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Report of the Director-General

Third Supplementary Report: Report of the committee set up to examine the representation alleging non-observance by France of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

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▶ I. Introduction

1. In a communication dated 31 January 2017, the General Confederation of Labour (CGT) and the General Confederation of Labour – Force Ouvrière (CGT–FO) made a representation under article 24 of the ILO Constitution alleging non-observance by the Government of France of the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). At its 329th Session (March 2017), the Governing Body decided that the representation was receivable and referred the allegations to the Committee on Freedom of Association for examination under articles 24 and 25 of the Constitution. Pursuant to the Governing Body's decision, adopted at its 334th Session (October–November 2018), instructing the Committee on Freedom of Association to examine representations referred to it according to the procedures for the examination of article 24 representations (GB.334/INS/5 and GB.332/INS/5(Rev.)), the Committee set up a tripartite committee composed of Ms Petra Herzfeld Olsson (Government member, Sweden), Ms Renate Hornung-Draus (Employer member, Germany) and Ms Amanda Brown (Worker member, United Kingdom of Great Britain and Northern Ireland) to examine the representation.

2. France ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), on 28 June 1951 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), on 26 October 1951; both instruments are in force in France.

3. The provisions of the ILO Constitution concerning the submission of representations are as follows:

Article 24

Representations of non-observance of Conventions

> In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

Publication of representation

> If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

4. On 1 February 2019, the two Confederations sent additional allegations.

5. The Government of France sent its observations in three communications dated 28 May 2018, 30 July 2019 and 2 February 2022, respectively.

6. The tripartite committee met formally on 6 November 2019, 22 January and 24 June 2021, 4 February and 10 March 2022 as well as on 30 January 2023 to examine the representation and adopt its report.

▶ II. Examination of the representation

A. The complainants' allegations

1. Changes in coordination between the various levels of collective bargaining introduced by the Act of 8 August 2016 and the Ordinances of September 2017, particularly with regard to the relationship between enterprise agreements and branch agreements

7. In their communication of 31 January 2017, the complainants allege that Act No. 2016-1088 of 8 August 2016 (the "Labour Act") violates the freedom to choose the level of collective bargaining by giving enterprise or establishment agreements priority over branch agreements on matters relating to hours of work, thus violating the principle of free and voluntary collective bargaining set out in Article 4 of Convention No. 98.

8. The two Confederations state that in France, 97 per cent of employees are covered by collective bargaining at the national level. Transferring the level of bargaining to the enterprise level will inevitably entail inequalities in the treatment of employees within the same sector and promote significant social dumping, and thus selection of the lowest bidder. They believe that this change in bargaining level will place employees under pressure during negotiations and that this resequencing of standards, particularly with regard to hours of work, will impose additional constraints on employees. The complainants maintain that there is no longer freedom to bargain at the branch level since branch agreements now have only subsidiary application (in the absence of an enterprise agreement) and an enterprise agreement's less favourable provisions on hours of work systematically replace those of a branch agreement. They report a "radicalization" of the subsidiarity of branch agreements with regard to working hours. The Act of 2016 expands this subsidiarity to include most of the rules governing hours of work and, in particular, eliminates the possibility for branch agreements to establish their continued priority of application over the less-protective provisions of enterprise agreements ("safeguard clauses"). They consider that the inversion of the hierarchy of norms is flagrant and that the level of bargaining is clearly restricted with respect to:

(i) **Legal length of working hours and overtime:** Prior to the Act of 2016, the law established a minimum overtime rate of 10 per cent for branch and enterprise agreements (except where prohibited by a branch agreement). In the absence of an agreement, the applicable overtime rate was 25 per cent for the first eight hours and 50 per cent for additional hours. Under the Labour Act, branch agreements no longer protect employees' rights: enterprise agreements may establish an overtime rate lower than that envisaged at the branch level with a 10 per cent minimum.

(ii) **Exceedance of the maximum daily or weekly hours of work:** Under the legislation prior to the Act of 2016, the maximum hours of work could be fixed at 48 per week, 44 per week for 12 consecutive weeks and, in some cases, 46 per week for 12 weeks, but only pursuant to a branch agreement that had been ratified by decree. Now, pursuant to the Act of 8 August 2016, they can be fixed through a mere enterprise agreement (which, moreover, in the absence of a trade union delegate, can be signed by elected staff representatives or, if there are no such representatives, by an appointed employee). The maximum is still fixed at 10 hours per day and may be to 12 hours increased by waiver. Such waivers were

possible in the past, but they required an approved branch or enterprise agreement and the former could override the latter.

(iii) **Organization of hours of work over periods longer than one week:** Previously, the law called for organization over periods of up to one year through a collective agreement and four weeks through a unilateral decision of the employer. The provisions of the Act of 2016 call for multi-year organization through a collective branch agreement. In the absence of a collective agreement, working hours may be organized over nine-week periods for enterprises with fewer than 50 employees and four-week periods for other enterprises through a unilateral decision of the employer. This provision eliminates equality between employees in enterprises with fewer than 50 employees (organization over a period of nine weeks) or 50 or more employees (organization over a period of four weeks).

(iv) **Night work:** The provisions of the Act of 2016 call for night work to be introduced through an enterprise agreement or, in the absence thereof, a branch agreement. Safeguard clauses in branch agreements are, here again, eliminated; thus, night work may be introduced through an enterprise agreement.

(v) **Part-time and on-call work:** Henceforth, these will be introduced primarily through enterprise agreements, irrespective of the content of a branch agreement.

(vi) **Daily rest:** Here, too, waivers of the daily rest period may be introduced primarily through enterprise agreements, regardless of the content of the branch agreement.

9. Generally speaking, the complainants consider that numerous provisions of the Act of 8 August 2016 will have a significant impact on working conditions and wages owing to the decentralization of collective bargaining to the enterprise level; this, in their view, violates not only Article 4 of Convention No. 98 but also the rules established under Convention No. 87 concerning the right of workers' and employers' organizations "to organise their administration and activities and to formulate their programmes".

10. They maintain that the ability of federations and confederations to negotiate collective agreements without being prohibited from so doing by the Act of 2016 would, in practice, be undermined by the expansion of areas in which branch agreements have only subsidiary application (they would apply only in the absence of an enterprise agreement on a given issue).

11. In particular, the complainants refer to the conclusions of the Committee on Freedom of Association on the impact of the decentralization of bargaining in the case of Greece, which underlined "that the elaboration of procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers' and employers' organizations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos 87 and 98". [1] In this respect, the complainants state that it can be argued that the amendments made under the Act of 8 August 2016 in favour of enterprise agreements will result in a weakening of collective bargaining at all levels.

