastly, at least 15 days must pass between notification of the draft agreement to each employee and the organisation of consultation, in order, inter alia, to allow employees to consult, if they so wish, the representatives of the trade union of their choice. Consequently, the argument alleging that the provisions of Articles L. 2232-21, L. 2232-22 and L. 2232-23 of the Labour Code do not comply with the requirements of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in support of which the conventions mentioned in paragraphs 6 and 7 as well as Article 6 of the European Social Charter (revised) and Article 28 of the Charter of Fundamental Rights of the European Union are cited, must be dismissed."

c) Constitutional Council

30. On 21 February 2018, the Constitutional Council was requested to rule on Law No. 2018-217 of 29 March 2018. The applicant members of the National Assembly complained inter alia of a breach by Articles L. 2232-21 and L. 2232-23 of the Labour Code of the principle of worker participation through the intermediary of their representatives in the collective determination of the working conditions and management of undertakings, and a disproportionate infringement of the right to organise.

31. In its decision of 21 March 2018, the Constitutional Council found the two articles in question to be in conformity with the Constitution.

32. It held firstly that "in authorising the employer in an undertaking employing up to 20 workers, under certain circumstances, to propose a draft collective agreement for staff consultation, the legislature had sought to promote collective agreements in smaller companies, taking account of the frequent absence of employee representatives capable of negotiating such agreements in these companies" (§7).

33. It also found that this possibility was limited, noting secondly that "the contested provisions enable the employer to subject a draft collective agreement to staff consultation only if the undertaking does not have a union representative and, in undertakings with between 11 and 20 workers, if there is also no elected member on the staff delegation to the social and economic committee". Under Article L. 2232-22 of the Labour Code, "the draft agreement must be announced by the employer to each employee and at least 15 days must pass between such notification and the organisation of consultation. In addition, the draft agreement is valid only if it was approved by a majority of two thirds in a staff vote. Lastly, the organisational arrangements applicable to consultation must under all circumstances comply with the general principles of electoral law" (§§ 8 and 9).

34. Accordingly, the Constitutional Council found that Articles L. 2232-21 and L. 2232-23 of the Labour Code "are in breach neither of the principle of worker participation nor of the right to organise" (§10).

D. Report to the President of the Republic concerning Order No. 2017-1385

(*Journal officiel de la République française (JORF))* (French official gazette) No. 0223 of 23 September 2017, text No. 28)

35. The report states:

> "… The five orders presented are structured around four key issues:
>
> 1. The aim of the first component of the reform is to provide pragmatic solutions for very small and medium-sized undertakings;
>
> …
>
> 1. Pragmatic solutions for very small and medium-sized undertakings, with a view to strengthening collective bargaining:

Negotiation will now be simple and accessible for undertakings with fewer than 50 workers because it will be possible to negotiate directly with an elected staff representative on all subjects. This pragmatic measure stems from the finding that only 4% of undertakings with between 11 and 50 workers have a trade union representative to negotiate a collective agreement. This is the case in two-thirds of undertakings with between 50 and 300 workers and in 90% of undertakings with more than 300. It was necessary therefore to come up with practical solutions for undertakings with fewer than 50 workers, which employ nearly 50% of France's total workforce.
This right to bargaining for small and medium-sized undertakings will be universal and relate to all negotiable topics. The reform enables all the undertakings in France, whatever their number of workers, to have direct and simple access to the negotiation process, which is at the very core of this project.
The reform is particularly concerned with the situation faced by very small undertakings, which lack either a trade union representative or an elected representative to carry out negotiations. Employers of very small undertakings now have the option of negotiating directly with their workers on every subject. Very small undertakings will therefore benefit from the same flexibility and the same ability to apply the relevant legislation as large undertakings, with respect to pay, working hours and organisation of the work process, which managers of such undertakings will be able to negotiate directly with their workers. The latter will have a guaranteed right of access to draft agreements submitted to them and the right to consult trade unions at *département* level, if they so wish, to help them to clarify their position before consultation starts. Agreements will be validated if two-thirds of the workforce give their approval.
This option is not confined to undertakings with fewer than 11 workers but will be available to all undertakings with fewer than 20 workers that have no elected staff representative.
So as to ensure that sectoral agreements cater for the specific features of small undertakings, there is a new requirement for such agreements to contain specific provisions which take account of the actual circumstances of very small and medium-sized undertakings. …"

RELEVANT INTERNATIONAL MATERIAL

A. Council of Europe

36. European Convention on Human Rights

Article 11 Freedom of assembly and association

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

B. United Nations

37. International Covenant on Economic, Social and Cultural Rights

Article 8

"1. The States Parties to the present Covenant undertake to ensure:
(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those

prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
…

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

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

38. Concluding observations of the Committee on Economic, Social and Cultural Rights on the fourth periodic report of France, E/C.12/FRA/CO/4, 13 July 2016

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

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

39. Joint statement by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee on freedom of association, including the right to form and join trade unions, E/C.12//66/5-CCPR/C/127/4, 6 December 2019

"4. Freedom of association, along with the right of peaceful assembly, also informs the right of individuals to participate in decision-making within their workplaces and communities in order to achieve the protection of their interests. …"

C. International Labour Organisation (ILO)

40. Convention No. 87 on freedom of association and protection of the right to organise, 1948

Article 3

"1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

41. Convention No. 98 on the right to organise and collective bargaining, 1949

Article 4

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

42. Convention No. 135 on workers’ representatives, 1971

Article 3

“For the purpose of this Convention the term *workers’ representatives* means persons who are recognised as such under national law or practice, whether they are:
(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.”

Article 5

“Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.”

43. Convention No. 154 on collective bargaining, 1981 (not ratified by France)

Article 2

“For the purpose of this Convention the term *collective bargaining* extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:

(a) determining working conditions and terms of employment; and/or
(b) regulating relations between employers and workers; and/or
(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

Article 3

1. Where national law or practice recognises the existence of workers' representatives as defined in Article 3, subparagraph (b), of the Workers' Representatives Convention, 1971, national law or practice may determine the extent to which the term *collective bargaining* shall also extend, for the purpose of this Convention, to negotiations with these representatives.
2. Where, in pursuance of paragraph 1 of this Article, the term *collective bargaining* also includes negotiations with the workers' representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers' organisations concerned.”

44. Recommendation No. 91 on collective agreements, 1951

II. Definition of collective agreements
Article 2

"(1) For the purpose of this Recommendation, the term *collective agreements* means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other ...".

45. Declaration on fundamental principles and rights at work, adopted in 1998 and amended in 2022

"The International Labour Conference,
…
2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the sub-ject of those Conventions, namely:
(a) freedom of association and the effective recognition of the right to collective bargaining;
…".

46. Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), International Labour Conference, 101st session, 2012

Convention No. 98

Introduction
"167. ... Collective bargaining is one of the principal and most useful institutions developed since the end of the nineteenth century. As a powerful instrument of dialogue between workers" and employers" organizations, collective bargaining contributes to the establishment of just and equitable working conditions and other benefits, thereby contributing to social peace…".

[…]

Promotion of collective bargaining
"199. While law or practice in the vast majority of countries recognizes the right of all workers to negotiate collectively through their trade unions, even though the extent to which collective bargaining is promoted varies, certain systems continue to deprive important categories of workers of this right. These restrictions are in addition to two trends to which the Committee draws attention. The first is the tendency for the legislature in several countries to give precedence to individual rights over collective rights in employment matters. This tendency runs counter to ILO principles, and particularly the Collective Agreements Recommendation, 1951 (No. 91), which recalls the principle of the binding effects of collective agreements and their primacy over individual contracts of employment (with the exception of provisions in the latter which are more favourable to the workers covered by the collective agreement). Secondly, in certain countries, direct agreements between employers and groups of non-unionized workers are much more numerous than the collective agreements concluded with the representative organizations of workers [e.g. Costa Rica, 2010]. This shows that the obligation to promote collective bargaining within the meaning of *Article 4* is not yet fully respected."

47. Direct request from the Committee of Experts on the Application of Conventions and Recommendations to France, adopted in 2021 and published at the 110th session of the International Labour Conference, 2022, concerning Article 4 of Convention No. 98 on the right to organise and collective bargaining (promotion of collective bargaining in small enterprises)

48. Following a complaint by the General Confederation of Labour *Force Ouvrière* (CGT-FO) and CFE-CGC denouncing the fact that Order No. 2017-1385 of 22 September 2017 was weakening the role of trade unions in collective bargaining procedures, making it possible in several situations to conclude agreements through non-trade union actors (particularly in small undertakings), the Committee noted:

> "… that, under the legislation in force since 2017, there are three main ways of concluding collective agreements in small companies, each subject to specific rules and conditions: (i) the conclusion of an agreement with one or more trade union delegates or one or more employees mandated by a trade union organization; (ii) the conclusion of an agreement with one or more elected staff representatives not mandated by a trade union organization; and (iii) the approval of an employer's proposal by a direct vote of the employeesof the company by a two-thirds majority. The Committee notes that the first method is in line with *Article 4* of the Convention, according to which collective bargaining takes place between employers and employers' organizations on the one hand, and workers' organizations on the other. With regard to the second modality, the Committee recalls … that direct negotiation with elected staff representatives should only be possible in the absence of trade union organizations at the relevant level. As regards the third modality, the Committee considers that the adoption by a direct vote of the workers of a proposal by the employer does not have the characteristics of a collective bargaining mechanism within the meaning of the Convention."

