République Française

Autorité de la concurrence

Only the French version is authentic and it prevails in the event of its differing from the translated version.

Opinion 19-A-13 of 11 July 2019 regarding the competitive effects of industry-wide agreements' extension

The *Autorité de la concurrence* (Permanent commission);

Considering the letter of 3 August 2018, registered on 6 August 2018 under number 18/0137 A, by which the French government requested an opinion from the *Autorité de la concurrence* on the competitive effects of industry-wide agreements concluded between employers' and employees' organisations to regulate labour relations;

Considering Book IV of the French Code of Commercial Law (*Code de commerce*) on the freedom of prices and competition;

Considering the Second Part of the French Labour Code (*Code de travail*) relating to collective labour relations;

Considering the other evidence in the case;

Considering the decision of 14 June 2019, by which the President of the *Autorité de la concurrence* appointed Mr Savinien Grignon-Dumoulin, member, to join the quorum and examine the referral registered under number 18/0137 A;

The Case officer; the Deputy General Rapporteur; the Government Commissioner and the representatives of the General Directorate of Labour and the Directorate of Research, Studies and Statistics (DARES) of the French Ministry of Labour; Mr Pierre Ramain, *Maître des requêtes* at the French Administrative Supreme Court (*Conseil d'État*), appointed by the Minister of Labour to examine the future of collective labour agreements; Mr Sébastien Roux, Chairman of the group of experts established under Article L. 2261-27-1 of the French Labour Code, heard at the meeting of 19 June 2019;

The representatives of the Confédération française démocratique du travail (CFDT), the Confédération française de l'encadrement - Confédération générale des cadres (CFE-CGC), the Confédération Générale du Travail Force Ouvrière (CGT-FO), and the Mouvement des entreprises de France (MEDEF), heard on the basis of the provisions of the second paragraph of Article L. 463-7 of the French Code of Commercial Law; those of the Confédération française des travailleurs chrétiens (CFTC) and the Confédération Générale du Travail (CGT) being regularly convened;

Takes the opinion that the reply to the request be in accord with the following observations:

Summary[1]

Since the 2017 labour law reform, a group of experts has been tasked with assessing the economic and social effects that may result from extending collective labour agreements (CLAs) concluded between employers' and employees' organisations to regulate labour relations (L. 2261-27-1 of the French Labour Code). The group requested the Minister of Labour to ask the Government to submit to the Autorité de la concurrence a request for an opinion on the effects on competition that could result from these extensions.

On 3 August 2018 the Autorité was therefore asked to examine the competition issues and identify useful criteria for assessing the risks to competition associated with the extension of these agreements. As the basis for its analysis, the Autorité obtained submissions from the different stakeholders involved in collective bargaining at the industry level (public authorities, experts and social partners).

The insight it offers in this opinion derives in particular from its technical expertise in anticompetitive practices and on case law.

The Autorité notes the following main findings:

- *From a social point of view, industry-wide agreements play a key role by ensuring social protection and by regulating the functioning of the labour market, particularly by limiting "social dumping". The extension mechanism can also compensate for low unionisation rates among employees and low employer organisation coverage rates in France (i.e. the proportion of companies that are members of employer organisations and the proportion of employees in those companies), particularly in microbusinesses and small and medium-sized enterprises (SMEs).*
- *The economic analysis examined the impacts of extending CLAs. The experts agree that this mechanism can reduce inequalities among employees, but also note the need for regulation given the potentially damaging consequences of extensions of agreements on the level of employment in the industry or on the intensity of competition in the relevant markets for goods and services.*
- *In this context, a group of experts may be required to provide technical support to the Minister of Labour in assessing the foreseeable economic and social effects of the extension of the agreement, in particular the potentially negative induced effects on employment and competition.*
- *The opinion of the group of experts, prior to decisions on approving extensions, as well as the arbitration carried out by the Minister of Labour between social objectives and the imperatives of free competition, requires a "case-by-case" prospective analysis of the effects induced by extending the agreement taking into account the actual state of competition in the business sector concerned.*
- *In practice, there are few examples where free competition has been harmed by the extension of collective labour agreements. However, they do provide useful guidance in the search for clauses that would, for example, have the purpose or effect of limiting market access or the free exercise of competition.*

[1]This summary is strictly for information purposes. Only the body of the following decision is binding.

<u>On the basis of these findings, the Autorité makes the following recommendations:</u>

- *Where the situation presents particular risks for competition, perform competitive analyses on a "case-by-case" basis of multi-employer agreements whose extension is requested in order to (i) take into account the real economic conditions specific to each industry, and (ii) achieve a fair balance between social and competition policy objectives.*
- *To assess these risks, the Autorité proposes useful indicators to anticipate the effects of the agreement on competition, which are of three types and bear respectively on:*

(i) matters covered by the agreement:

In particular, the evaluator's attention may be drawn to the agreements that:

- ✓ *cover subjects not limited to simple application of legal requirements to improve working conditions but that affect relationships between economic stakeholders;*
- ✓ *cover minimum pay for different grades or classification tables;*
- ✓ *involve a change or a new way of organising working time;*
- ✓ *specify the conditions for maintaining employment contracts when businesses are transferred;*
- ✓ *recommend provident institutions and medical insurance providers;*
- ✓ *introduce new requirements for training or obtaining vocational qualifications;*
- ✓ *contain clauses relating to employee transfers.*

(ii) functioning of the industry to which the agreement will apply.

Some criteria alone may be sufficient to justify a more in-depth analysis of the agreement, while others will be part of a "multiple indicator cluster". This may be the case in particular for:

- ✓ *monopolies, oligopolies or companies that hold a dominant market position;*
- ✓ *companies holding exclusive rights and operating in the competitive market;*
- ✓ *asymmetry in the capital intensity of companies in the market;*
- ✓ *low trade flows between EU Member States or low international exposure;*
- ✓ *technological innovation;*
- ✓ *industries where there is a shortage of labour.*

(iii) conditions in which the agreement is negotiated.