12. In their communication of 1 February 2019, the two Confederations consider that the aforementioned inversion of the hierarchy of norms is aggravated by the Ordinances of 22 September 2017, which strengthen the guidelines set out in the Act of 8 August 2016 by

[1] GB.316/INS/9/1, para. 997.

expanding the areas in which priority is given to enterprise agreements containing waivers that are unfavourable to employees. While it is still possible to bargain at a higher level, such as at branch, occupational or inter-occupational level, they believe that such negotiations are, in practice, rendered ineffectual. Although the primacy of branch agreements is ensured in a restricted list of areas, and while a branch agreement may establish its own primacy over those negotiated at the enterprise level in four other areas, in all other areas the primacy of enterprise agreements is now the rule. In all areas other than those mentioned in sections L. 2253-1 and L. 2253-2 of the Labour Code, the provisions of an enterprise agreement take precedence, whether the agreement was signed before or after the date on which a branch agreement or an agreement with broader geographical or occupational scope entered into force. The complainants emphasize in particular that, under the Ordinances of September 2017, the thirteenth-month salary, seniority or holiday bonuses and other elements established by a branch agreement can be waived by an enterprise agreement. The complainants state that this new hierarchy of norms runs counter to the freedom to choose the level of collective bargaining as provided in Article 4 of Convention No. 98 and that it ultimately weakens collective bargaining since branch agreements, which are intended to protect employees from some enterprise agreements, no longer fulfil their function. The complainants also mention the expanded scope of these waiver agreements, including collective performance agreements as their content overrides more favourable provisions of an employment contract.

2. Absence of social dialogue prior to the adoption of the Act of 8 August 2016

13. The two Confederations maintain that the draft Labour Act was introduced by the Government in violation of section L. 1 of the Labour Code, which requires that such draft legislation be referred for discussion and potential negotiation by the social partners. Contrary to the obligations established in this section, the Government did not submit a preliminary draft to the social partners and the trade unions were informed of the provisions of the draft legislation through the press. The complainants also note that both the method employed by the Government and some aspects of the Act violate the provisions of the United Nations International Covenant on Economic, Social and Cultural Rights.

3. Recourse to a vote of the employees in the case of enterprise agreements signed by minority organizations

14. The complainants maintain that under the Act of 8 August 2016, the new requirements for the validity of enterprise or establishment agreements, which authorize recourse to a vote of the employees where the signatory trade unions represent only 30 to 50 per cent of the votes cast by the entity’s employees in the trade union elections, are in violation of Conventions Nos 87 and 98. In that connection, the CGT and the CGT–FO state that: (i) the option to have employees endorse an agreement through a referendum even where it has been rejected by the representative trade unions undermines the latter’s position, making bargaining more difficult; this is contrary to the principle of the promotion of collective bargaining that is guaranteed by Convention No. 98; and (ii) the use of a referendum to endorse a minority agreement desired by an employer will encourage employers to interfere and to exert pressure on the holding of referendums and on the employees’ choice, contrary to the guarantees provided by Conventions Nos 87 and 98.

15. The complainants add that: (i) the purpose of the new rules is to facilitate the signing of waiver agreements by circumventing opposition from majority trade unions that attach great importance to the favourability principle; and (ii) recourse to a vote of the workers might allow

employers to bypass negotiation with majority unions as seen, moreover, from the latter's exclusion from negotiations on election agreement protocols, in which, by law, only the employer and the trade unions signatories to the agreement to be voted upon participate.

4. Reorganization of staff representation institutions

16. In their February 2019 communication, the complainants maintain that the reorganization of staff representation institutions (the fusion of various institutions to form economic and social committees, changes in the thresholds for representativeness and rules governing the appointment of representatives) introduced by the September 2017 Ordinances have seriously undermined trade union rights and prove to be contrary to the spirit of Conventions Nos 87 and 98. Specifically, they report the elimination of staff representatives in small enterprises and of working conditions hygiene and safety committees (CHSCTs) and state that the reform will entail a 40 per cent decrease in the number of elected staff representatives and a significant decrease in the resources allocated to staff institutions.

B. The Government's observations

17. In its communications dated 28 May 2018 and 30 July 2019, the Government replies as follows.

1. Changes in coordination between the various levels of collective bargaining introduced by the Act of 8 August 2016 and the Ordinances of September 2017, particularly with regard to the relationship between enterprise agreements and branch agreements

18. The Government emphasizes that the primary purpose of the Act of 8 August 2016 is to establish a new normative architecture designed to expand the scope of collective bargaining. For example, section 8 amends the sections of the Labour Code on the hierarchy of norms in order to facilitate and strengthen collective bargaining at the enterprise level, particularly with respect to the duration and organization of hours of work.

19. The Government considers that Article 4 of Convention No. 98, which merely refers to the "full … utilisation of machinery for voluntary negotiation … by means of collective agreements", does not imply any obligation for States parties to the Convention to give bargaining at the branch level priority over bargaining at the enterprise level, in general or in particular, in one or more of the areas available for collective bargaining. The Government emphasizes that on the contrary, by expanding the scope of the primacy of enterprise agreements, the Act of 8 August 2016 promotes social dialogue at the stakeholder level without, however, depriving the social partners of the option to negotiate at the branch level and that, in the absence of an enterprise agreement, the provisions of the branch agreement are applicable.

20. The Government recalls that the 2016 reform is part of a movement that began with Act No. 2004-391 of 4 May 2004 on lifelong vocational training and social dialogue. As the first step in this process, the 2004 Act provided that, in the absence of a prohibition by the branch agreement of such adaptation clauses, the social partners could, through an enterprise or establishment agreement, modify a branch agreement. By law, this power to modify did not, however, apply to a list of four restricted areas: minimum wages, classifications, group insurance plans and pooling of vocational training funds.

21. The Government goes on to state that Act No. 2008-789 of 20 August 2008 on the renewal of social democracy and the reform of working hours, which marked the second stage of this

process, both gave new legitimacy to the social dialogue stakeholders in the case of trade unions and established the primacy of enterprise or establishment agreements over branch agreements in six additional areas associated with the duration and organization of working hours in enterprises. Thus, the Act of 8 August 2016 is part of a movement that began over ten years ago and was designed to ensure that social standards arise from more legitimate stakeholders whose representativeness is grounded in the employees to which the agreements will apply and which can therefore be adapted to the expectations of employees and the specific needs of an enterprise. According to the Government, this does not mean that branch agreements have been stripped of their role as economic and social regulators; for example, section L. 2232-5-1 of the Labour Code, as amended by the Act of 8 August 2016, undertook for the first time to define in labour legislation the role of branch agreements:

- by making them responsible for setting employees' employment and working conditions in six areas: minimum wages, classifications, supplemental group health insurance, pooling of vocational training funds, gender equality and prevention of hazardous work. In these areas, enterprise agreements either cannot intervene (for example, with regard to the pooling of vocational training funds), or can contain only provisions more favourable to employees (for example, with regard to minimum wages);
- by allowing them to stipulate that they take precedence over agreements at the enterprise level in areas other than those for which the law establishes the primacy of an enterprise convention or agreement; [2]
- by recognizing their role in regulating competition.