49. The Committee requested the Government to:

> "(i) clarify whether, in a small enterprise where there is an employee mandated by a representative trade union organization for the purpose of collective bargaining, the employer may freely choose another method of concluding a collective agreement (negotiation with non-mandated elected staff representatives where they exist; submission by the employer of a proposal to a vote of the staff in the absence of elected staff representatives in enterprises with up to 20 employees); (ii) continue to provide statistics on the use of the different ways of concluding collective agreements in small enterprises; and (iii) continue to provide information on measures to promote collective bargaining between the employer and workers' organizations in small enterprises."

D. European Union

50. Treaty on the functioning of the European Union

> Article 152
>
> "The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.
>
> The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue."

51. Charter of fundamental rights of the European Union

Article 28 – Right of collective bargaining and action

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6§2 OF THE CHARTER

52. Article 6§2 of the Charter reads as follows:

Article 6 – The right to bargain collectively

Part I: "All workers and employers have the right to bargain collectively."

Part II: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

[…]

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

[…]".

A – Arguments of the parties

1. The complainant organisation

53. CFDT points out firstly that Order No. 2017-1385 on strengthening the collective bargaining process forms part of a series of orders adopted with a view to reforming labour law. It is the last component of a series of large-scale reforms whose aim was to strengthen and legitimise social dialogue.

54. In the course of these reforms, more and more matters were made a priority subject of company-level bargaining as part of a process of preserving employee safeguards and protections and of introducing regulatory measures at branch level and in legislation.

55. Order No. 2017-1385 however marks a backwards step in this approach to social dialogue, preparing the ground for the social partners to be bypassed, employers' unilateral power to be strengthened and a form of social monologue to be created with no worker safeguards in companies with fewer than 11 workers and 11 to 20 workers, even though such staff are the most at risk from this point of view. In short, CFDT takes the view that Order No. 2017-1385 undermines the right to collective

bargaining and the recognition of trade unions' special role in negotiating company-level agreements.

On lack of prior negotiations with trade unions

56. Before Order No. 2017-1385 came into force, the Labour Code made a distinction between companies with fewer than 50 workers which have no trade union representative and ones with 50 workers or more. For companies with fewer than 50 workers, employers wishing to negotiate a collective agreement were first obliged to inform representative trade unions at branch level, or in their absence, national cross-industry level, who would then designate an employee to undertake the negotiations. This meant that representative trade unions were not bypassed.

57. Since the entry into force of Order No. 2017-1385, it has been possible to draw up "collective agreements" without involving representative trade unions in the negotiations at all. On the basis of Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code, in companies with fewer than 11 workers and no union representative and ones with 11 to 20 workers where there is no elected member of the staff delegation to the undertaking's social and economic committee, employers can present workers with a draft agreement (or amendment to an agreement) drawn up unilaterally and have it validated through simple ratification by a two-thirds majority of the workers.

58. CFDT acknowledges that Article L. 2232-21 of the Labour Code provides for a minimum period of 15 days between the submission of a draft agreement to workers and the point at which consultation with them can be held – a period which should enable workers to make contact with the département section of representative trade unions at branch or national, cross-industry level and with the Social Dialogue and Collective Bargaining Study and Support Centre. However, nowhere is it provided that employers must inform workers that these bodies exist and that they can consult them. Since there is no such requirement, it is rare for workers to think of turning to these bodies despite the fact that they play an essential role. The 15-day consideration period also seems exceedingly short for workers who know little about trade unionism. The result is that representative trade unions are left completely out of the picture.

59. In CFDT's view, Article 6§2 of the Charter specifies clearly that negotiating procedures should be held with "workers' organisations". These are, primarily, representative trade unions or, failing that, elected workers' representatives who may or may not be mandated by representative trade unions to exercise the right to negotiate. Individual workers cannot be regarded as workers' organisations able to exercise the right to collective bargaining unless they are designated to do so by a representative trade union. This is borne out by ILO standards (see for example Articles 2 and 3 of its Collective Bargaining Convention (No. 154), Article 3 of its Workers' Representatives Convention (No.135), Article 2(1) of its Collective Agreements Recommendation (No. 91) and paragraph 199 of Report III (part 1B) of the ILO Committee of Experts on Application of Conventions and Recommendations, 2012).

60. CFDT acknowledges that Articles L. 2232-21 to L. 2232-23 of the Labour Code do not prohibit the involvement of trade unions. However, neither do they encourage or enable it within the meaning of Article 6§2 of the Charter as the system for the ratification of draft agreements by a two-thirds majority of workers does not entail any negotiation.

61. CFDT also acknowledges how difficult it is for trade unions to establish themselves in small companies but argues that the Government could have adopted an arrangement other than an "employers' referendum" as an alternative negotiating procedure. Trade unions can be involved through arrangements which truly promote and strengthen collective bargaining within companies. It would have been possible – and preferable – for instance, to correct, add to and improve existing arrangements, such as: (i) designation of an employee by a representative trade union in companies with fewer than 11 workers (a procedure which was done away with in 2017 in companies with fewer than 11 workers with no other justification than it had not "proved its worth", but maintained for companies with 11 to 20 workers; (ii) negotiation at the level of the regional joint cross-industry commissions set up by Law No. 2015-994 on social dialogue and employment with a view to ensuring local and regional representation of workers in companies with fewer than 11 workers (to date these commissions have not been permitted to take part in bargaining); (iii) standard branch agreements for small companies (which are still all too rare in practice).

On obstacles to trade union presence in small companies

62. CFDT contends that it is impossible for trade unions to establish themselves in companies with fewer than 11 workers by appointing a trade union representative, as employers are not required to hold elections. Furthermore, the new rules on calculating the threshold of 11 workers beyond which it is legally possible to set up a social and economic committee within an undertaking make fulfilling the conditions still more difficult.

63. Under Article L. 2143-3 of the Labour Code, the right to designate a union representative is confined to representative trade unions in companies of 50 workers or more who have set up a union branch.

64. In companies with fewer than 50 workers, representative unions in the undertaking concerned can appoint a member of the staff delegation to the undertaking's social and economic committee as the union representative (Article L. 2143-6 of the Labour Code). The Labour Code also authorises the appointment of a union representative by agreement. Collective and other forms of agreement may include more favourable provisions such as the right to designate locally or centrally-based trade union representatives in all cases where this is not already legally binding (L. 2141-10 of the Labour Code). This possibility is still extremely hypothetical however.

65. CFDT points out that before Order No. 2017-1385, it was possible for representative trade unions to designate an employee to negotiate company-level agreements. This applied specifically to companies with fewer than 11 workers (former Article L. 2232-24). Under the new legislation, the Labour Code no longer provides for such designations in companies with fewer than 11 workers, creating yet another barrier to trade unions' access to small businesses.

66. In companies with 11 to 20 workers, it is still possible in theory for a union representative (a member of the staff delegation to the social and economic committee) to negotiate agreements. However, in practice, the application of the new rules tends to hinder the establishment of staff representation in companies of this size, particularly in those which have a staff approaching 11 workers. This is true with regard to the rules on the organisation of workplace elections (trade unions are no longer automatically informed that they are being held), designation (priority designation by a trade union where there is no trade union representative has been done away with) and the method of calculating staff numbers (there must now have been 11 workers or more for the last 12 consecutive months as opposed previously, before the entry into force of the 2017 Orders, to 12 months in total (consecutive or not) in the last three years).

67. In CFDT's opinion, the new method of calculating staff numbers has only one effect, namely to make it more difficult to get over the 11-employee threshold. It is wrong to claim that this has the virtue of avoiding staff fluctuations resulting in abrupt changes and an instability in the provisions that applied with regard to representative staff bodies in companies.

68. It is also wrong, in CFDT's view, to say that in companies with 11 to 20 workers, the lack of elected representatives is the result of a shortage of candidates. Order No. 2017-1386 on the new organisation of social and economic dialogue in companies clearly hampered means of triggering the electoral process in such companies. Article L. 2314-5(5) of the Labour Code provides that by derogation from ordinary law, in companies with 11 to 20 workers, employers must invite trade unions to negotiate a pre-electoral memorandum of understanding provided that at least one employee has registered as a candidate for the elections within 30 days following the launch of the electoral process. In other words, it is in companies in which it has been objectively noted that it has been more difficult to find candidates that the law has now made the requirements for an electoral process to be triggered even more restrictive (as it requires a candidature to materialise even before the pre-electoral memorandum of understanding is negotiated, whereas it should in fact be the task of this memorandum to lay down the conditions for the presentation of candidatures).