In addition to other indicators, the employer coverage rate and the structure of the industry may also be useful in targeting certain agreements that warrant in-depth analysis. This may be the case when:

- ✓ *employer organisation coverage is low in an industry;*
- ✓ *rate of signature of agreements by small and medium-sized enterprises (SMEs) is low;*

- ✓ *the industry consists mainly of microbusinesses and SMEs;*
- ✓ *the industry consists mainly of subcontractors;*
- ✓ *the industry consists of companies likely to have diverging interests.*

- *Because of difficulties with quantifying the economic cost of some labour rules for companies that are not signatories to an agreement or more specifically for microbusinesses and SMEs, the Autorité recommends the development of impact studies within the industry as part of the negotiating process.*

- *Finally, each of the concepts of business sector, industry and relevant market has its own logic. Thus, the analysis of the effects of the extension on employment (in the industry) and on competition (in the relevant market) cannot be based, in the current state of the concepts used, on the use of harmonised statistics or correspondence tables. A comprehensive examination by public statisticians would be necessary to overcome this difficulty.*

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Introduction

1. Since the Waldeck-Rousseau Law of 1884, which recognised trade unions, and the signing of the Arras Agreement in 1891, the first CLA in the coal industry, collective bargaining has undergone profound changes. An initial "decentralisation" was implemented with the laws of 1946 and 1950, which gave the social partners real standardising power through the negotiation of agreements at the industry level. The movement then shifted focus to the company with the Auroux Laws of 1982.

2. The latest reforms, with the Law of 8 August 2016 on Work, the Modernisation of Social Dialogue and the Securing of Career Paths (the Labour Law) and then with the five ordinances of 22 September 2017 on strengthening collective bargaining, the new organisation of social and economic dialogue in companies and promoting the exercise and enhancement of trade union responsibilities, the predictability and security of labour relations, the professional prevention account and various measures relating to the framework of collective bargaining, have pursued a dynamic of change in favour of strengthening the company's role in collective bargaining and redefining the relationship between industry- and company-level agreements. From now on, in the matters that are exhaustively listed, the industry-wide agreement prevails over the company agreement (so-called "Block 1" and "Block 2" matters[2]), which cannot be less favourable, and must provide at least equivalent guarantees. In all other matters ("Block 3"[3]), the company-level agreement prevails over the industry-level agreement, and may therefore deviate less favourably from it.

3. The 2017 ordinances amended the procedure for extending CLAs to anticipate more effectively than before the risks to competition associated with such extensions. In its division ruling on *Syndicat professionnel des exploitants indépendants des réseaux d'eau et d'assainissement*[4], the French Administrative Supreme Court laid down the following principle: *"in the implementation of the powers that the Minister of Labour has under the above-mentioned provisions of Article L. 133-8 of the French Labour Code,* ***it is his duty to ensure that the extended CLA does not have the effect of preventing, restricting or distorting competition on a market, in particular by limiting access to the market or the free exercise of competition by other companies [...]*** *that, as such,* ***it is the responsibility of the Minister to reconcile, under the supervision of the court judging abuses of power, the social objectives likely to justify making the rules defined by the signatories of a CLA mandatory for all employees and employers in the industry and the requirements relating to the preservation of free competition in the relevant industry"*** (emphasis added). This position has been reiterated in its subsequent case law.

4. The consideration of risk to competition in the process of extending CLAs is thus not in itself a novelty. The main innovation is the means allocated to the legal review prior to the extension: the Minister of Labour, in addition to the French National Commission for Collective Bargaining, Employment and Vocational Training, now has the option to enlist the help of a group of experts to assess the "economic and social effects" that may result

[2]The list of matters in Blocks 1 and 2 is given in Appendix 1 of this opinion.

[3]Block 3 refers to all materials not covered by either Block 1 or Block 2 that can be agreed at the company level. For further details, see below, Paragraph 2, A, I.

[4]French Administrative Supreme Court, 30 April 2003, 230804, *Syndicat professionnel des exploitants indépendants des réseaux d'eau et d'assainissement*.

from the extension of an agreement. These effects include, in particular, risks of excessive harm to free competition or undermining employment policy objectives.

5. The definition of the role and the establishment of this group were largely inspired by the results of economic studies, which focused on the risks associated with the semi-automatic nature of extending CLAs in certain countries such as France, Portugal and Spain.

6. The legislator's choice, when empowering the government to reform by ordinance, was not to remove any right of industry-wide agreements (unlike in other European states) or to reduce their number. In the interests of equilibrium, however, he wanted other forms of public interest not to be sacrificed in the process of extending CLAs. The aim was thus to prevent the extension from raising competition concerns that would be harmful to all consumers and unlikely to be offset by social progress for the categories of employees covered by the agreement. This need to arbitrate between sometimes conflicting objectives, and therefore to carry out an impact study before the adoption of the extension orders, justified the setting up of the group of experts, as the Minister of Labour indicated during the debates of 24 January 2018 in the Senate: *"I will convene a scientific committee of independent persons to examine competition and employment issues and to **inform the decision-making process in the procedures for extending an agreement**"* (emphasis added).

7. Finally, this increased consideration of competition risks in the context of the mechanism for industry-wide agreements is concomitant with a process of grouping industries together, which is likely to bring about a fundamental change in collective labour agreements[5]. Indeed, the competitive stakes of extending an agreement are not the same depending on whether the environment is composed of a multitude or a reduced number of industries.

8. In this context, the *Autorité* was asked by the Minister of Economy on 3 August 2018 for an opinion at the request of the Minister of Labour, who invited it to carry out an analysis of the competition issues and to identify useful criteria for assessing the risks to competition associated with extending CLAs.

9. In order to answer the question raised on the possible effects on competition of industry-wide agreements, this opinion first analyses the legal framework of these agreements (I). It then details the economic and social effects that may result from these extensions (II). On the basis of the *Autorité*'s advisory and decision-making practice, as well as the case law of review courts, it carries out an assessment of the risks to competition most likely to be encountered (III) before making practical recommendations to inform the work of the group of experts. The *Autorité* shall also identify criteria for detecting such risks (IV).