22. The Government stresses that none of the challenged provisions of the Act of 8 August 2016 states that the social partners can no longer negotiate at the branch level. On the contrary, the Act establishes areas exclusive to branch agreements (such as waivers of the minimum weekly working hours of part-time employees) and those in which, where negotiation at the branch level is relevant, provisions may only be more favourable to employees (for example, with regard to minimum wages). The Government adds that the primacy of enterprise agreements which the law recognizes in certain areas is contingent on the signing of so-called "majority" agreements and that it would be rash, to say the least, to maintain that the provisions of such agreements would inevitably and systematically be unfavourable to employees; in order to strike a balance between economic efficiency and social progress in enterprises, the law allows the parties within an enterprise the possibility of reaching different agreements from those negotiated at the branch level. Lastly, the Government considers that neither the goal nor the effect of the process in which France has been engaged since 2004 is to "destabilize" collective bargaining mechanisms. In particular, it denies the complainants' allegations that the level of bargaining would be restricted.

23. With regard to the legal length of working hours and overtime, the Government states that the provision prior to the Act of 2016 (section L. 3121-22 of the Labour Code as it read prior to the adoption of the aforementioned Act) already established that an approved branch agreement or, in the absence of a safeguard clause, an enterprise agreement could fix a different and lower overtime rate; the rates of 25 and 50 per cent were already applicable only "in the absence of an agreement".

24. Concerning the organization of hours of work over periods longer than one week, the Government maintains that the alleged inequality among employees as a result of new

[2] This provision was repealed by section 1 of Ordinance No. 2017-1385 of 22 September 2017.

section L. 3121-45 of the Labour Code – which states that hours of work may be unilaterally organized over periods of up to nine weeks if the enterprise has fewer than 50 employees, as opposed to four weeks for other enterprises – is not recognized under the law since the difference in treatment is justified by the public interest and reflects an objective difference in situations.

25. With respect to night work, the Government states that, pursuant to section 42 of Act No. 2004-391 of 4 May 2004 on lifelong vocational training and social dialogue, an enterprise agreement could already introduce night work in the absence of a safeguard clause in a branch agreement. According to that Act, unless the branch agreement included a provision prohibiting the enterprise agreement from making stipulations concerning night work, the enterprise's social partners could already negotiate collective agreements on the issue. The Government notes, moreover, that while section 8 of Act No. 2016-1088 of 8 August 2016 gives enterprise agreements priority over section L. 3122-15 of the Labour Code in introducing night work, the latter must function as part of a protective framework which the lawmakers preserved in order to safeguard workers' health. Thus, the use of night work, whether regular or occasional, is still rare and must still be justified "by the need to ensure the continuity of the economic activity or of socially necessary services" (section L. 3122-1 of the Labour Code). The Government also states that enterprise agreements that introduce night work must also provide for compensatory rest and for measures designed to improve employees' working conditions and facilitate a balance between night work and their personal lives (section L. 3122-8 of the Labour Code).

26. With regard to part-time work, the Government states that the Act of 8 August 2016 preserves the key role of branch agreements: for example, only a branch agreement can fix the minimum weekly working hours of part-time employees and the bonus for each additional hour or, through an amendment to the employment contract, authorize a temporary increase in the hours of part-time employees (sections L. 3123-19 and L. 3123-23 of the Labour Code).

27. In its communication of 30 July 2019, the Government explains that the provisions of Ordinance No. 2017-1385 of 22 September 2017 reaffirm the regulatory role of branch agreements in the establishment of social order by establishing their primacy in 13 areas, specifically those related to regulating competition and ensuring that the specific characteristics and needs of small enterprises are taken into account. For example, the Ordinance requires that such agreements include specific provisions as a condition for their approval and that a group of experts responsible for assessing the social and economic impact of competition, particularly for small enterprises, be established.

28. The Government reiterates that the provisions of the aforementioned Ordinance should not be viewed as contrary to Article 4 of Convention No. 98 since the parties remain free to decide whether to negotiate an agreement at the level of their choice. It recalls that the reform is fully consistent with the movement that began in 2004 with a goal of strengthening the role of collective bargaining, particularly at the enterprise level, in standard-setting. Prior to the adoption of the Act of 4 May 2004, unless otherwise stipulated by the signatories to an agreement at a higher level, coordination between agreements at different levels was based on the favourability principle: an agreement governing a lower-level geographical or occupational area could only differ from a higher-level agreement if it was more favourable to employees. The Act of 4 May 2004 modified this coordination based solely on the favourability principle by establishing that enterprise (or establishment) agreements could include provisions less favourable to employees than those of Conventions or agreements signed at a higher level or with broader geographical or occupational scope unless otherwise stated in those Conventions or agreements. This option was, however, prohibited in four restricted

areas: minimum wages, classifications, group insurance plans and pooling of vocational training funds. Subsequently, the Act of 20 August 2008 gave enterprise agreements priority over branch agreements on certain issues related to working hours (annual overtime quotas, organization of hours of work over periods longer than one week and required number of hours or days per year). Lastly, the Act of 8 August 2016 authorized bargaining at the enterprise level on all matters relating to hours of work, except in a few cases where approved branch agreements are still the norm (including the introduction of an equivalence system, the option of lowering or raising the 24-hour minimum for part-time work).

29. The Government states that the purpose of sections L. 2253-1 to L. 2253-7 of the Labour Code is now to specifically assign the different issues for negotiation to the most appropriate level. To that end, sections L. 2253-1 and L. 2253-2 list the areas in which branch agreements have priority and enterprise agreements have subsidiary application. In areas other than those listed in sections L. 2253-1, L. 2253-2 and L. 2253-3, priority is given to enterprise agreements. The Labour Code does not, however, prohibit branch agreements from including provisions on these issues, which are applicable only in the absence of an enterprise agreement: they have subsidiary application. The Government maintains that the legislation clarifies the coordination among all collective agreements, regardless of the issues covered, by identifying the level of agreement with primacy on each of these issues. In that connection, it quotes from the report of the President of the Republic on the aforementioned Ordinance of 22 September 2017, which states that section L. 2253-1 and the following sections “modify the coordination between branch agreements and enterprise agreements. In order to safeguard this coordination, strengthen the role of branch agreements as economic and social regulators and give enterprise agreements more power to take the initiative on other issues, a list of restricted areas in which branch agreements establish employees’ employment and working conditions and the applicable guarantees applicable is provided.” Lastly, the Government emphasizes that the lawmakers have reorganized the distribution of bargaining between the branch level and the enterprise level with the three goals of providing legal safeguards, strengthening branch agreements’ role in economic regulation and expanding bargaining at the enterprise level.