On whether employers' unilateral power is strengthened to the detriment of workers' rights

69. In CFDT's view, the provisions of the Labour Code to which its complaint relates infringe the right to collective bargaining because the consultation of workers (i) takes

place without any prior negotiation and through direct dialogue with workers; (ii) results in employers' unilateral powers being strengthened; and (iii) does not make it possible to ensure that negotiations will be fair and equal.

70. CFDT states that the lack of negotiation can be perceived in various features of the new law. Firstly, employers prepare draft agreements alone. Articles L. 2232-21 to L. 2232-22-1 have been incorporated into a paragraph of the Labour Code entitled "methods of ratifying agreements", which confirms that there is no question of any negotiation occurring. In practice, workers cannot do anything to change the content of the collective agreement when the draft is presented by the employer or during the review procedure. Secondly, in companies with fewer than 21 workers, a two-thirds majority is rapidly achieved and employers can easily identify who has voted for the draft and who has voted against. It is highly likely therefore that workers will not dare to object in the light of the pressure that the employer can exert on them. Third, an assessment of the "agreements" ratified by a two-thirds majority of workers in January and February 2020 reveals that none of these agreements was negotiated (i.e. their preamble generally only reflects the employer's views). Fourth, Articles L. 2232-22 and L. 2232-22-1 of the Labour Code on the review and termination of the ratified agreement by a two-thirds majority of workers fails to make satisfactory arrangements for workers. Fifth, the consultation which may be held 15 days at the earliest after the presentation of the agreement by the employer to the workers (Article L. 2232-21 of the Labour Code) does not seem to be very effective (see §58 above).

71. CFDT adds that it is the representation of the collective will which makes for equality in collective bargaining. In the "employer's referendum" however, workers vote according to their own interests; "consultation" of workers merely reflects the sum of an expression of individual interests (not the expression of the workers' collective will, which is provided by a trade union representative, an elected representative or a designated employee). Trade union designation makes it possible to restore the balance of power.

72. It follows that collective bargaining must involve the presence of trade union or elected representatives. It cannot consist in direct "negotiation" with workers. Nor can collective bargaining, as defined in international and European texts, take the form of an informal social dialogue between employers and workers.

73. In CFDT's view, the "employer's referendum" favours a unilateral employer's decision over a branch agreement, thus amounting to interference by the employer in the right of trade unions to negotiation at branch level.

74. In addition, there is no guarantee in practice that negotiations will be fair and equal. Evidence of this can be seen in some of the reports of referendums that have taken place. Nor is there any particular protection against possible reprisals for workers (whether they vote for or against the draft agreement), as is the case for trade union or staff representatives. All of this shows that the system for ratification of the draft agreement by a two-thirds majority of workers is intended to strengthen the employer's unilateral power while undermining collective bargaining, as any system of this kind is by nature devoid of any negotiation within the meaning of Article 6§2 of the Charter.

75. According to CFDT, the referendum procedure is, in most cases, harmful to workers, resulting in the adoption of “agreements”, which restrict their rights without any real compensation from the employer in return. This is the case for example with collective performance agreements (APCs), which enshrine the principle that APCs have precedence over employment contracts.

76. CFDT gives examples of agreements (APCs and others) and two studies by the Ministry of Labour’s Directorate of Research, Studies and Statistics (DARES) in support of its claim that workers’ rights have been curbed. CFDT also points out that on 1 December 2020, 573 agreements were “equivalent in nature” to APCs and (as in 2019) 7%, i.e. a not insignificant proportion, had been endorsed through ratification by two-thirds of the workers.

2. The respondent Government

On lack of prior negotiations with trade unions

77. In the Government’s opinion, the fact that there is no prior negotiation with trade unions is not in itself a breach of the principle of worker participation.

78. In this connection, the Government notes firstly, that Article 6§2 does not make provision for situations in which there is no trade union representation within an undertaking and secondly, that the words of this provision (“where necessary and appropriate”) grant States Parties a great deal of discretion. Accordingly, it cannot be inferred from the wording of Article 6 of the Charter that the right to collective bargaining can only be exercised properly with trade unions. In other words, the lack of prior negotiation with trade unions cannot, in itself, be regarded as an infringement of the right to collective bargaining within the meaning of Article 6§2 of the Charter, which does not confer a monopoly on such organisations where it comes to negotiations but also seeks to foster joint consultation between workers and employers.

79. The Government adds that contrary to what is alleged by CFDT, the impugned provisions of the Labour Code work towards the goals pursued by Article 6§2 of the Charter by enabling employers faced with a situation where there is no trade union representative or elected staff representative to consult workers and seek their approval on measures to be taken which will affect their working conditions.

80. The Government points out that Articles L. 2232-21 and L. 2232-23 of the Labour Code apply only when there are no trade union representatives, in other words when there are no representative trade unions acting within a company or elected members of the staff delegation to the social and economic committee. It was in order to ensure that small companies were not structurally barred from the possibilities offered by company-level agreements, that it was necessary to establish negotiating procedures geared to their specific features. The contested procedure was designed precisely to cater for a scenario in which negotiation with trade unions was impossible because the persons entitled to negotiate did not exist.

81. The report to the President of the Republic on Order No. 2017-385 specifies that these provisions seek pragmatic solutions to enable agreements to be reached in very small companies: “This right to bargaining for small and medium-sized companies will be universal and relate to all negotiable topics. The reform enables all the companies in France, whatever their number of workers, to have direct and simple access to the negotiation process, which is at the very core of this project. The reform is particularly concerned with the situation faced by very small companies, which lack either a trade union representative or an elected representative to carry out negotiations. Employers of very small companies now have the option of negotiating directly with their workers on every subject. Very small companies will therefore benefit from the same flexibility and the same ability to apply the relevant legislation as large companies …” (JORF No. 0223 of 23 September 2017, text No. 28).

82. In the Government’s view, the impugned provisions cannot therefore be considered to infringe the obligation of prior negotiation when it cannot, by definition, be implemented.

83. It points out that there are in fact very few trade union representatives within small businesses: only 4 to 5% of companies with 11 to 50 workers have a trade union representative to negotiate collective agreements. The reports from the bilateral meetings held before the draft orders were drawn up confirmed the lack of trade union representation in very small and small to medium-sized businesses despite the fact that for decades the law has made provision for their presence. This situation affects a large number of workers. There are over a million companies with one to nine workers, employing nearly 19% of private sector workers, or 3.3 million people (data from DARES for 31 December 2018).

84. Thus, a very large number of small companies do not have a trade union representative through whom collective company-level agreements can be negotiated by means of the usual procedure, making it necessary to use alternative negotiating procedures.

85. The Government also argues that the referendum of workers cannot be regarded as a means of circumventing trade union designation, this being a procedure that is practically never used in small companies. Article L. 2232-23 of the Labour Code does not mean that negotiation with one or more specifically designated workers or members of the staff delegation to the social and economic committee is prohibited in companies with 11 to 20 workers. In fact, this possibility is specifically provided for by Article L. 2232-23-1 of the Labour Code for companies with 11 to 50 workers.

86. Article L. 2232-23 of the Labour Code authorises a referendum of workers only when there is neither a trade union representative nor an elected member of the social and economic committee within the undertaking. While, as CFDT points out, this means that an employer is free either to negotiate an agreement with a designated

worker or to make use of a referendum, the former is actually still very rare. Law No. 2015-994 of 17 August 2015 on social dialogue and employment opened up the possibility for workers to be designated by representative trade unions at branch or cross-industry level to negotiate and conclude agreements in companies with fewer than 11 workers. However, this procedure has not proved its worth in very small companies. For instance, in 2017, only 197 of the 30,000 company-level agreements concluded were negotiated with a designated employee. In companies with fewer than 11 workers, only 31 agreements were negotiated by a designated worker. According to figures from DARES, the use of designation is still exceptional and relates to less than 1% of companies which open negotiations (Collective negotiations geared more towards employment in 2013, DARES analyses, No. 094, December 2015).

87. In short, Article 6 of the Charter does not restrict negotiating rights to trade unions alone and does not preclude direct dialogue between employers and their workers provided that it does not bypass social partners where they exist.

On obstacles to trade union presence in small companies

88. The Government confirms that it is not obligatory to set up a social and economic committee in companies with fewer than 11 workers. Employers are encouraged to do so nonetheless because of the “traditional” remit of such committees, namely staff representation assigned the task of submitting individual and collective claims to management. In addition, the 11-worker threshold may be lowered through a company-level or branch agreement. Lastly, even if there is no such agreement, a trade union is still authorised to set up in a very small company by establishing a trade union section under the conditions set out in Article L. 2142-1 of the Labour Code.