I. Legal framework of industry-wide agreements

10. First, it is necessary to analyse the legal framework within which collective bargaining is conducted in France. Recent developments in this framework reflect the legislator's desire to strengthen industry's role, without neglecting the importance of collective bargaining within a company (A). Secondly, the approximation sought between the concepts used in

[5]On 15 January 2019, the Minister of Labour requested the support of Mr Pierre Ramain, *Maître des requêtes* at the French Administrative Supreme Court, to facilitate the implementation of this process of restructuring industries.

competition law and labour law during the process of extending CLAs requires a review of the relationship between these two areas as it has been established in case law and decision-making practice (B).

A. INDUSTRY-WIDE AGREEMENTS AND THE EXTENSION MECHANISM AT THE HEART OF COLLECTIVE BARGAINING

11. After presenting the growing importance of collective bargaining in the development of labour law (1) and the substantial changes in its legislative framework in 2016 and 2017 (2), there will be a detailed description of the mechanism for industry-wide agreements as it results from the desire to standardise labour rules (3).

1. THE EVOLUTION OF COLLECTIVE BARGAINING AND THE ROLE OF AN INDUSTRY IN DETERMINING COMMON SOCIAL GUARANTEES

12. While recent legislative reforms have, through a series of transfers of jurisdiction, strengthened collective bargaining at the company level (a), the industry level remains privileged for determining a minimum set of social guarantees (b).

a) The rise of collective bargaining in the development of labour law

13. Historically, the employment relationship was first built around the employment contract, which is essentially considered unbalanced in favour of the employer to the detriment of the employee. The need to compensate for this asymmetry and to ensure employee protection led to the development of a set of provisions contained in the French Labour Code.

14. In the organisation of the employment relationship, the state has long been the sole producer of standards and the law thus played a predominant role. The reluctance of the social partners[6] to engage in collective bargaining has strengthened the state's "monopoly" in determining social public policy. This position of the state lasted until the entry into force of the law of 11 July 1950[7], which marked the liberation of collective bargaining and reflected the expression of trade union independence in the establishment of social standards. This legislation ended the mandatory ministerial approval[8] required for CLAs to become binding. It also authorised the social partners to negotiate wages once again. Thus, the text provides in particular that "the agreement may mention provisions more favourable to workers than those of the laws and regulations in force [...]"[9].

15. As Jean-Denis Combrexelle, then President of the Labour Division of the French Administrative Supreme Court, pointed out in his report to the Prime Minister in 2015, *"[...] since the beginning of the 20th century, a specific source of law has gradually been created between the law and the employment contract, which is the right granted, on the one hand,*

[6]The social partners are represented by employer organisations on the one hand and employee organisations on the other.
[7]Law 50-205 of 11 February 1950 on CLAs and procedures for the settlement of labour disputes.
[8]Before 1950, the law of 23 December 1946 subjected CLAs to ministerial approval.
[9]Article 31 a. paragraph 2, of the Law of 11 February 1950.

to trade unions and, on the other hand, to employers and organisations representing them, to sign CLAs"[10].

16. Little by little, in fact, the role of the state, and more specifically the importance of the law as a source of law, has been redefined to give greater legislative autonomy to employers' and trade union organisations and to contribute to giving collective bargaining a major role in regulating labour relations.

17. Among these texts, the Auroux Laws of 1982 mark an important step, providing for an obligation to negotiate both at the industry and company level in certain areas and at intervals set by law[11]. In 2007, the Law on the Modernisation of Social Dialogue introduced a compulsory phase of consultation between the social partners prior to any government project of reform in the field of labour relations, employment and vocational training.

18. Case law, both constitutional and that of the European Union courts, has moved in the same direction, strengthening the place of collective bargaining in the legal system[12]. Collective bargaining has in fact been described by the Court of Justice of the European Union (CJEU) as a general principle of EU law. It was also established as a principle of constitutional value on the basis of the 8th paragraph of the Preamble to the 1946 Constitution.

19. While its role has been redefined, the state retains a central role in the development of social norms. It remains the initiator of the laws that define the framework of labour relations. It intervenes in collective bargaining, but as a second step, in particular through the process of extending CLAs after having carried out a legal review[13].

20. Collective bargaining therefore now plays a major role in defining labour relations between employers and employees. More specifically, it concerns employment conditions, vocational training and working conditions and social guarantees granted to employees. Within these areas, the different levels of negotiation are divided into specific themes:

    - The <u>cross-sector agreement</u> covers specific issues related to working conditions and social guarantees (e.g. agreement on Agirc and Arrco supplementary pensions, work stress, quality of work life). This type of agreement may cover cross-sector matters affecting most employment contracts. It is signed by representatives of employees and employers in several sectors of activity and is binding, from top to bottom, on all the industries that make up the sector, themselves represented by the trade unions present during the negotiations.

    - <u>an industry-wide agreement</u> is negotiated in matters strictly defined by law[14] and applies only to a sector[15] and at a national, regional or departmental level defined during the negotiation. The agreements concluded at this level deal with all the matters mentioned

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[10]France Stratégie report to the Prime Minister, September 2015, Jean-Denis Combrexelle "La négociation collective, le travail et l'emploi", page 18.

[11]The provisions relating to mandatory collective bargaining are currently codified in Articles L. 2241-1 to L. 2241-19 of the French Labour Code for industries and L. 2242-1 to L. 2242-20 of the same code for companies.

[12]For further details, see Constitutional Council *(Conseil Constitutionnel*) Decision of 5 July 1977, 77-79 DC and CJEU Judgement of 8 September 2011, *Hennigs*, C-297/10, EU:C:2011:560.

[13]For more details on the legal review by the General Directorate of Labour, see the section beginning at paragraph 33.

[14]Since the ordinances of 22 September 2017 (Article L. 2253-1 of the French Labour Code), the industry-wide agreement has taken precedence over the company agreement in 13 exhaustively listed matters. For more details, see paragraph 28 and following.

[15]For example, construction and retail trade. A classification code of activities and products (NAF) is used to identify a company with a sector.

in Article L. 2221-1 of the French Labour Code ("the rules according to which employees' right to collective bargaining concerning all their conditions for employment, vocational training and work as well as their social guarantees is exercised").