30. In a communication dated 2 February 2022, after reaffirming that the purpose of the Act of 2016 and the 2017 Ordinances is, on the one hand, to develop the participation in negotiations at the enterprise level, particularly in very small companies, and, on the other hand, to strengthen the role of economic and social regulation of the branch, the Government provides information of a ruling handed down by the Council of State on 7 October 2021. The Government indicates that this ruling, relating to the definition of the “hierarchical minimum wage” established by branch agreements, clarifies the effects of the 2017 reform concerning the articulation between the different levels of collective bargaining. The Government states in this respect that: (i) the 2017 Ordinances reaffirmed the regulatory role of the branch by providing for its primacy in 13 areas that present competition regulation issues, including in particular “hierarchical minimum wages”; (ii) in the absence of a definition of the concept of “hierarchical minimum wages” in the Labour Code or in case law, the Ministry of Labour had drawn up a definition to enable the social partners to use it, particularly with a view to the extension of branch wage agreements; (iii) this definition had been challenged by certain employers’ organizations and workers’ unions, which had lodged appeals; (iv) in a decision of 7 October 2021 (No. 433053, 433233, 433251, 433463, 433473, 433534), the Council of State considered that branch negotiators are free to define what is meant by the notion of “hierarchical minimum wages” and therefore the elements of remuneration that should be included in this notion (basic wage or basic wage and bonuses or other supplements); (v) the amount defined by the branch as a minimum wage, after taking into account any supplementary wages or bonuses, is binding on the enterprise agreement; and (vi) if an

enterprise agreement can modify or abolish the supplementary wages mentioned in the branch agreement, it must in this case provide for other elements of remuneration enabling the company's employees to receive a total remuneration that is at least equal to the minimum amount set by the branch.

31. The Government concludes that the above-mentioned ruling confirms the branch's role in regulating minimum wages, since the minimum amount set by the branch is binding on the company and the room for manoeuvre left to the enterprise agreement relates solely to the way in which this minimum is achieved.

2. Absence of social dialogue prior to the adoption of the Act of 8 August 2016

32. The Government points out that in an opinion on the draft Act issued on 17 March 2016, the Council of State recognized that the provisions of section L. 1 of the Labour Code had been respected during preparation of the draft legislation and that the relevant industry organizations and trade unions had not called for negotiations. The Government also states that several consultations on the draft legislation were held before it was brought before Parliament and that, in accordance with the internal consultation procedures, it was referred to the National Collective Bargaining Committee on 24 February 2016; to the Advisory Council on Working Conditions on 26 February 2016; to the National Employment, Training and Vocational Guidance Council on 29 February 2016; and to the High Council on Gender Equality in the Workplace on 11 March 2016.

3. Recourse to a vote of the employees in the case of enterprise agreements signed by minority organizations

33. In its communication of 28 May 2018, the Government rejects the allegation that the use of a vote of the employees in the case of enterprise agreements signed by trade unions having obtained between 30 and 50 per cent of the votes cast during the first round of the most recent trade union elections in the enterprise would undermine social democracy and the legitimacy of majority trade unions. The Government emphasizes that the 2016 Act strengthened the requirement of majority support for the conclusion of enterprise agreements, since their validity is now contingent on the signature of both the employer or a representative thereof and one or more representative employee trade unions that received more than 50 per cent (rather than 30 per cent) of the votes cast during the first round of the most recent trade union elections. The Government adds that, since the threshold of validity for the conclusion of enterprise agreements has been raised from 30 to 50 per cent of the votes received by the signatory organizations, it was considered desirable to provide for an alternative means of adopting agreements signed by organizations representing between 30 and 50 per cent of the votes cast by employees during the trade union elections. In this regard, the Government refers to the Constitutional Council's decision of 20 October 2017 (Preliminary Ruling on Constitutionality No. 2017-664), which states that social dialogue might break down if the lawmakers did not provide an alternative means of validating the agreements signed by representative trade unions but which do not, however, reach the threshold of 50 per cent of the votes cast during the most recent trade union elections.

34. The Government states that where trade unions signatory to the enterprise agreement did not reach the 50 per cent threshold during the most recent trade union elections but received more than 30 per cent of the votes cast, they may request that an employee consultation be held. All of the stakeholders are given eight days in which to decide whether to maintain or modify their position prior to the consultation. If, during the consultation, the majority of the

employees express their support for the agreement, it becomes valid. The consultation procedures followed must be set out in a specific protocol signed by the employer and the signatory trade unions. The Decree of 20 December 2016 sets out the procedures for organizing and holding the vote.

35. In reply to the complainants' allegation that trade unions that have not signed an agreement are excluded from the negotiation and signing of the election protocol, the Government points out that section 10 of Ordinance No. 2017-1385 of 22 September 2017 modified the organization and consultation procedures set out in section L. 2232-12 of the Labour Code by allowing all trade unions that have been recognized as representative to participate in the negotiation of election protocols: "employee consultations, which may be held online, are carried out with respect for the general principles of election law and according to the procedures set out in a specific protocol signed by the employer and one or more representative trade unions that received more than 30 per cent of the votes cast in favour of representative organizations during the first round of the election mentioned in paragraph 1, regardless of the number of voters".

36. Lastly, the Government explains that section L. 2232-12 of the Labour Code, as amended by the aforementioned Ordinance, now provides that employers may decide to request the holding of a consultation on an agreement signed by trade unions that have received at least 30 per cent of the votes cast in the most recent trade union elections; it notes, however, that this option is contingent on the absence of objection from any of the signatory trade unions. The Government considers that in the unlikely event that an employer requested the holding of an employee consultation, a union that objected to that request need only withdraw its signature from the agreement.

4. Reorganization of staff representation institutions

37. In its reply of 30 July 2019, the Government rejects the complainants' argument that the reorganization of staff representation institutions is contrary to the spirit of Conventions Nos 87 and 98 and would undermine trade union rights. In particular, it states that: (i) the primary goal of the reform of the staff representation framework in enterprises through the Ordinances of 2017 is to give the social partners more flexibility in adapting representative bodies to an enterprise's social and economic circumstances. For example, there is considerable scope for negotiation in establishing the implementing procedures for the new economic and social committees (CES); (ii) the establishment of a CES in no way implies that the three pre-existing bodies (staff representatives, enterprise committees and CHSCTs) have lost their powers; rather, they have merged into a single body, the CES, which exercises all of these powers; (iii) a CES must be established in any enterprise with 11 or more employees whereas the threshold for the establishment of an enterprise committee was 50 employees; (iv) like the former CHSCTs, the CES is responsible for matters relating to health, safety and working conditions; (v) a health, safety and working conditions committee (CSSCT) must be established in every enterprise with 300 or more employees; however, the social partners may establish such a committee in enterprises with fewer employees; (vi) the Ordinances allow for the possibility of appointing, through a collective agreement of the majority enterprise, local representatives as new stakeholders in the enterprise's social dialogue; (vii) the legislation that is the subject of the representation in no way calls for decreasing the resources of a CES; instead, it allows the social partners to determine the composition of these bodies and the resources allocated to their operation through negotiation at the enterprise level; (viii) at the time when a CES is established, the supporting measures for staff representatives are also negotiated in order to recognize the value of their service and to support departing

representatives when new ones are appointed; and (ix) lastly, the rules governing the appointment of trade union delegates have been only slightly modified by the Ordinances of 2017; in fact, those rules can now be relaxed to the unions' benefit.