89. The aim of the new rules on surpassing the 11-worker threshold (12 consecutive months as opposed to a total of 12 months over three years), is to ensure that fluctuations in staff numbers do not result in an abrupt change and instability of the measures that apply with regard to representative staff bodies within companies, particularly for those whose staff numbers frequently change.

90. The Government points out that, in companies with 11 to 20 workers, the fact that there is no elected representative does not stem from a lack of encouragement from the employer to find a negotiating partner but from the absence of any election candidates. Under Article L. 2311-2 of the Labour Code it is obligatory to set up a social and economic committee once a company has 11 workers or more. This is moreover the reason why, before a consultation with workers may be conducted in such companies, it must be recorded in an official report that there is no elected representative.

91. Secondly, as pointed out above, trade unions may establish a trade union section in any undertaking. In companies with 11 to 20 workers where no election for a social and economic committee has been held, the trade union section may ask the

employer to hold an election and put forward a candidate (Article L. 2314-8 of the Labour Code). It even has a monopoly in the first round of elections, which is reserved for trade union lists, with the second round being open to workers only if the requisite number of positions of representative have not been filled (Article L. 2314-29 of the Labour Code).

92. Third, as explained above, the designation system is still intact, as Article L. 2232-23 of the Labour Code does not rule out the application of Article L. 2232-23-1, which authorises the use of worker designation (a measure which is rarely used however and is not an effective means of strengthening trade union presence within companies, according to the Government).

On whether employers' unilateral power is strengthened to the detriment of workers' rights

93. The Government takes the view that the lack of prior negotiation with trade unions does not mean that there has been no negotiation between the employer and the workers consulted.

94. In companies without a trade union representative, social dialogue is informal in nature. In practice, the draft agreement proposed by the employer is negotiated informally with the workers before the employer presents it for ratification. The large majority (two-thirds majority requirement) to which approval of the draft agreement is subject forces employers to establish a dialogue with their workers, who become de facto parties to the agreement.

95. In addition, Article L. 2232-21 of the Labour Code provides for a minimum period of 15 days between the date on which the employer presents the draft agreement to the workers and that on which consultation of the staff can be held. The purpose of this delay is to enable the workers to make contact with the regional (*département*) sections of the representative trade unions at branch or national and cross-industry level and with the Social Dialogue and Collective Bargaining Study and Support Centre of the *département* in which the undertaking is located (these centres were set up by Order No. 2017-1385, which seeks to foster and encourage collective bargaining, particularly in small companies, and is made up both of representatives of the administrative authority and employers and of workers designated by representative trade unions in the *département*).

96. The aim both of *département* sections and of the Study and Support Centre is to provide workers with information on the organisation and content of agreements presented to them, enabling workers to be fully informed during consultation and thus guaranteeing equality during negotiations.

97. The Government adds that consultation of workers is not an extension of the employer's unilateral decision-making powers, and that there are two reasons for this.

98. Firstly, Article L. 2232-22 of the Labour Code provides that draft agreements are regarded as valid company-level agreements when they are approved by a two-thirds majority of workers. Approval by a two-thirds majority guarantees the meeting of wills which mark proper agreement and makes it impossible to label such agreements as unilateral decisions, especially as they are the outcome of informal negotiations, as clarified above. Involvement of trade union representatives is not therefore a prerequisite for the workers' collective will to be taken into account since all workers are consulted and a two-thirds majority is required thus ensuring that their interest is collectively expressed.

99. Secondly, the Government points out that the contested legislation includes safeguards guaranteeing that negotiations are fair and equal. Article R. 2232-10 of the Labour Code guarantees the personal and secret nature of the consultation, for which employers are not present, so as to protect workers from any interference by the employer in their decision-making process. This secrecy is also intended to protect workers from any arbitrary decision taken against them because of their position.

100. The Government maintains that the few collective performance agreements (APCs) mentioned by the complainant organisation do not amount to proof of the almost systematic curbing of workers' rights which it alleges. In the absence of further details about the context in which these agreements were signed in the companies concerned, it is impossible to gauge how much these measures were needed and assess the scale of the restrictions to rights and the benefits granted in compensation (in short to ascertain how appropriate they were in the specific context of the companies concerned).

101. Moreover, according to the Government, in small companies the adoption of collective performance agreements through referendum is a rare event. At the end of December 2019, 297 collective performance agreements had been concluded since the introduction of the measure and of these, only 21 had been adopted by consultation (7%), 19 of which related to companies with fewer than 11 workers (figures which should be compared with the 22,370 agreements negotiated through consultation and the 13,940 agreements concluded in companies with fewer than 11 workers in 2019).

B – Assessment of the Committee

General principles

102. The Committee recalls that the objective of Article 6§2 is to promote free and voluntary collective bargaining between employers or employers' organisations and workers' organisations. According to the Committee's interpretation, in accepting the terms of this provision, the States Parties undertake not only to recognise, in their legislation, that employers' and workers' organisations may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreements if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other. Where adequate machinery for voluntary negotiation is set up spontaneously, however, the Government in question is not, in the Committee's opinion, bound to intervene in the

manner prescribed in this paragraph (Statement of Interpretation on Article 6§2, Conclusions I).

103. Further to the above and having regard to the complaint before it, the Committee wishes to underline that Article 6§2 expressly refers to collective bargaining between employers or employers' organisations on one side and workers' organisations, i.e. trade unions, on the other side. The Committee acknowledges that the States Parties have a margin of appreciation as to the nature of measures taken to promote collective bargaining in accordance with national systems and traditions, however such measures must not undermine or counteract the access of trade unions to conduct collective bargaining on behalf of workers nor should they, as a point of departure, favour or incentivise bargaining directly between employers and their workers without the mediating negotiation power of trade unions as this would likely lead to perpetuating the weaker position of the workers' side contrary to a fundamental principle of the Charter's collective labour rights provisions.

104. Where national legislation provides for a possibility to conclude collective agreements directly between employers and workers without the intermediary of trade unions, the Committee considers that adequate safeguards should be in place at several levels. Firstly, the scope of such a possibility should be narrowly defined to those situations where trade unions are manifestly unable or unwilling to conduct bargaining on behalf of the workers concerned; secondly, measures must be taken not only to ensure that all relevant trade unions have the necessary information and access to conduct collective bargaining on behalf of the workers concerned, but also to actively encourage and accompany the engagement of trade unions at the level of small companies; and thirdly, there must be guarantees, notably of a procedural nature, ensuring that any agreements concluded directly with the workers in this way represent a genuinely negotiated outcome as well as the genuinely collective will of the workers concerned.

Application of these principles to the present complaint

105. The Committee considers that it is called upon to assess whether the measures introduced by Order No. 2017-1385 amending the Labour Code in its Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23, which enables the conclusion of company-level agreements directly between the employer and the workers in small companies (20 or fewer workers) where there is no trade union representative or elected workers' representative, are compatible with obligation laid down by Article 6§2 to promote collective bargaining and the conclusion of collective agreements between employers, or their organisations, and trade unions.

106. In this respect, while taking note of the argumentation of the parties around the issue of the 11-worker threshold (which must be met over a period of 12 consecutive months) which when met leads to the establishment of a social and economic committee in the company becoming obligatory, the Committee does not consider it to be of decisive importance for its assessment under Article 6§2 of the Charter in the

present complaint. In any event, the Committee considers that States Parties have a margin appreciation in fixing such thresholds for workers' representation bodies.

107. The Committee firstly notes that the stated aim of the reforms introduced by Order No. 2017-1385 was to strengthen collective bargaining, in particular in small companies with 20 or fewer workers. In this respect, it notes the Government's observation that trade union representation in small and medium-sized companies is weak with only 4 to 5% of companies with between 11 and 50 workers having a trade union representative (see §83 above). From this relative lack of trade union presence, the Government concluded that there was a need to devise alternative bargaining procedures in small companies.

108. Article 2232-21 of the Labour Code provides that in companies with no trade union representative and with fewer than 11 workers, the employer may submit to the workers a draft agreement for vote ("agreement by referendum"). The referendum shall take place after a minimum period of 15 days from the submission of the draft agreement. In terms of content, the agreement may concern the entirety of subjects which are open to company-level bargaining under the Labour Code. Moreover, pursuant to Article L. 2232-23 of the Labour Code the same possibility applies in respect of companies having between 11 and 20 workers and where there is no elected member of the staff delegation to the social and economic committee of the company.

109. Article L. 2232-22 of the Labour Code stipulates that where the draft agreement is approved by a majority of two-thirds of the workers in a company it shall constitute a valid company agreement. This provision also lays down rules on termination and amendment of agreements. Article L. 2232-22-1 of the Labour Code further stipulates that the rules on termination and amendment shall be applicable to any agreement whatever the modalities of its conclusion when the company subsequently meets the above-mentioned requirements of Articles L. 2232-21 and L. 2232-23.