- an agreement at the company or group level is negotiated between the employer and the representative trade unions within a company. It can be concluded at the level of a group of companies (holding company and subsidiaries) or an establishment. It may deal with matters falling within the competence of the industry, provided that it offers at least equivalent guarantees (see hierarchy of standards below). In all other matters which are not reserved at the industry level, it now prevails over the industry-wide agreement.

21. Until the 2016 Law and the 2017 ordinances[16] mentioned above (see below), collective labour relations law was built on a pyramidal architecture: the relations between the different levels were based on the "favourability principle". This meant that lower-level agreements could deviate from the higher standard only in a way that was more favourable to the employee, unless the industry allowed it.

22. This legal framework has evolved significantly through successive legislative amendments towards greater autonomy for the various levels of negotiation. In particular, the importance of negotiation at the company level has been reinforced. For example, the Aubry Laws of June 1998 and January 2000[17] and the Fillon Law of May 2004[18] provided that the signing of company agreements could deviate on certain topics from the favourability principle, thus extending the scope of the deviation process initiated by the Auroux Laws of 1982 with regard to working time. In the same vein, the Bertrand Law of 2008 provides, with regard to several areas of working time, that companies may themselves determine by agreement the overtime quota, as well as the off-duty compensation for employees, by deviating from the favourability principle.

b) The importance of collective bargaining at the company level does not reduce the relevance of industry-level bargaining for determining a minimum set of social guarantees

23. Despite the increasing development of negotiations at the company level, the national representative trade union and employer organisations heard during the investigation consider that the industry remains a relevant level of collective bargaining, particularly for the granting of social guarantees. This position seems to be shared by the report to the President of the Republic on Ordinance 2017-1385[19], which states that the purpose of the reform is to modify *"the relationship between industry-level and company-level agreements. In order to secure this link, strengthen the role of the industry in its economic and labour regulatory function and provide greater initiative to the company agreement in other areas, the matters in which the industry-wide agreement defines the employment and working*

[16]Law 2016-1088 of 8 August 2018 on Work, the Modernisation of Social Dialogue and the Securing of Career Paths and the five Ordinances 2017-1385, 2017-1386, 2017-1387, 2017-1388 and 2017-1389 of 22 September 2017.

[17]Law 98-461 of 13 June 1998 on Guidance and Incentives for the Reduction of Working Time (Aubry Law) and Law 2000-37 of 19 January 2000 on the Negotiated Reduction of Working Time (1).

[18]Law 2004-391 of 4 May 2004 on Lifelong Vocational Training and Social Dialogue.

[19]Official Journal of the French Republic (JORF), 0223 of 23 September 2017, text 28, report to the President of the Republic on Ordinance 2017-1385 of 22 September 2017 on strengthening collective bargaining.

conditions of employees as well as the guarantees applicable to them are exhaustively listed."

24. The definition of the common set of social guarantees remains the responsibility of the specific industry, which standardises labour rules for all companies in the sector concerned (i.e. the industry), defined by the scope of the agreements negotiated by the social partners[20]. The pivotal role of industry is maintained by the 2017 ordinances, which reserved 13 subjects exclusively to it. Thus, in the key areas of working and employment conditions, the primacy of the industry is not called into question.

25. One of the trade unions interviewed by the Investigation Services indicated that negotiation at the industry level is fundamental to rebalancing power between employers' and employees' organisations. In the same vein, another pointed out that the possibility of deviating, at the company level, from the CLA (which sets, in principle, the "laws" of the profession) without following the favourability principle would greatly weaken, in these reserved areas, the regulatory mission of the industry, risking creating different rights and guarantees among companies in the same business sector.

26. Finally, as another organisation pointed out, the industry plays a supporting role for microbusinesses and SMEs, which negotiate little or no company agreements, often due to a lack of elected representatives or a trade union presence. In these situations, the industry has the possibility of concluding "standard agreements" to help these companies adapt to legal rules. This information may suggest that the centralisation of negotiation at the industry level has the advantage of reducing the costs associated with the multiplication of agreements negotiated with each company. Indeed, the reduction of these negotiation costs could constitute a significant economic benefit of industry-wide agreements.

27. Thus, the harmonising role assigned to the industry aims to guarantee the improvement of employees' working conditions, since after the extension of a CLA, competing companies in the same sector are required to apply the same rules and offer the same guarantees to their employees, or are strongly encouraged to do so by the use of standard agreements.

2. Effects of the 2016 Labour Law and the September 2017 Ordinances on the legal system

28. The parliamentary debates during the examination of the 2016 government bill on labour and the bill ratifying the Ordinances of 22 and 23 September 2017 clearly reflect the desire to redefine the balance of power between the various levels of negotiation so that the company too is placed at the heart of social dialogue[21]. As Prime Minister Manuel Valls pointed out during the parliamentary debates on the Law of 8 August 2016, the objective was to develop "local social dialogue", which, according to Deputy Laurent Pietraszewski, rapporteur of the Social Affairs Committee of the National Assembly (*Assemblée nationale*), would be more favourable to the negotiation of rules adapted to the specificities of the company, its production system and its work organisation[22].

29. The aim of the reforms was to instil a "new culture of social dialogue" in France, with its supporters hoping that it would make it possible to move from a logic of "confrontation" to

[20]Article L. 2222-1 of the French Labour Code provides that: "The collective labour agreements [...], determine their regional and professional purview." The professional purview is defined in terms of economic activity.
[21]National Assembly XIVth legislature - Ordinary session 2015-2016 - Sitting of 12 May 2016.
[22]National Assembly XVth legislature - Ordinary session 2017-2018 - Sitting of 21 November 2017.

a logic of "compromise". In the end, this redefinition of the respective roles of the industry and the company has led to a transformation of the legal system of labour law.

30. Initially, the Labour Law provided that the industry-wide agreement would prevail over the company agreement in six limited areas, outside of which the company agreement could therefore be less favourable to employees than the industry-wide agreement, unless the latter provided for "lock-in clauses"[23]. Such clauses allowed the industry to make certain provisions of the agreement negotiated at its level mandatory.