C. The Committee's conclusions

1. Absence of social dialogue prior to the adoption of the Act of 8 August 2016

38. *The complainants allege that the principles of social dialogue arising from Conventions Nos 87 and 98 were ignored during preparation of the Act of 8 August 2016 because consultations with the social partners were not held on the basis of a shared preliminary draft. They add that they were informed of the provisions of the draft legislation through the press.*

39. *The Committee notes that the Government, for its part, points out that in a 17 March 2016 opinion on the draft Act, the Council of State recognized that the provisions of section L. 1 of the Labour Code had been respected during preparation of the draft legislation and that the relevant industry organizations and trade unions had not requested negotiations. The Committee also notes that, according to the Government, several consultations on the draft legislation were held before it was brought before Parliament and that, in accordance with the internal consultation procedures, it was referred to the National Collective Bargaining Committee on 24 February 2016; to the Advisory Council on Working Conditions on 26 February 2016; to the National Employment, Training and Vocational Guidance Council on 29 February 2016; and to the High Council on Gender Equality in the Workplace on 11 March 2016.*

40. ***While taking due note of the Government's statements regarding the various consultations held prior to the adoption of the Act of 8 August 2016 and of the contrasting view expressed by the trade unions, which consider that they were not, in fact, consulted on the content of the future legislation, the Committee would like to emphasize the importance that needs to be attached to ensuring that the introduction of any draft legislation on freedom of association and the right to organize that is likely to affect collective bargaining or terms and conditions of employment is preceded by free and frank consultations with the most representative employers' and workers' organizations.*** [3]

2. Changes in coordination between the various levels of collective bargaining introduced by the Act of 8 August 2016 and the Ordinances of September 2017, particularly with regard to the relationship between enterprise agreements and branch agreements

41. *The Committee notes that, according to the complainants, the Act of 2016 and the Ordinances of 2017 radically changed the hierarchy among the different levels of collective bargaining in favour of enterprise agreements by allowing them to set aside, in many areas, in particular with respect to remuneration, the protective provisions of higher-level agreements, as the latter only have a supplementary role. The Committee notes the complainants' allegation that the social partners' freedom to choose the level of collective bargaining has been violated insofar as the application of agreements concluded beyond of the enterprise level is henceforth only of a subsidiary nature, that the levels of protection and the employees' conditions of work will deteriorate significantly through*

[3] ILO, *Giving Globalization a Human Face: General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, ILC.101/III/1B, 2012 (hereinafter "2012 General Survey"), para. 55.

the decentralization of collective bargaining and that the effect of the new rules above will be to weaken collective bargaining at all levels.

42. *The Committee notes, further, that according to the Government: (i) the Act of 8 August 2016 and the Ordinances of 2017 are part of a movement that began over ten years ago and was designed to ensure that social standards in this area are established by stakeholders to which the agreements will apply and can therefore be adapted to the expectations of employees and the specific needs of an enterprise without depriving the branch agreement of its role as economic and social regulator; (ii) the Ordinances of 2017 establish a specific distribution of competences on a thematic basis among the different levels of collective bargaining with the effect of consolidating the role of the branch; and (iii) Convention No. 98 does not establish any obligation to ensure the primacy of bargaining at the branch level over bargaining at the enterprise level.*

43. *The Committee also notes the Government's additional indication concerning the effects of a Council of State ruling of 7 October 2021 concerning the definition of "hierarchical minimum wages" on the respective roles of branch and enterprise-level collective bargaining with respect to remuneration. According to the aforementioned ruling, branch agreements may not only set the amount of hierarchical minimum wages but also define their structure (which may include certain wage supplements, such as bonuses). Although, since the 2017 reform, these wage supplements may be modified or abolished by an enterprise agreement, in this case the referred agreements must provide for other elements of remuneration enabling the company's employees to receive a total remuneration at least equal to the minimum amount set by the branch.*

(a) Successive legislative developments regarding the coordination between the various levels of collective bargaining

44. *The Committee notes that, as mentioned by the Government and the complainants, since 2004, several changes have been made to the rules regarding the coordination between the various levels of collective bargaining. The Committee notes in particular that:*

- *prior to the promulgation of Act No. 2004-391 of 4 May 2004 on lifelong vocational training and social dialogue, conflicts between the provisions of two agreements adopted at different levels were resolved by applying the collective agreement most favourable to the employees (following the favourability principle);*
- *the Act of 4 May 2004 established the possibility for collective enterprise agreements to waive the provisions of branch agreements, unless otherwise established in the latter (the possibility of a so-called safeguard clause used largely by branch agreements), while establishing four areas identified as "safeguarded" (minimum wages, sectoral classifications, insurance and vocational training) for which the adoption of less favourable clauses for employees by enterprise agreements was in no way possible;*
- *Act No. 2008-789 of 20 August 2008 on the renewal of social democracy and the reform of working hours established the primacy of enterprise or establishment agreements over branch agreements in several areas relating to the duration and organization of hours of work in an enterprise (annual overtime quota, organization of hours of work over periods longer than one week and required number of hours or days per year). Regarding these areas, the provisions of branch agreements had only subsidiary application, that is to say only in the absence of provisions of the enterprise agreement in this respect;*
- *the Act of 8 August 2016 expanded to virtually all of the themes relating to working time (with the exception of different aspects concerning part-time work) primacy of the enterprise agreement clauses (thereby attributing the corresponding clauses of branch agreements with subsidiary*

application only). Further, the Act of 8 August 2016: (i) defined six areas falling under the competence of branch agreements (minimum wages, classifications, supplemental group health insurance, pooling of vocational training funds, gender equality and prevention of hazardous work) for which the branch agreement clauses therefore had primacy except the more favourable clauses at the enterprise level; and (ii) established that, with regard to the other themes for which primacy of enterprise agreements had not expressly been established in law, branch agreements could decide to have primacy over enterprise agreements (safeguard clause).