110. The Committee notes that these provisions entail that an employer in a small company may simply submit a draft agreement stipulating terms and conditions of work to a vote (or a "referendum") of the workers in that company. As pointed out by the ILO Committee of Experts (ILO CEACR) this means in effect that under the legislation in force since 2017 there are three main ways of concluding collective agreements in small companies: (i) the conclusion of an agreement with one or more trade union delegates or one or more workers mandated by a trade union; (ii) the conclusion of an agreement with one or more elected staff representatives not mandated by a trade union; and (iii) the approval of an employer's proposal by a direct vote (referendum) of the workers of the company by a two-thirds majority (see Direct request (CEACR), adopted 2021, published 2022).

111. Having regard to general principles outlined above (§§102-104), the Committee is unable to consider that this system of agreements by referendum may be regarded as promoting collective bargaining between employers and trade unions in the meaning of Article 6§2 of the Charter. Although the provisions in question could be

said to foster a certain form of “worker participation” at company level as argued by the Government (see §§77-78) - other forms of which are guaranteed by other Charter provisions (for example Articles 21 and 22) – the fact that these provisions facilitate the conclusion of agreements without the participation of trade unions does not pursue or contribute to the express objective laid down by Article 6§2 of the Charter.

112. Notwithstanding this holding, the Committee does not interpret Article 6§2 to prohibit or prevent bargaining and conclusion of agreements between employers and workers without the participation of trade unions provided that this does not result in undermining or marginalising the role of trade unions in collective bargaining processes in small companies and provided that guarantees are in place to ensure that any such agreements reflect a genuinely negotiated outcome agreed between free and empowered parties and not a de facto imposed outcome shaped by an imbalance of bargaining power.

113. As to the role of trade unions, the Committee notes their limited presence in small companies (see §107 above) and considers that ensuring that small companies have the possibility of concluding company-level collective agreements in the meaning of the Labour Code even where there is no trade union presence is in itself a legitimate objective.

114. The Committee also notes that prior to Order No. 2017-1385 employers in companies with less than 50 workers and wishing to conclude a collective agreement were obliged to inform representative trade unions at branch level (or in their absence, trade unions at national cross-industry level). Furthermore, following Order No. 2017-1385 it is no longer possible for trade unions to designate a worker for the purposes of collective bargaining in small companies with less than 11 workers. This possibility is maintained only for small companies with 11 or more workers. However, the Committee also notes that designation was and is rarely used in very small companies (see §§86 and 92) and it therefore does not see the situation as a significant restriction on the access of trade unions to collective bargaining.

115. From the statistical information at its disposal, the Committee notes that since the 2017 reforms, the number of company-level agreements in small companies has increased significantly. The number of these agreements concluded with trade unions has declined modestly until 2020 before picking up slightly in 2021, whereas there has been a strong growth in the number of agreements by referendum and in the number of agreements concluded with elected staff representatives (see, inter alia, *DARES, La négociation collective en 2021, Edition 2022*). However, the Committee does not consider that this development in itself is indicative of any interference with the right guaranteed by Article 6§2 of the Charter.

116. More importantly, the Committee notes that nothing in French law and practice prevents trade unions from persuading workers in small companies to become unionised and from establishing trade union sections within these companies (cf. Article L. 2142-1 of the Labour Code) and thus being able to access the collective bargaining process. The Committee wishes to point out in this respect that the Charter

does not require workers to be unionised and does not offer any guarantee that trade unions will obtain the conclusion of collective agreements in all situations. Collective bargaining is an entirely voluntary process between free parties which may or may not result in an agreement.

117. The Committee notes the parties' arguments concerning the so-called collective performance agreements (APCs) but it considers that the information and figures presented are neither conclusive nor are they essential for the assessment of the issue at stake in this complaint. Moreover, CFDT mentions in passing (see §73) that agreements by referendum amounts to "interference by the employer in the right of trade unions to negotiation at branch level." While the Committee considers that it would be a matter of serious concern were agreements by referendum to override more protective and essential clauses of collective agreements concluded with trade unions at branch level, CFDT does not further substantiate this claim and the Committee will therefore not assess it in this decision.

118. With respect to procedural safeguards of a genuinely negotiated outcome the Committee firstly notes the minimum period of 15 days from the employers' submission of the draft agreement and until the vote of the workers takes place, a period during which negotiation of the draft agreement can take place and during which the workers also have the possibility of consulting with representative trade unions at branch or national cross-industry level and with the Social Dialogue and Collective Bargaining Study and Support Centre (cf. Articles L. 2234-4 *et seq.* of the Labour Code). While considering that the period in question is relatively short and acknowledging that the workers concerned may not always be aware of these possibilities, the Committee nevertheless considers that this opens a real avenue for trade unions to engage with the company-level processes and to be pro-active in raising awareness among the workers concerned.

119. Secondly, the Committee notes that the referendum takes place by secret ballot, which indeed offers the individual workers a safeguard against possible pressure and retaliatory measures by the employer. The Committee considers in this respect that the provisions of Article R. 2232-10 of the Labour Code, which guarantee the personal and confidential nature of the referendum, are adequately protective of the workers in this process.

120. Moreover, the Committee notes that at least two-thirds of the workers in the company concerned must vote in favour in order for an agreement to be validly concluded. Although this requirement does not in itself guarantee a genuinely negotiated outcome, it does in the Committee's view ensure that the agreement by referendum has relatively strong support among the individual workers concerned and conversely that it is relatively easy for workers to reject a draft agreement deemed to be unfavourable.

121. In conclusion, it appears to the Committee that there is a need in France to take specific measures to promote collective bargaining in small companies in the meaning of Article 6§2 and that the possibility to conclude agreements without the participation of trade unions does not represent such a measure. However, it does not consider that the possibility of agreement by referendum provided for by the impugned provisions amounts to a breach of Article 6§2 in view of the fact that possibilities remain in place

for trade trade unions to engage with workers and collective bargaining processes in small companies and having regard to the safeguards in place which it views as not precluding a negotiated outcome and as sufficiently protective of the weaker party, including the minimum 15 day period from the submission of a draft agreement, the secrecy of the ballot and the strong majority requirement for an agreement by referendum to be validly concluded.

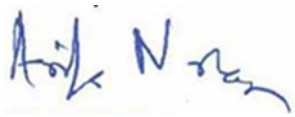
122. The Committee holds therefore that there is no violation of Article 6§2 of the Charter.

CONCLUSION

For these reasons, the Committee concludes :

- by 9 votes against 3 that there is no violation of Article 6§2 of the Charter.

George THEODOSIS
Rapporteur



Aoife NOLAN
President

Henrik KRISTENSEN
Deputy Executive Secretary

In accordance with Rule 35§1 of the Rules of the Committee, a separate dissenting opinion of Carmen SALCEDO BELTRÁN is appended to this decision.

SEPARATE DISSENTING OPINION OF CARMEN SALCEDO BELTRÁN

I am unable to agree with the majority decision of the Committee that there is no violation of the Charter in this case. With the greatest respect for my colleagues' opinion, I believe that the decision on the merits should have found a violation of Article 6§2 of the revised European Social Charter (Charter) and that it should have done so both from the angle of the right guaranteed by the provision and its purpose and aim, and in the light of the Committee's established case law, viewed in general and in particular in similar contexts.

My opinion is based on a threefold approach. Firstly, I will outline the basic principles of the right to collective bargaining enshrined in Article 6§2 of the Charter from the viewpoint of the treaty and as interpreted by the Committee through its case law (I). Secondly, I will analyse the application of these general principles to the complaint lodged so as to contest the arguments on which the finding of no violation is based and highlight the fact that at present, the legislative amendment undoubtedly violates the right to collective bargaining in several respects and moreover, prevents the enjoyment of other rights guaranteed by the Charter (II). Third, I will show that the argument that there is a violation of the Charter is also reinforced by a previous finding of non-conformity by the Committee concerning certain legislative amendments which enabled employers not to apply the rules agreed on in collective agreements and to interpret them unilaterally. In this manner I will seek to emphasise that the finding of a violation was the only consistent option possible in the light of the guaranteed right to collective bargaining and of the established case law (III).

I. Basic normative and case-law foundations of the right to collective bargaining under Article 6§2 of the European Social Charter

I will begin by looking at the text of the provision and the appropriate textual interpretation that the ECSR has made of it to achieve its objective and goal. I shall single out certain expressions on purpose as they will be examined in more detail in the context of this opinion (II).