31. In a second step, the September 2017 ordinances again modified the hierarchy of collective standards, as follows:

(i) A primacy block, known as "Block 1", now ensures a "legal lock-in" of 13 matters for which the industry-wide agreement prevails over the company agreement concluded before or after the date of entry into force of the industry-wide agreement. The company agreement cannot therefore be less favourable to employees than the industry-wide agreement. It must always provide for at least equivalent guarantees if it seeks to deviate from them.

According to Article L. 2253-1 of the French Labour Code, these 13 subjects are:

- 1° Minimum hierarchical salaries;
- 2° Classifications;
- 3° Pooling of funding for gender mainstreaming;
- 4° Pooling of vocational training funds;
- 5° Additional collective benefits;
- 6° The measures set out in Article L. 3121-14, 1° of Article L. 3121-44, Article L. 3122-16, the first paragraph of Article L. 3123-19 and Articles L. 3123-21 and L. 3123-22 of the same Code relating to working hours, distribution and adjustment of working hours;
- 7° Measures relating to fixed-term employment contracts and temporary employment contracts;
- 8° Measures relating to permanent contracts for construction sites or operations;
- 9° Professional equality between women and men;
- 10° The conditions and duration of the renewal of the trial period;
- 11° The procedures according to which the continuation of employment contracts is organised between two companies when the conditions for the application of Article L. 1224-1 are not met;
- 12° Cases of secondment of an employee to a user company;
- 13° Minimum remuneration of the employee concerned, as well as the amount of the business contribution allowance.

(ii) An intermediate block, known as "Block 2", ensuring an "optional lock-in": this is a list of four matters for which the industry-wide agreement may expressly decide to prohibit from the subsequent company agreement (on the date of its entry into force)

[23]Since 2004, the law had given the industry priority in four areas (minimum wages, classifications, provident schemes and pooling of vocational training funds), to which the 2016 Labour Law had added professional equality and the prevention of hardship. For other matters, the industry had to define the constituent themes of the "public policy agreement of the industry" from which companies could not deviate with less favourable agreements.

any deviation unfavourable to employees unless the company agreement provides at least equivalent guarantees[24].

According to Article L. 2253-2 of the French Labour Code, these four other matters are:

- 1° Prevention of the effects of exposure to occupational risk factors;
- 2° Professional integration and retention of disabled workers;
- 3° The staff from which union delegates may be appointed, their number and the valuation of their trade union careers;
- 4° Bonuses for dangerous or unhealthy work.

(iii) The remaining block, known as "Block 3", affirms the primacy of the company agreement over the industry-wide agreement and confirms its supplementary nature[25]. In all matters other than those covered by Blocks 1 and 2, the company agreement prevails over the industry-wide agreement, whether concluded before or after the entry into force of the industry-wide agreement. It may therefore be more or less favourable to employees. The industry-wide agreement is intended to apply only in the absence of a company agreement.

32. Over the years, a culture of co-construction of labour law with the social partners has emerged from the development and strengthening of collective bargaining at different decision-making levels: sectors, industries, groups, companies. In this context, the firm desire to standardise the rules of labour law was based on a driving force: the mechanism for extending CLAs by order of the Minister of Labour, which is almost systematically implemented in practice.

3. Procedure for extending CLAs

33. The procedure for extending CLAs was introduced by the Matignon agreements of June 1936 in the context of an economic and labour crisis. The objective was then to standardise labour conditions among employees in the same sector.

34. A CLA concluded at the industry level by trade unions and employers' organisations representative at that level applies to the member (or represented) companies of the signatory employers' organisations. However, the extension mechanism provides for collective bargaining coverage of the negotiated agreement by extending its scope to all companies, even non-signatories, and their employees within the same business sector.

35. The extension of CLAs is covered by Articles L. 2261-19 to L. 2261-31 of the French Labour Code. An extension must meet two conditions:

(i) the agreement must have been negotiated and concluded within a joint committee[26], which is composed of delegates of representative employers' and employees' organisations at the industry level;

[24] It is important to note that industry-wide agreements, which provide for a "lock-in" clause on those topics where the primacy is now given to the company agreement, will cease to have effect as from 1 January 2018.

[25] Article L. 2253-3 of the French Labour Code.

[26] Article L. 2232-9 of the French Labour Code, amended on this point by Law 2016-1088 of 8 August 2016: "I.- A permanent joint committee for negotiation and interpretation shall be set up with agreements in each industry. (...)."

(ii) the agreement must not have received "written and reasoned" opposition within one month of publication of the extension notice from one or more representative professional employers' organisations at the industry level[27].

36. The request for extension may be made either by one or more signatory trade union or employer organisations or by the Minister of Labour. A notice prior to the extension is then published in the *Official Journal of the French Republic* (JORF). At this stage, the investigation and legal review phase of the agreement, led by the Ministry of Labour, begins. The purpose of this control is to verify the legal validity of the clauses negotiated by the social partners in the light of the laws and regulations in force. At the same time, a national commission on collective bargaining, employment and vocational training (CNNCEFP) - composed of representatives of trade unions and representative employers' professional organisations - is also consulted for an advisory opinion.

37. The Minister may then authorise the extension by an order published in the JORF. However, the Minister may formulate several types of observations.

(i) The first type sends a message to "be aware", which has an educational purpose and is used to inform the social partners of clauses whose wording is ambiguous and could call into question the legality of the agreement.

(ii) The second type of observation, the "reservation", can take several forms. If certain clauses of an agreement are incomplete with regard to the legal provisions, the extension order specifies that the agreement is extended subject to its being brought into conformity with the provisions concerned[28]. The Minister may also accept the extension of certain clauses but reserve their entry into force for a company agreement providing for additional stipulations. It may also make the extension of an agreement subject to the application of Article L. 261-7 of the French Labour Code on the revision procedure for CLAs. Finally, a clause may be subject to a reservation on the basis of an interpretation of constitutional case law. It is then deemed to be in conformity provided that its interpretation or application is in accordance with the applicable laws.