(b) Content of the Ordinances of 22 September 2017 regarding the coordination between the various levels of collective bargaining

45. *The Committee notes that Ordinance No. 2017-1385 of 22 September 2017 once again significantly modifies the coordination between branch agreements and enterprise agreements by providing a detailed division of bargaining areas between the branch level and the enterprise level. It also notes that sections L. 2253-1 and L. 2253-2 of the Labour Code list the areas in which branch agreements have priority (thereby attributing enterprise agreements with subsidiary application), and that in areas other than those listed in sections L. 2253-1 and L. 2253-2 above, section L. 2253-3 of the Labour Code establishes the general rule of primacy of enterprise agreements. Branch agreements may include provisions on these issues, but they have only subsidiary application (in the absence of an enterprise agreement).*

46. *Thus, the Committee notes that the Ordinances establish several areas or units:*

(i) ***Legal primacy of branch agreements.*** *Under section L. 2253-1 of the Labour Code, branch agreements have priority over enterprise agreements in the following 13 areas: minimum wages per occupational categories; classifications; pooling of funds allocated to gender mainstreaming; pooling of funds allocated to vocational training; additional collective guarantees; certain measures concerning the duration, distribution and organization of working hours;* [4] *measures concerning temporary work and fixed-term contracts; open-ended contracts in the construction industry; gender equality in the workplace; conditions for and length of renewal of trial periods; procedures for the transfer of employment contracts through an agreement; cases of secondment of a temporary worker to a user enterprise; and the minimum wage of contractual workers. In these areas, the law prohibits enterprise agreements from waiving more favourable provisions of a branch agreement.*

(ii) ***Primacy of branch agreements, established by the parties at the branch level, over other agreements.*** *In four additional areas, the social partners at the branch level, or at a geographical or occupational level broader than that of the enterprise, have the option of establishing, through an agreement, the primacy of agreements at the level in question by eliminating all possibility of a waiver through an enterprise agreement. Section L. 2253-2 of the Labour Code authorizes such safeguard clauses in the following areas: prevention of the effects of exposure to occupational risk factors; hiring and continued employment of workers with disabilities; minimum number of workers for the appointment of trade union delegates, their number and recognition of their trade union experience; and bonuses for dangerous and unhealthy work.*

(iii) ***Legal primacy of enterprise agreements.*** *In all areas other than those mentioned in sections L. 2253-1 and L. 2253-2 of the Labour Code, the clauses of the branch agreement are*

[4] The measures concerned are: (i) the hours of work equivalent to the legal length of working hours for certain jobs and occupations; (ii) the definition of night work, as a reference period for the organization of working hours; (iii) the minimum hours of work of part-time workers; (iv) overtime rates; and (v) additional working hours for part-time employees.

overridden even by less favourable clauses of an enterprise agreement and, since they are now subsidiary, they apply only in the absence of a corresponding clause at enterprise level. Except in the areas specifically mentioned in the aforementioned two provisions, the primacy of enterprise agreements, already established by the Act of 8 August 2016 with respect to most aspects of working hours, is therefore being extended to other employment conditions, including bonuses (except for hazardous work), benefits granted on the basis of seniority and severance payments

47. *The Committee observes that, with respect to points (i) and (ii), i.e. in areas where branch agreements have priority over enterprise agreements, whether by law or under the branch agreement itself, enterprise agreements may be applicable pursuant to the aforementioned provisions of the Labour Code, provided that employees receive "guarantees at least equivalent" to those established in the corresponding provisions of the branch agreement. The Committee also notes that, with respect to point (iii), while most of the bonuses or wage supplements set by the branch agreement may now be modified or abolished by an enterprise agreement, the said agreements must in this case provide for other elements of remuneration enabling the employees of the company to receive a total remuneration at least equal to the minimum amount set by the branch agreement, the branch being free to define the notion of the hierarchical minimum wage.*

(c) ILO standards and the position of the supervisory bodies concerning the various levels of collective bargaining and their coordination

48. *The Committee observes that while Convention No. 98 (Article 4) requires States to promote the full development and utilization of machinery for free and voluntary negotiation, it does not contain a specific provision on the level of collective bargaining. In this respect, the Committee considers that free and voluntary negotiation means that collective bargaining should be possible at all levels and emphasizes that the determination of the level of bargaining is essentially a matter for the parties, who are in the best position to decide the most appropriate bargaining level.* [5] *Concerning the coordination between the different levels of collective bargaining, the Committee observes that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has considered that in countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is coordination among these levels. The CEACR has accepted both systems which leave it to collective agreements to determine the means for their coordination, as well as systems characterized by legal clauses distributing subjects between agreements, giving primacy to a certain level or adopting the criterion of the most favourable provision for workers.* [6] *As a general matter, the Committee considers that any redistribution by legislation of collective bargaining competencies between the different levels should keep in mind and protect the overall balance, stability and functioning of the collective bargaining system and that the possibilities to deviate from clauses adopted by higher level agreements should take into account the importance of the mutual respect for the commitments made and the results achieved through bargaining at all levels. While noting again the various possibilities for articulation between the different bargaining levels that are compatible with Article 4 of Convention No. 98, the Committee also reiterates that the determination of the bargaining level is essentially a matter to be left to the*

[5] 2012 General Survey, para. 222.

[6] 2012 General Survey, para. 223.

discretion of the parties and that, whenever possible, the system that articulates the different levels of collective bargaining should be established by common agreement between the parties. [7]

49. *Based on the foregoing information, the Committee notes that the reforms introduced by the Act of 8 August 2016 and by Ordinance No. 2017-1385 of 22 September 2017 aimed at enhancing enterprise collective bargaining, especially in small companies, while preserving the role of branch collective bargaining by distinguishing three blocks: (i) a first block grouping the subjects for which the branch agreement prevails; (ii) a second block grouping the subjects for which the branch agreement may decide to maintain or not its primacy over the enterprise agreement; and (iii) a third block grouping the subjects for which the enterprise agreement prevails. As for the content of these three blocks, the 2016 reform had: (i) established the primacy of branch agreements with regard to 6 areas (while recognizing the applicability of enterprise agreements clauses more favourable to workers); (ii) granted the branch the latitude to maintain or not the primacy of its clauses with regard to all subjects that did not specifically provide for the primacy of the branch or enterprise agreement; and (iii) established the primacy of enterprise agreements with regard to most subjects related to working time. For its part, the 2017 reform, which is the law currently in force, has: (i) increased to 13 the number of areas in which branch agreements prevail (while recognizing the applicability of enterprise agreement clauses providing at least equivalent guarantees to workers); (ii) limited to 4 the areas in which the branch may decide to ensure or not the primacy of its clauses; and (iii) established the primacy of enterprise agreements on all other subjects (including vis-à-vis clauses more favourable to workers included in agreements broader in scope).The Committee finally notes that with respect to the areas where legislation establishes the primacy of enterprise agreements, the clauses of the branch-level agreement continue to apply in the absence of a corresponding clause in the enterprise agreement.*