Under paragraph 2 of Article 6 of the Charter, the Parties undertake, with a view to ensuring the "*effective* exercise" of the right to bargain collectively, "*to promote*, where necessary and appropriate, machinery for voluntary negotiations *between employers or employers' organisations and workers' organisations*, with a view to the *regulation of terms and conditions of employment by means of collective* agreements" (*Unione Generale Lavoratori - Federazione Nazionale Corpo forestale dello Stato* (UGL-CFS) and *Sindacato autonomo polizia ambientale forestale* (SAPAF) v. Italy, Complaint No. 143/2017, decision on the merits of 3 July 2019, §117; European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, decision on admissibility and the merits of 2 December 2013, §173; *Associazione nazionale sindacato professionisti sanitari della funzione infermieristica* - Nursing Up v. Italy, Complaint No. 169/2018, decision on the merits of 19 October 2022, §56).

According to the Committee's interpretation, the Contracting Parties which have accepted this provision undertake not only to *recognise*, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also "*actively to promote* by *appropriate means the conclusion of such*

agreements" if their spontaneous development is not satisfactory and, "*in particular, to ensure that each side is prepared to bargain collectively with the other"*. In addition, in order to discharge the exclusive supervisory duties assigned to it by the Charter, the Committee asked for complete information on existing machinery for negotiation in order to assess whether states were "*making a real effort to promote the conclusion of collective agreements*" (Conclusions I – Statement of interpretation – Article 6§2).

The Committee has considered it pertinent to state that the exercise of the right to bargain collectively guaranteed by Article 6§2 of the Charter "*represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter*, including for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information and consultation (Article 21), participation in the determination and improvement of the working conditions and working environment (Article 22)" (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §109; Nursing Up v. Italy, Complaint No. 169/2018, *op. cit.*, §56).

Only if "*adequate machinery for voluntary negotiation is set up* spontaneously" are governments "not bound to intervene in the manner prescribed in this paragraph" [i.e. 6§2] (LO and TCO v. Sweden, Complaint No. 85/2012, *op. cit*., §§110-111; Confédération Générale du Travail Force Ouvrière (FO) v. France, Complaint No. 118/2015, decision on the merits of 3 July 2018, §60).

It is very important to point out that the Committee has noted that "collective bargaining is a *mutual process* where not all conditions required by one party are likely to be accepted by the other" (LO and TCO v. Sweden, Complaint No. 85/2012, *op. cit*., §112). The Committee has added that a trade union "*must maintain its ability to argue on behalf of its members through at least one effective mechanism.* Moreover, *in order to satisfy this requirement,* the mechanism of collective bargaining must be such as to *genuinely* provide for a possibility of *a negotiated outcome* in favour of the workers' side" (EuroCOP v. Ireland, Complaint No. 83/2012, *op. cit*., §§176-177).

II. Application of the general principles in the instant case

The complainant organisation requested the Committee to examine Article 8 of Order No. 2017-1385, ratified by Law No. 2018-217 of 29 March 2018, which amended collective bargaining in undertakings with fewer than 11 employees (very small enterprises), where it was not compulsory to hold workplace elections, and in undertakings with 11 to 20 employees (small enterprises) where there was no elected staff representative (optional). It was incorporated into Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code.

This new legislation, in my opinion, unquestionably quite blatantly infringes Article 6§2 of the Charter in several respects. Set out below are my four legal arguments to this effect.

Firstly, the general rule is that collective bargaining must be set up between employers or employers' organisations and workers' organisations. Exceptionally, where national legislation provides for the possibility of concluding collective agreements between

employers and workers directly, without going through the trade unions, the Committee considers in the decision on the merits that sufficient safeguards must be set up at several levels (§104).

The legislative reform under examination begins by stating that “in undertakings with no trade union representative and which usually have fewer than eleven employees, *the employer may submit to the employees a draft agreement* or draft amendment covering any of the topics subject to collective bargaining under the Labour Code. The employee *consultation* process shall take place after a minimum period of fifteen days from submission of the draft agreement to each employee (Article L. 2232-22 of the Labour Code). The same legal rules apply “in undertakings which usually have between eleven and twenty employees, where there is no elected member of the staff delegation to the social and economic committee …” (Article L. 2232-23 of the Labour Code).

First, I would like to state my view that the new arrangement adopted for small and very small enterprises is not really “collective bargaining”. If it is, it is in name only because, with the new legislation, it involves no real “bargaining” and still fewer guarantees. This follows from the terms which were ultimately adopted in the legislation. The employer proposes an “employers’ draft agreement”. The expression could be accepted if there was subsequently some negotiation with workers but there is none, because the legislator specifically states that the document is subject to “consultation” with employees for a period of no fewer than 15 days. Under the conditions provided for by the legislation, employers are not required to “negotiate” or even to exchange views. They may simply inform their employees that they are forwarding them the draft agreement. The interpretation of the paragraph cannot be based on what might happen during the consultation period. The precepts must be based on what is written. This must guarantee rights “not merely theoretically, but also in fact” as this is what the Charter is supposed to protect (International Commission of Jurists (ICJ) v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32; European Federation of National Organisations Working with the Homeless (FEANTSA) v. Slovenia, Complaint No. 53/2008, decision on the merits of 8 September 2009, §28).

Likewise, according to the nuance in the terms adopted by the legislator, the employer merely “submits” the document, and no other action is indicated. It is not specified what is meant by “submit”, an act which can be limited to placing the document before the workers if the employer deems it appropriate. Nor is it specified if the employer must explain the regulatory content of the provisions of the document, justify the measures, merely announce to the workers’ representatives that it exists or inform the workers of any alternatives available to them, of the procedure involved, of guarantees that they can consult their representatives or of any use that may be made of the document outside the context of the consultation. In my opinion, the content of the draft agreement is not more specific because the aim is that it will result promptly and, as I will explain further below, in a *simplified, pragmatic* manner – terms that I have taken from official documents – in a company-level agreement, as provided for expressly in Article L. 2232-22 of the Labour Code, without any initial negotiation procedure. The minimum period of 15 days is, moreover, further evidence of this. The legislator rightly thought that since the discussion is a direct one between employer and employees and that only a consultation is required, the time allotted had to be sufficient. If there were

negotiation and guarantees, more time would be needed. The Committee acknowledges in the decision on the merits that “the period in question is relatively short” (§118).

My appraisal is confirmed by the Report to the President of the Republic on Order No. 2017-1385 of 22 September 2017. It is odd that it states that one of the advantages of the new legislation is that “employers of very small companies now have the option of *negotiating directly with their workers* on every subject …”. In other words this explanation refers to “*the option of* direct *negotiation*”. I would stress that the word *negotiation* was not included in the text of the legislative provision. Besides this, even if the legislator had used this wording, it would not have been in conformity with Article 6§2 of the Charter because of its optional nature.

The decision on the merits adopted by a majority of the members of the Committee makes some references to the fact that the period of consultation may include negotiation – see, for example, §118 (“the employers’ submission of the draft agreement and until the vote of the workers takes place, a period during which *negotiation* of the draft agreement *can take place*”). This presentation of negotiation as a possibility is at odds, firstly, with the case law of the Committee, under which, where there is no trade union, there is “*a need to devise alternative bargaining procedures in small companies*”. Secondly, the Committee recognises that during the consultation period, it is possible for there to be no negotiation. In this case, the right does not exist and therefore there is a violation of the Charter. If negotiation takes place during the consultation period, it is only because the employer agrees to it. Third, it is the Committee which has made the generous interpretation that there may be negotiations during the consultation. Legally, and it is this that we should be examining strictly speaking, there is no such indication but merely a process to submit a document drawn up in advance by the employer and made directly available to workers and the opening of a period of consultation. Under the Committee’s case law, “a mere hearing of a party on a negotiated outcome will not satisfy the requirements of efficiency inherent in Article 6§2 of the Charter” (EuroCOP v. Ireland, Complaint No. 83/2012, *op. cit*., §§176 and 177; European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, decision on the merits of 12 September 2017, §§87 and 88).

Referring again to the interesting explanatory information provided by the Report to the President, it is said that this new form of “negotiation” is one of “*pragmatic* solutions, … with a view to strengthening collective bargaining” and that the “right to bargaining for small and medium-sized undertakings will be universal”. I note that this in itself is a pragmatic solution because there is no doubt that the determination of working conditions in very small enterprises, and if necessary, in small enterprises, will be very simple and expeditious. In practice, employers will meet little or no opposition to their proposals. The intermediaries (designated employees or trade unions) with whom they were expressly required to *negotiate* before the reform – and I would emphasise that the former article expressly required negotiation – were removed from the process after the entry into force of the new law. So it is pragmatic, but for one party only. To regard this measure, which does away with the right to collective bargaining in the true sense, as one which reinforces this right or makes it universal, would require a great effort of the imagination which on the one hand would diverge entirely from the approved text and on the other would be a legal fabrication.