(iii) The third type of observation, "exclusion", is intended to exclude from the extension the clause or clauses of an agreement where they are considered unlawful. This may be the case when a clause "does not correspond to the situation of an industry or industries within the scope in question"[29] or when a clause is contrary to a reason of public interest, as affirmed by the French Administrative Supreme Court in a 2008 decision[30].

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[27]Opposition to the notice of extension may be lodged by one or more employers' organisations recognised as representative at the level in question, whose member firms employ more than 50% of all employees of firms belonging to professional employers' organisations recognised as representative at that level (paragraph 3 of Article L. 2261-19 of the French Labour Code).

[28]In 2018, 178 agreements were the subject of one or more reservations. Data from the *Bilan de la négociation collective 2018*, 2019 edition, page 148.

[29]Second paragraph of Article L. 2261-25 of the French Code of Commercial Law.

[30]French Administrative Supreme Court, 21 November 2008, *Syndicat national des cabinets de recouvrement des créances et de renseignements commerciaux et autres,* no. 300135, published in the Lebon collection: "Considering that, in refusing to extend this agreement by the contested decision, the Minister relied on the public interest in promoting the continued employment of "seniors", in accordance with the action plan announced by the government on 6 June 2006; that, on such grounds, and even though the conclusion of the agreement in question had been made possible by Article 16 of the Law of 21 August 2003, the Minister did not make an incorrect application of the power he has under the first paragraph of Article L. 133-8 of the French Labour Code."

The latter two types of observations are, unlike the first, binding. They are legally based on Article L. 2261-25 of the French Labour Code.

38. In addition, since the 2017 labour law reform, the French Labour Code has expressly provided for the possibility of the Minister of Labour refusing to extend a CLA for "reasons of public interest, particularly for excessive harm to free competition"[31] (emphasis added). To assist the Minister in these aspects, a group of experts was set up. When asked for an opinion, its task is to assess the economic and social effects likely to result from the extension of CLAs[32]. These new provisions enshrine and organise the principle of proportionality between social objectives and the need to preserve competition developed by the case law of the French Administrative Supreme Court. In its aforementioned division judgement, the *Syndicat professionnel des exploitants indépendants des réseaux d'eau et d'assainissement*[33], the High Court had thus, for the first time, annulled an order extending a CLA after consulting the *Conseil de la concurrence*[34] on the grounds of excessive harm to competition.

39. It should be noted that, in practice, representative trade unions and professional employers' organisations have told the *Autorité* that they rarely oppose a request for an extension or the extension itself. The majority of them negotiate agreements essentially with the aim of extending them to all employees in the industry. In France, according to DARES[35], refusal to extend is "infrequent": for example, it states that over the last four years, there has been only one refusal for more than 900 extended wage agreements per year in the 300 main industries. According to the General Directorate of Labour, in 2018, 77 agreements were the subject of one or more exclusions of clauses. Only 13 agreements were refused extension.

40. It should be noted that extended CLAs cover approximately 80% of employees in France, despite a particularly low unionisation rate. Using the first measurement of the public for employer representativeness[36], carried out in 2017, DARES estimates that one quarter of companies (employing two thirds of employees) belong to an employer organisation. Consequently, the extended CLAs thus lead to making them applicable to three quarters of the companies and one third of the employees who would not be covered without the extension.

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[31] Article L. 2261-25 of the French Labour Code, based on Article 1 of Ordinance 2017-1388 of 22 September 2017.

[32] First paragraph of Article L. 2261-27-1 of the French Labour Code: "The Minister of Labour, on his own initiative or at the written and reasoned request of a representative employers' organisation or employees' organisation within the scope of an agreement or its amendments, shall refer the matter to a group of experts responsible for assessing the economic and social effects likely to result from its extension."

[33] French Administrative Supreme Court, division, 30 April 2003, no. 230804, published in the Lebon collection, conclusions of J-H. Stahl, *Syndicat professionnel des exploitants indépendants des réseaux d'eau et d'assainissement*: "[...] it is incumbent on the Minister to reconcile, under the supervision of the court judging abuses of power, social objectives likely to justify making the rules defined by the signatories of a CLA that is mandatory for all employees and employers in the sector with the imperatives relating to the preservation of free competition in the relevant sector."

[34] *Conseil de la concurrence*, Opinion 00-A-30 of 4 December 2000.

[35] DARES Analyses, 53 (November 2018), *Les extensions des accords de branche : quels sont les entreprises et les salariés concernés?* The Direction de l'Animation de la Recherche, des Études et des Statistiques (DARES) of the French Ministry of Labour produces analyses, studies and statistics on work, employment, vocational training and social dialogue.

[36] See references note 34.

B. LINK BETWEEN LABOUR LAW AND COMPETITION LAW RESULTING FROM THE NEW LAWS

41. In certain cases, an industry-wide agreement based on labour law may be subject to the rules of competition law. An initial link between the two legal systems was established by the law when it assigned to the industry a mission of "regulating competition", a meaning that will have to be explained (1). The second point of intersection between these two areas of law was established by the 2017 ordinances, which now explicitly specify that the Minister of Labour may be informed, if he decides to refer the matter to it, by a group of experts set up specifically to assess the consequences of CLAs on competition, among other issues. It is precisely in order to properly understand the scope of this mission that it is necessary to clarify any ambiguity about these various concepts (2).

1. MISSION OF "REGULATING COMPETITION" IN INDUSTRIES

42. The positive law governing collective labour relations contains two references to competition:

    (i) Under the terms of Article L. 2232-5-1 of the French Labour Code, each industry has the task of *"regulating competition among the companies falling within its purview"* (emphasis added).

    (ii) Secondly, Article L. 2261-25 of the French Labour Code provides that the Minister of Labour may refuse to extend a CLA *"for reasons of public interest, in particular for excessive harm to free competition"* (emphasis added).