50. *The Committee finally notes that, under the texts adopted in 2017, a committee to evaluate the implementation of the Ordinances concerning social dialogue and industrial relations has been established by the Ministry of Labour. In particular, the Committee observes that the interim reports of the evaluation committee published in July 2020 and December 2021 indicate that: (i) following the extension of the subjects for which enterprise-level agreements prevail, the number of collective agreements signed at the enterprise level increased significantly since 2017, with certain cyclical reasons having also possibly contributed to this development; (ii) in enterprises with less than 50 employees, the number of texts filed is rising markedly, mainly because of the new possibilities for negotiating and concluding agreements offered by the Ordinances to these enterprises without union representatives (signing of agreements by representatives elected by the employees, adoption of the agreement by referendum); (iii) some branches have begun to adopt agreements on some of the new subjects assigned by the 2017 reform to negotiation at branch level; (iv) the social partners of a certain number of branches, through agreements subsequent to the Ordinances of September 2017, have endeavoured to maintain the primacy of branch agreements on various aspects relating to remuneration by adopting a broad definition of the minimum wage, a concept not defined by law; and (v) negotiation at branch level remains stable, but the distinction made by the Ordinances between three blocks of subjects and the possibility for companies to negotiate on subjects where branch agreements prevail, as long as that they provide at least equivalent guarantees, still pose difficulties of interpretation and application. Finally, the Committee notes that the evaluation committee emphasizes the need to supplement existing data by means of qualitative analysis of the agreements concluded and the dynamics of real negotiation in the enterprise, and that among the*

[7] ILO, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association*, sixth edition, 2018, paras 1406, 1407 and 1408. ILO, *Ensuring Decent Working Time for the Future: General Survey concerning Working-time Instruments*, ILC.107/III(B), 2018, para. 799.

subjects considered to be fundamental for the continuation of its work is the question of the articulation between collective bargaining at the enterprise level and that at the branch level.

51. ***The Committee notes that, according to the indications from the Government, the purpose of the reforms of 2016 and 2017 is to recognize and give a central place to collective bargaining, particularly at enterprise level, and to promote the conditions for the implementation of collective bargaining, especially in small companies. Observing that enterprise-level trade unionism is traditionally minimal in France, particularly in small enterprises, the Committee emphasizes the importance of the measures taken to promote collective bargaining under Article 4 of Convention No. 98 being appropriate to national conditions. Recalling also that the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and emphasizing the need to protect the overall balance, stability and functioning of the collective bargaining system, the Committee requests the Government to engage with the social partners so as to ensure that the legislation is implemented in a manner that ensures the principle of free and voluntary collective bargaining. Based on the above, the Committee requests the Government, in the context of the application of Convention No. 98, to keep the CEACR informed of the implementation of these reforms and their effects on collective bargaining in practice.***

3. Recourse to a vote of the employees in the case of enterprise agreements signed by representative organizations but not approved by the majority unions in the enterprise

52. *The Committee notes that the complainants allege that under the Act of 8 August 2016, the new requirements for the validity of enterprise or establishment agreements, which authorize recourse to a direct consultation of the employees where the signatory trade unions represent only 30 to 50 per cent of the votes cast by the given entity's employees in the most recent trade union elections – and where, as a consequence, the agreement would not be supported by the majority unions in the enterprise – run counter to Conventions Nos 87 and 98. The Committee notes that, for its part, the Government rejects these allegations as it emphasizes that, on the contrary, the Act of 8 August 2016, has had the effect of strengthening the legitimacy of enterprise agreements by raising the majority requirements for the conclusion of such agreements.*

53. *The Committee notes in this respect that, from 2008 onwards, French legislation has undergone a number of reforms concerning the representativeness requirements applicable to enterprise or establishment collective agreements. The Committee points out that, in the context of trade union pluralism that characterizes the French system of industrial relations, the law of 20 August 2008 has: (i) based the assessment of the representativeness of trade union organizations on the results obtained in the trade union elections that enterprises must organize every four years to elect employee representatives; (ii) reserved the right to take part in collective bargaining at enterprise level to trade union organizations having obtained at least 10 per cent of the votes cast in the last trade union elections; and (iii) made it a condition for the validity of company collective agreements and agreements that they be signed by an organization or a group of organizations having obtained at least 30 per cent of the votes cast in those elections, while reserving to the organization(s) having obtained at least 50 per cent of the votes cast the right to override the agreement by exercising their right to object.*

54. *The Committee notes that the Act of 8 August 2016 modifies the rules governing the adoption of enterprise or establishment agreements. Under the Act of 2016, an enterprise agreement has been validly concluded if: (i) it is signed by one or more of the trade unions that received more than 50 per cent of the votes cast in favour of representative unions during the trade union elections; or (ii)*

it is signed by one or more of the trade unions that received between 30 and 50 per cent of the votes cast in favour of representative unions during the trade union elections and has subsequently received the majority of votes cast by the enterprise's employees after one of the signatory trade unions has requested the holding of a specific vote on the enterprise agreement in question; (iii) the trade unions signatory to the agreement decide whether to hold a vote on the enterprise agreement; (iv) these unions have one month in which to decide whether to call for a vote of the enterprise's workers (if they do not do so, the signed agreement will not enter into force); (v) the conditions for voting are established through a pre-referendum memorandum of understanding, which is negotiated and signed only by the employer and the trade unions signatory to the enterprise agreement; and (vi) a decree (the Decree of 20 December 2016) sets out the procedures for organizing and holding the vote.

55. *The Committee notes that the complainants allege in particular in this respect that: (i) the option to have employees endorse an agreement even where it has been rejected by the majority trade unions in the enterprise undermines the position of the representative trade unions, thereby hindering collective bargaining, the promotion of which is guaranteed by Convention No. 98; (ii) recourse to a vote of the workers in order to stall negotiation with the majority unions is reflected in the latter's exclusion from negotiations on election agreement protocols, in which, by law, only the employer and the trade unions signatories to the agreement to be voted upon participate; and (iii) the holding of such a consultation will encourage the interference and pressure of the employer in the organization of the vote as well as in the choice of employees, contrary to the guarantees set out by Conventions Nos 87 and 98.*