The truth of this argument is not affected by the so-called *referendum* to which the draft agreement is submitted. The Committee itself considers in the decision on the merits that this system for the conclusion of agreements “does not pursue or contribute to the express objective laid down by Article 6§2 of the Charter” (§111). It was established as part of the consultation process, but nothing is said about guarantees. The Committee points out that guarantees must be set up for all direct negotiations. In view of the wording of the provision, it is clear that the procedure is little regulated if regulated at all, meaning that it is in fact the employer which organises it. In truth, there is no need for any negotiation. If there was, aspects such as the need to do so in good faith would be spelt out. This has been highlighted several times by the Committee (Conclusions XIX-3 (2010), former Yugoslav Republic of Macedonia, Article 6§2; Conclusions 2014, Ireland, Article 6§2; Conclusions 2022, Romania, Article 6§2).

The legislation clearly points to the organisation of a free, secret vote by the workers for or against the agreement as a guarantee. However, no measure has been introduced to safeguard this freedom or this secrecy, suggesting that in a small or very small enterprise they may be a pipe dream. In the report to the President, there are claims that the new legislation has put such enterprises on an equal footing with large enterprises. If the legislators had really wished to put them on an equal footing, their starting point should have been a scenario which took account of the existing imbalance. The Committee itself has stated in its case law that collective bargaining must be “real” and that to achieve this, the procedure must be “free and voluntary” and based on dialogue between the parties (Conclusions 2022, Romania, Article 6§2).

The undertakings to which the contested reform applies have very few employees, some only one or two. For procedures to be properly free, voluntary and confidential, they require positive action to take account of the particular circumstances. The context is one of a complete imbalance of powers, in which conflicting interests are at play. A worker in a very small or small enterprise cannot respond in the same way to a document or a proposal from their employer as they would in a larger enterprise. Diverse risks are associated with a “direct” communication to an employer expressing disagreement. Employees can easily expose themselves to the threat of dismissal, which is not offset by the existence of judicial remedies.

The legislation was formulated on the basis of a situation in which an equal balance between actions and responses was assumed, leaving these workers with no protection from an employer who comes forward with a unilaterally drafted document regulating employment relations, after this formal process, to be entirely valid. The Committee interprets the rights and freedoms set out in the Charter in the light of a number of criteria. These include current conditions and new challenges and situations, as the Charter is a living instrument (Marangopoulos Foundation for Human Rights v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006, §194; European Federation of National Organisations working with the Homeless (FEANTSA) v. France, Complaint No. 39/2006, decision on the merits of 5 December 2007, §64, and Transgender Europe and ILGA-Europe v. Czech Republic, Complaint No. 117/2015, decision on the merits of 15 May 2018, §75). The right to collective bargaining determined by legislators and examined by the Committee should not diverge from these criteria.

Therefore, for the reasons given above, a collective bargaining mechanism must provide for the possibility of a *negotiated outcome* in favour of the workers' side (EuroCOP v. Ireland, Complaint No. 83/2012, *op. cit.*, §§176-177). There has been a first violation of Article 6§2 of the Charter because, following the legislative amendment, the right to collective bargaining neither of workers' representatives nor of workers themselves is directly recognised or guaranteed, as the existing right has been replaced by a mechanism in which working conditions are established unilaterally with no real and effective bargaining at the beginning, middle or end of the process.

Secondly, Article 6§2 of the Charter requires states to "*promote* negotiations between employers and trade unions at all levels where employment conditions are agreed, *including enterprise or company level*". In other words, the aim is also to *facilitate* or *successfully encourage*, in theory and in practice, the conclusion of collective agreements, the establishment of appropriate procedures or the development of voluntary negotiation between employers' organisations and trade unions with a view to regulating working and employment conditions through collective agreements (Conclusions 2014, Lithuania, Article 6§2; Conclusions 2014, Moldova, Article 6§2; Conclusions 2014 and Conclusions XIX-3 (2010), Slovak Republic, Article 6§2, Conclusions 2014, Sweden, Article 6§2).

According to its title the order is intended to "strengthen the collective bargaining process". The Report to the President refers to the same term several times, linking it to expressions such as "strengthening social dialogue", while specifying that it "is intended to increase the security of labour relations, both for employers and for employees".

In questioning these allusions, I refer in part to the arguments above. They make it clear that the right to collective bargaining was eliminated in small and very small enterprises and replaced by a procedure which is not bargaining. When we look at the current provisions as amended and compare them with the former wording, we see that there has been no *promotion* of this right by the state but a regression instead. More specifically:

(a) The positive measures introduced into French legislation benefit only one of the parties, namely the employer. They circumvent the trade unions by creating a direct process between the employer and workers which lacks the essential component, namely for collective bargaining to be an instrument of social progress and conflict settlement based on true equality of arms between independent partners.

(b) The new regulation prevents collective bargaining at the level of small and very small enterprises.

In this connection, I consider it relevant to make a comment on *social dialogue*. Social dialogue must be based on the participation of workers' representatives or, in exceptional cases, workers themselves. In my opinion, there is little dialogue involved in the way that the legislation is formulated, which is in fact a means of strengthening a monologue, namely that of the employer.

If this had really been the objective, then the legislators should have adopted positive measures for the *active, genuine and effective* promotion of collective bargaining between the two parties and its outcomes in companies, bearing in mind the absence of workers' representatives. This was precisely an indication of their inferiority, which

would be even greater as a result of the reform. Instead of establishing measures which would oblige to take account of workers' representatives, their participation has been excluded. The Committee itself does not consider in the decision on the merits that "this system of agreements by referendum may be regarded as promoting collective bargaining between employers and trade unions within the meaning of Article 6§2 of the Charter" (§111).

The legislative reform adopted does not, in my view, meet the positive obligation incumbent on all States Parties to "take not merely legal action but also practical action to give full effect to the rights recognised in the Charter" (Autism-Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 53). I would point out that the Committee has emphasised that this "requires state parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein" (International Movement ATD Fourth World v. France, Complaint No. 33/2006, decision on the merits of 5 December 2007, §61).

Similarly, it should be pointed out that the right to enter into a collective agreement might represent, in the particular circumstances of a case, one of the principal means – even the foremost of such means – for trade unionists to protect their interests and those of employees. A union has to be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In other words, there is an organic link between freedom to organise and freedom to bargain collectively. The Committee considers that the satisfactory execution of the obligations deriving from Article 6§2 depends on prior compliance with Article 5 (Conclusions XIII-3 (1995), France, Article 6§2; interpretation taken up by the European Court of Human Rights in the judgment Demir and Baykara v. Turkey, 12 November 2008, §129). The Court also found that "even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests"). In my opinion, the instant case is an example of a situation in which the two precepts are linked.

For the reasons outlined above, there has been a second violation of Article 6§2 of the Charter because the legislative reform failed to actively promote either the right to collective bargaining or a culture of dialogue.

Third, the Committee considers that the States Parties have a margin of appreciation when setting the thresholds which govern the formation of workers' representative bodies (§§103-106). It has accepted that States Parties may restrict the exercise of the right to collective bargaining as long as restrictions are prescribed by law, pursue a legitimate aim, 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 (Article G of the Charter) (*Confederazione Generale Sindacale (CGS)* and *Federazione dei Lavoratori Pubblici e Funzioni pubbliche (FLP)* v. Italy, Complaint No. 161/2018, decision on the merits of 19 October 2022).

In examining this argument, on which the Committee's majority decision is based, I will begin by pointing out, as is established by the Committee's case law, that legislators do not have full and unconditional freedom. In other words, their margin of appreciation is not absolute or unlimited. A vital aspect must be taken into account when assessing

the limits to their freedom, namely that the right to collective bargaining is one of the key components of the social and democratic rule of law, social justice and the right to organise, which, in regulating working conditions, has an impact on other rights guaranteed by the Charter.

Legislators must ensure that it is effective in all contexts, adopting specific measures for situations in which it may be more difficult for it to be exercised. Extra measures may therefore be necessary to:

(a) preserve the bargaining autonomy of workers and employers and/or their respective representatives.

(b) foster their free development in all undertakings, including by preventing any interference or intrusion on the part of the authorities.

Such action is particularly necessary in cases in which the imbalance is patently obvious, as is the case here. The total failure to act is a further indication that the right is not guaranteed. Increased protection would not be discriminatory as its aim would be to balance the two powers (employer and employees) in the light of their competing interests. Limiting one of them is not interference but helps to balance up the labour relations system as a whole and is therefore based on essential legal principles.

Article 6§2 of the Charter requires states to ensure that the right to collective bargaining is accessible at all levels and is consistent with the purpose for which the treaty recognises and guarantees it. Legislators must set up the necessary machinery for collective bargaining to be able to perform its function. It is essential in all cases to protect the partners and the procedure. Positive measures must be taken to ensure that the process works along with preventive measures to eliminate any interference or limitation which is not justified from the viewpoint of the Charter.