43. It follows from these provisions that competition is taken into account at two levels: first, as part of the industry's tasks - the industry is responsible for regulating competition between companies - it must therefore be taken into account by the social partners when they negotiate a CLA; competition is then one of the criteria that must be taken into account by the Minister of Labour when examining a request to extend an agreement. It should be noted that, in particular in view of their observations before the *Autorité*'s board, the social partners consider that the economic effects (including competition) induced by an extended CLA on non-signatory firms are taken into account during its negotiation.

44. While the term used, "competition", is identical in both Articles L. 2232-5-1 and L. 2261-25 of the French Labour Code to that in Chapter 1 (*"Rules on competition"*) of Title VII of the Treaty on the Functioning of the European Union (TFEU) and in Book IV of the French Code of Commercial Law (*"Pricing freedom and competition"*), it seems that due to conceptual differences, it can be understood according to different meanings.

45. It thus emerges from the various hearings conducted by the *Autorité* that the term "competition", in relation to the task of regulating the industry provided for in the aforementioned Article L. 2232-5-1, is interpreted by practitioners, in particular the social partners (in the absence of topical case law), as a means of preventing unfair "social competition" between companies in the same industry (i.e. linked to the application of labour rules less favourable to employees) by negotiating and setting common rules.

46. The same term "competition" has a very different meaning when it refers to anticompetitive practices, agreements or abuses of a dominant position having the object or effect of hindering the free functioning of a market (for goods or services). The European Commission, throughout the European Union, and the *Autorité de la concurrence* in France,

are empowered to investigate, prosecute and impose fines for such practices in order to safeguard economic public policy and the interests of consumers. This specific oversight mission is governed by Articles 101 and 102 of the TFEU, as well as by Articles L. 420-1 and L. 420-2 of the French Code of Commercial Law.

47. Thus, clarification appears necessary on the notion of "excessive harm to free competition" mentioned in Article L. 2261-25 of the French Labour Code. This is one of the reasons of public interest for which the Minister of Labour may refuse to extend a CLA. It must assess whether the extension of an agreement presents a risk of harming competition on the markets for goods and services in which the companies in the industry are active. In this respect, the above-mentioned provision aims to provide a safeguard against the effects of extending the CLA on the conditions for entry, development or innovation of firms in the markets for the goods and services concerned, or even on the continued presence in the market of certain economic stakeholders such as microbusinesses and SMEs, which are generally not anticipated by the social partners, but are potentially negative.

48. Recently included in Article L. 2261-25 of the French Labour Code, these provisions do not constitute an addition to positive law insofar as the legislator has "codified" an obligation that was identified by the judge some fifteen years ago. Indeed, the provisions in question enshrine a principle established by the French Administrative Supreme Court in its above-mentioned 2003 division decision: *"It is the responsibility of the Minister of Labour to ensure that the extension of a CLA does not have the effect of preventing, restricting or distorting competition in a market, in particular by restricting access to that market or the free exercise of competition by other firms"*[37].

49. Moreover, these new legislative provisions show that the mission of the Minister of Labour, with occasional support from the group of experts, is not to qualify an anticompetitive practice (cartel or abuse of a dominant position), which is the sole responsibility of competition authorities. Rather, it is a question of assessing the risk that the extension, in specific situations brought to their attention, will lead to an excessive harm to competition in one or more markets for goods and services covered by the agreement.

50. In the context of this opinion, if the *Autorité* intends to provide the Minister and the group of experts with insight into the assessment of the competitive risk associated with an extended CLA, it is not for it to take a position when examining the request for extension on the arbitration that may have to be made between the social objectives arising from the conclusion of the CLAs and competition concerns that may be identified. It can simply be noted that the nature and scale of the effects expected on both sides could be a relevant factor in the assessment.

2. Review by the Minister of Labour, with the support of the group of experts when its opinion has been requested, of the risk of "excessive harm to free competition"

51. The first paragraph of Article L. 2261-25 of the French Labour Code provides that: *"The Minister of Labour may exclude from the extension, after receiving a reasoned opinion from the French National Collective Bargaining Commission, clauses that contradict legal provisions. It may also refuse, for reasons of public interest, in particular for excessive harm to free competition or in the light of employment policy objectives, to extend a CLA"*.

[37] French Administrative Supreme Court, 30 April 2003, *Syndicat professionnel des exploitants indépendants des réseaux d'eau et d'assainissement*, no. 230804, conclusions of J-H. Stahl.

52. In addition, Article L. 2261-27-1 of the same code provides that: *"The Minister of Labour, on his own initiative or at the written and reasoned request of an employers' organisation or a representative employees' organisation within the scope of an agreement or its amendments, shall refer the matter to a group of experts responsible for assessing the economic and social effects likely to result from its extension. A decree shall determine the detailed rules for the application of this article, in particular the conditions for the appointment of the experts referred to in the first paragraph to ensure their independence."*

53. These provisions lay down the conditions under which the Minister of Labour may refuse to extend a CLA for *"reasons of public interest, in particular for excessive harm to free competition,"* possibly on the opinion of a group of experts, in the event that he refers the matter to it for an assessment of the *"economic and social effects"* of such extensions, it being understood that, where appropriate, this opinion is not binding.

54. The Minister of Labour may in fact refer the matter to a group of experts for an opinion on his own initiative or at the request of a representative organisation of employers or employees within the scope of the agreement in question. The mission of this group was specified by a decree of 14 December 2017. It is now governed by Articles D. 2261-4-1 to D. 2261-4-6 of the French Labour Code, which respectively provide that:

- *"The group of experts responsible for assessing the economic and social effects likely to result from the extension of an agreement or its amendments provided for in Article L. 2261-27-1 shall be composed of five persons chosen for their competence and experience in the economic and social field and appointed by order of the Minister of Labour. The Minister of Labour appoints the chairperson of the group of experts from among its members;*

- *"The term of office of the members shall be four years and shall not be revocable. Those of the members whose term of office is interrupted, for whatever reason, shall be replaced under the same conditions of appointment as their predecessors within two months for the remainder of the term of office";*