56. *The Committee notes that the Government states that: (i) the possibility of the recourse to a vote of the workers for the conclusion of an enterprise agreement goes hand in hand with the significant reinforcement, through the Act of 8 August 2016, of the majority requirements for the conclusion of such agreements; (ii) the objective of the possibility of the consultation with employees, as noted by the Constitutional Council, is to prevent stalemate in social dialogue when an enterprise agreement has been signed by representative unions which have nonetheless not reached the threshold of 50 per cent of the votes cast during the most recent trade union elections; (iii) Ordinance No. 2017-1385 of 22 September 2017 modified employees' organization and consultation procedures by allowing all trade unions that have been recognized as representative to participate in the negotiation of the corresponding election protocols, including therefore the trade unions which are not signatories to the collective agreement subject to a vote of the employees; (iv) under the same Ordinance of 2017, the employer may henceforth decide to request the holding of a consultation on an agreement that was signed by trade unions that have received between 30 and 50 per cent of the votes cast in favour of representative unions in the most recent trade union elections, this option being contingent on the absence of objection from any of the trade unions signatory to the agreement subject to consultation; and (v) if an employer requested the holding of an employee consultation, a union that objected to that request need only withdraw its signature from the agreement.*

57. *The Committee notes that since the presentation of the representation, section L. 2232-12 of the Labour Code has been amended through section 10 of Ordinance No. 2017-1385 of 22 September 2017 on the strengthening of collective bargaining and section 4 of Ordinance No. 2017-1386 of 22 September 2017.* [8]

58. *The Committee observes in particular that Ordinance No. 2017-1385 of 22 September 2017 significantly modified the rules established by the 2016 Act with respect to the initiation and*

[8] See the various amendments to section L. 2232-12 of the Labour Code.

organization of employee consultation for the purpose of approving an enterprise or establishment agreement. It notes with interest that the option of concluding a pre-referendum memorandum of understanding – i.e. to participate in the negotiation of procedures regarding a vote to approve an enterprise agreement – is now available not only to the trade unions that have signed the enterprise agreement but to all trade unions recognized as representative. On the other hand, it notes that, as described above, the Ordinance of 22 September 2017 allows employers to initiate the use of consultation through which the majority trade unions' opposition to the signed collective agreement can be overridden by a vote of the employees. A consultation may now be organized either at the request of one or more trade unions signatory to a draft agreement during the month following the signature of the agreement, provided that they represent between 30 and 50 per cent of the votes cast in favour of representative trade unions (no change in the previous provision) or, after this period, at the employer's request unless all of the signatory trade unions object. The Committee notes in this respect that: (i) while section L. 2232-12 of the Labour Code establishes a one-month limit for non-majority trade unions signing a collective agreement to convene a consultation of employees, the possibility for the employer to take such an initiative is not subject by the said section to a specific time limit; and (ii) in its 2021 report, the committee assessing the implementation of the Ordinances observes that the use of a referendum when an agreement is signed only by unions representing between 30 per cent and 50 per cent of the votes requires further investigation.

59. *The Committee recalls that in ratifying Convention No. 98, States undertake to promote collective bargaining between, on the one hand, employers and their organizations and, on the other, workers' organizations. It is on this basis that the supervisory bodies consider that direct bargaining between the enterprise and its employees with a view to avoiding sufficiently representative organizations, where they exist, constitute a violation of Article 4 of Convention No. 98.* [9] *In this context, the Committee takes particular note of the complainants' allegation that the procedures for adopting collective enterprise agreements through consultation with employees where the majority trade unions object to the agreement would significantly weaken the latter's position, specifically by allowing employers to terminate negotiations with them, and could encourage employers to interfere in the collective bargaining process.*

60. *As stated above, however, the Committee notes that according to the applicable provisions of the Labour Code under the Act of 8 August 2016, the trade unions signatory to the agreement retained, at least from the legal point of view, full control of the decision as to whether to resort to a vote of the employees, a fact that does not support the allegations of employer interference in trade unions' decision-making and circumvention of those unions during the negotiation of collective enterprise agreements.*

61. *The Committee nevertheless notes that, as stated above, following the reforms introduced by the Ordinances of 22 September 2017, the new section L. 2232-12 of the Labour Code now establishes that where a month has passed without any of the signatory trade unions calling for the holding of a vote and in the absence of objection by all of the signatory organizations, the employer may initiate consultation with the employees. The Committee observes that, in the situation where trade unions representing less than 50 per cent of the workers in the company may hold diverging positions with respect to the majority representation (and even possibly among the minority unions following the signing of the collective agreement), the employer may go directly to the workers for their approval in a manner which could interfere with the functioning of these workers' organizations. In this respect, the Committee highlights that Convention No 87 and Article 2 of Convention No 98 provide that workers' and employers' organizations must be able to carry out their activities and defend their*

[9] See the 2012 General Survey (note 3 above), paras 239–240.

members' interests autonomously and without interference, of particular importance in the context of the collective bargaining process.

62. ***Recalling the importance of respecting the autonomy of the parties in the collective bargaining process, the Committee requests the Government to review and assess with the social partners concerned the application of the provisions granting the employer the option of holding a consultation with employees with a view to the approval of an enterprise agreement that would not have received the support of the majority trade unions in the enterprise and for which the signatory unions have not put the matter to a workplace referendum. The Committee requests the Government, in the context of the application of Convention No. 98, to keep the CEACR informed of the above-mentioned tripartite dialogue and its results.***

4. Reorganization of staff representation institutions

63. *The Committee takes note of the complainants' allegation that the fusion of various existing staff institutions to form a single body (the CES) pursuant to the Ordinances of September 2017 would seriously undermine trade union rights and would be contrary to the spirit of Conventions Nos 87 and 98. The Committee notes that the complainants report the elimination of the CHSCTs and of staff representatives in small enterprises and that they state that the reform will entail a 40 per cent decrease in the number of elected staff representatives and a significant decrease in the resources allocated to staff institutions.*

64. *The Committee also takes note of the Government's statement that: (i) the establishment of a single staff representation body, the CES, which combines all of the powers of the previous staff institutions and has equivalent resources, does not undermine staff representation and in no way violates Conventions Nos 87 and 98; (ii) on the contrary, collective bargaining plays a greater role under the new system by adapting the operations of the CES to the enterprise's situation and specific characteristics; and (iii) through collective bargaining, it is also possible to establish local representatives as new stakeholders in the enterprise's social dialogue and to take measures to recognize the value of staff representatives' service.*

65. ***Observing the general nature of the complainants' allegations, which do not specify the manner in which the reform of staff institutions would affect the freedom of association and collective bargaining guarantees contained in Conventions Nos 87 and 98, and taking note of the aforementioned statements made by the Government, the Committee considers that these allegations do not call for further examination at this stage.***

▶ III. The Committee's recommendations

66. **The Committee recommends that the Governing Body:**

(a) approve the present report;

(b) request that the Government, in the context of the application of Convention No. 98, take into account the observations made in paragraphs 51 and 62 of the Committee's conclusions;

(c) invite the Government to provide information in this respect for examination by the Committee of Experts on the Application of Conventions and Recommendations; and

(d) make this report publicly available and close the present representation procedure.

Geneva, 30 January 2023

Ms Petra Herzfeld Olsson
Government member

Ms Renate Hornung-Draus
Employer member

Ms Amanda Brown
Worker member