Once this absolute minimum has been guaranteed, the legislator has some leeway in terms of configuration. The Committee considers that the reform in this case is legitimised by the state's margin of appreciation. In my opinion, of the three requirements laid down in Article G of the Charter, only the first, namely being prescribed by law, has been met. As to the second, namely pursuing a legitimate aim, I cannot see in what way this "non-negotiation" between the employer and the employees, resulting in the unilateral determination of working conditions by the employer, is legitimate in a democratic, social state governed by the rule of law. It is also surprising that the Committee did not consider that if this measure pursued a legitimate aim, it was possible to achieve it by other means which did not exclude workers' representatives completely and did not deprive workers of machinery enabling them to act on an equal footing in this direct relationship with their employers as part of the regulations on their labour relations. At no point did the legislator establish a right of participation for trade unions in these undertakings, and it should be pointed out that the Committee has stated that in situations where trade union rights have been restricted, they must maintain their ability to argue on behalf of their members through at least one effective mechanism (UGL-CFS and SAPAF v. Italy, Complaint No. 143/2017, *op. cit.*, §118).

As to the third criterion, namely the need to protect the rights and freedoms of others or public interest, national security, public health or morals, I cannot see what general interests are protected. Considering that social justice and decent work are basic

general guidelines for the determination of working conditions, I think that if the legislative reform served to guarantee anything at all, it was the exclusive interest of employers.

Therefore, for the reasons outlined above, there has been a third violation of Article 6§2 of the Charter, because the legislator exceeded the limits set by Article G of the Charter in adopting this reform.

Fourth and lastly, I would add a point that I think it is important to highlight with regard to two references in the Report to the President of the Republic concerning the alleged advantages of the new order. It is stated in this report that as a result of the new legislation, “very small undertakings will therefore benefit from *the same flexibility and the same ability to apply the relevant legislation* as large undertakings” or that “undertakings will be able to anticipate and *adjust rapidly to upward or downward market trends* through *simplified majority agreements* on working hours, pay and mobility, thanks to the merger of agreements on reduced working hours, job retention, internal mobility and job preservation and their simplification”.

For some years, references to “flexibility” and adjusting to market trends have been commonplace in the explanations accompanying the legislative reforms governing labour relations. They are presented as essential measures linked to the right of employers to organise their affairs and based on their powers of management or their freedom to conduct business.

Once again, I would point out that the European Social Charter protects social rights. It does not include a right for undertakings to adapt or adjust their internal functioning or improve their competitiveness. In other words, there is no conflict in the rights guaranteed by the Charter, whether directly or indirectly. The only right to be preserved in the context of the complaint is the right of workers and/or their representatives to collective bargaining.

Market operating rules and the accompanying adjustment to its upward or downward trends, as referred to in the report, should not be any point of reference when establishing the social rights guaranteed by the Charter. If they were, social rights would be interpreted arbitrarily according to the rules of the market economy, which are not known for their exemplary precision and are more generous during periods of economic prosperity and more restrictive during crisis periods. The social rights enshrined in the Charter are human rights and must be protected at all times, especially during crisis periods. Measures adopted during these times must not be turned against the most vulnerable, as the Committee has rightly stressed. It has established the principle that “the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter” and specified that that this also applies to the Charter rights relating to employment (Observation made by the Committee on the application of the Charter in the context of the global economic crisis, Conclusions 2009; General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011, decision on the merits of 23 May 2012, §§16-18). Their core parameters must not vary according to market rules.

The legitimacy granted by the legislator to the employer in the final text adopted is not dependent on any form of justification, thus giving general effect to a simplified system to determine working conditions. This simplification lies in the fact that in truth it is the employer alone which decides. The flexibility and adjustment sought have been achieved by sacrificing the only right which the Charter is required to preserve and protect in this context, the right to collective bargaining.

Furthermore, even supposing we accept this system, it should be assessed in terms both of any inequality between the working conditions of employees in the same branch of activity and of the effect on competition between the employers in that branch.

Consequently, there has been a fourth violation of Article 6§2 of the Charter because the legislator, in adopting the new legislation, has allowed the essential right to collective bargaining to be impacted by market rules.

III. Previous examinations by the Committee of decisions by employers not to apply collective agreements

In conclusion, it should be noted that in the latest assessments of the Committee through its reporting system, focusing on the group of employment-related norms including Article 6§2, several conclusions of non-conformity were adopted. Among the various grounds of non-conformity, one was that it had not been established that the relevant legislation provided that an employer could not unilaterally disregard a collective agreement (Conclusions 2010, Conclusions 2014, Conclusions 2016 and Conclusions 2018, Georgia).

I will focus on the conclusions which are more similar and more closely linked to this complaint. The first of these was adopted with regard to Spain in Conclusions XX-3 (2014). As the situation had not been remedied, the finding of non-conformity was reiterated in Conclusions XXI-3 (2018) and XXII-3 (2022). These findings related to the existing regulations deriving from Article 41 of the Workers' Statute (*Estatuto de los Trabajadores*, ET), as amended by Law No. 3/2012. Under this law, employers may elect – by unilateral decision – not to apply the measures agreed on in collective agreements. This power goes hand in hand with the right to make unilateral amendments to the arrangements made through collective or company-level agreements.

Amendments are subject to additional procedures only if they are considered to be "collective". This title is given to amendments which, over a minimum time-period of 90 days, affect at least ten workers in undertakings employing fewer than 100 workers, 10% of the number of workers in the undertaking for those with 100 to 300 employees, and 30 workers in undertakings with more than 300 employees.

If these limits are not reached, the amendment, whether it affects one or more workers, is considered an "individual" one. In this case, the only procedure the employer has to follow is to *notify* the worker and his/her legal representatives of the amendment at least fifteen days before its entry into force (Article 41.3 of the ET).

Additional formalities are required in the event of collective amendments. Firstly, if the amendment to be made relates to a collective agreement covered by Title III of the ET,

in other words a type of collective agreement whose formal and substantive requirements for adoption are greater than those provided for by the law, they may only be carried out in accordance with the procedure provided for by Article 82.3 of the ET, which calls for an “accord” or a pact with workers’ representatives entitled to negotiate this type of agreement. I note briefly that although the Committee has not examined this procedure in detail, it may be incompatible with the Charter because if the required accord is not reached, the parties are authorised to use a mandatory arbitration mechanism, which may exceed the limits set by Article 31 of the 1961 Charter and G of the revised Charter (see, for example Conclusions XIII-3 (1995), Norway, Conclusions 2022, Portugal, Conclusions 2022, Albania and the Statement of interpretation on Article 6, Conclusions I). In Conclusions XIII-3 (1995)on Norway and Ireland, the Committee found as follows: “As far as the use of compulsory settlement was concerned, the Committee referred to its conclusion under Articles 6 para. 3 and to its case law according to which state intervention — which in certain circumstances allowed to impose settlement overreaching the limits set by Article 31 of the Charter — was also in violation of Article 6 para. 2.”

The law grants employers this power, albeit subject to certain limits. Firstly, it must be justified by an objective reason, which the law divides into three possibilities: economic, organisational or production technique-related.

In addition, in the event of amendments to collective agreements not covered by Title III (which can play a decisive role in the establishment of labour relations), the employer’s decision must be preceded by a “consultation procedure” with the workers’ legal representatives lasting up to fifteen days. It is specified that this procedure must take place within a committee made up of representatives of each of the parties and that it is unnecessary to reach agreement because, once the time limit is up, the employer notifies the workers of his or her decision, which takes effect seven days after notification.

This detailed explanation is provided to show that the Committee considered that the power granted by Spanish law to employers to unilaterally disregard measures agreed to in collective agreements for workers or small groups of workers (individual amendments) and even for larger groups in the case of agreements not covered by Title III (collective amendments) is not in conformity with Article 6§2 of the Charter. The arguments are obvious: in both cases, the law gave employers the power to control, through non-application, the right to collective bargaining given tangible form by a collective or company-level agreement, in other words the expression of a wish agreed on between employers and workers’ representatives. In other words, these are occasions on which, although in principle forming exceptions to the implementation of the fundamental right to collective bargaining, the legislator has exceeded his powers by granting employers a power enabling them to take substantial control of the application of a collective agreement in their undertaking.

If we conduct a comparative analysis with the present complaint, it is clear that in the French legislative amendment, the right to collective bargaining in small and very small undertakings is unconditionally rescinded through the creation of an artificial construct of a non-existent “phantom” negotiation. This is simply and clearly a case of the unilateral control by employers of the regulation of the working conditions in their

undertakings, in respect of which the workers can do nothing or practically nothing given the genuine imbalance which exists.

Consequently, if the Spanish legislation referred to above, which has common features with that assessed in this complaint, was not in conformity, the decision on the merits should, in my opinion, have been, for pure consistency's sake, one of a violation, in view of the interpretation already adopted. The present case makes unilateral decision-making by employers on working conditions even more of a general rule, as they do not even have to give reasons. This completely eliminates the right to collective bargaining of workers' representatives in this context, and the right of workers in small and very small enterprises to have their conditions negotiated collectively by representatives.

For all these reasons, I consider that the Committee should have concluded that there was a violation of Article 6§2 of the Charter in several respects.