- *"The organisations mentioned in Article L. 2261-27-1 shall have a period of one month from the publication of the notice provided for in Article L. 2261-19 to request the Minister to refer the matter to the group of experts. This application is filed with the central services of the Ministry of Labour. The Minister of Labour shall refer the request provided for in the preceding paragraph to the chairperson of the group of experts";*

- *"The group of experts shall submit to the Minister of Labour, within two months of its referral, a report on the economic and social effects likely to result from the extension of the agreement or from one or more of its amendments. This opinion shall be communicated to the National Commission for Collective Bargaining, Employment and Vocational Training prior to its report on the extension of the agreement or amendment concerned given pursuant to 3° of Article L. 2271-1. In the absence of a report by the end of the period provided for in the first paragraph, the group of experts shall be deemed not to have any comments on the extension of the agreement";*

- *"In carrying out the work of the group of experts, its members may not seek or accept instructions from any authority. They shall be bound by secrecy with regard to the debates in which they have participated and the information to which they have had access in the course of their work. In the event of failure to comply with the obligations laid down in this article, the term of office of a member may be suspended by the chairperson of the group of experts";*

- *"Members of the group of experts may not take part in the preparation of the report when they have a personal interest in the matter in question."*

55. The trade union organisations met during the investigation expressed concerns about the creation of this group of experts. For them, in particular, the issue of the legitimacy of the appointed experts arises. Without challenging their technical skills in their respective fields of specialisation, these trade union organizations question their mastery of the issues involved in industry-wide negotiations, which, in their opinion, are specific to each business sector. A detailed knowledge of these issues seems essential to them in order to properly analyse the economic and social effects of extensions. Moreover, if they were to become common practice, they fear that opinions against extension requests would lead to a reduction in the rate of those covered by CLAs in France. Finally, they fear that the extension procedure will take longer (on average one year from the date of submission of the application) if the matter is referred to the group of experts. The effects of applying the agreement to the whole industry would thus be delayed, since employees of non-signatory companies would have to wait for the agreement to be extended before they could benefit from its advantages.

56. In view of the applicable laws, the task of the group of experts seems to be to shed light on the socio-economic effects of the extended CLA. It is therefore for the group of experts, as regards competition, to assess whether in the future the extension of the agreement to all firms in the industry is likely to affect free competition excessively in light of social objectives.

57. In the medium term, the dissemination of its consultative practice may be anticipated by the bodies responsible for collective bargaining at the industry level. This could encourage the social partners to take better account of anticompetitive risks as soon as the agreement is negotiated, and thus to reduce the frequency of negative opinions from the group of experts.

58. In a spirit of transparency and pedagogy, the group of experts indicated that it was keen to establish and make public its own policy, which could take the form of guidelines intended in particular for industry negotiators. Such a document could contribute to a better consideration of the competitive aspect in the negotiation of agreements, prior to the request for extension, i.e. in litigation, if the order of the Minister of Labour were challenged before the French Administrative Supreme Court.

59. The preliminary legal review carried out by the Minister of Labour, with the support of the group of experts when the matter is referred to it, prior to the possible extension of the agreement, is carried out under the supervision of the court judging abuses of power, as reiterated by the French Administrative Supreme Court in its decision *Syndicat national des exploitants indépendants des réseaux d'eau et d'assainissement*[38] cited above. In other words, the Minister of Labour's extension order, as well as his possible refusal to extend it for reasons of public interest, may be challenged before the administrative judge, who then carries out a proportionality review between social objectives and the imperatives of preserving free competition.

[38]French Administrative Supreme Court, 30 April 2003, *Syndicat professionnel des exploitants indépendants des réseaux d'eau et d'assainissement*, no. 230804, "[...] it follows from the above that, in the present case, its extension is, taking into account the specific characteristics of the market for water and sanitation services, likely to cause excessive harm to free competition."

II. Economic and social effects of extending CLAs

60. The socio-economic equilibrium which the Minister of Labour is required to seek with the support of the group of experts where appropriate and under the supervision of the court judging abuses of power, aims to reconcile a requirement for social protection, which may justify the extension of social benefits negotiated collectively to all employees in an industry (A), and taking into account the disadvantages likely to result for the economy of the sector, whether these are restrictions on employment or the competitive operation of the markets for goods and services (B).

A. THE SEARCH FOR SOCIAL EQUILIBRIUM

61. As a preliminary point, it seems useful to identify the respective advantages and disadvantages of extending CLAs to the various stakeholders, in particular employees' and employers' organisations, but also to analyse their relative importance from the point of view of the stakeholders concerned, as the state and social partners were able to explain during the investigation.

62. In general, according to the International Labour Organization (ILO)[39], collective bargaining aims to protect conditions of employment, to distribute social benefits fairly within a sector and to ensure social peace among stakeholders. The objective of social equilibrium can be achieved through negotiation, because it is indeed a “joint decision-making process“, ensuring that each party has the right to reject a proposal, to present a counter-proposal or to request a concession.

1. AMBIGUOUS EFFECTS ON THE RATE OF MEMBERSHIP IN TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

63. While extended CLAs guarantee the application of a social floor to as many people as possible[40], one of the main fears, expressed by commentators, is that it will lead to a corresponding decrease in the rate of unionisation of employees. They would then lose any interest in joining a union by obtaining collectively negotiated benefits “free of charge”. As the authors of a study published in the journal of the Institut de Recherches Économiques et Sociales (IRES) in 2016[41] explain, by allowing employees to directly obtain collectively negotiated benefits without having to join a union, the *de facto* extension compensates for the impact of low union membership. Conversely, it could make trade union organisations highly dependent on the use of this mechanism, and therefore on state intervention.

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[39] *Factsheet No. 1 Collective Bargaining*, Inclusive Labour Markets, Labour Relations and Working Conditions Branch (INWORK), International Labour Office, ISSN 2411-684X (print) / ISSN 2227-9334 (web) November 2015, International Labour Organization (ILO).

[40] Collective bargaining at the industry level ensures a high rate of coverage by agreements thanks to the extension mechanism. The previously cited DARES study (references note 34) shows that extension orders expand the coverage of CLAs by making them applicable to non-signatory companies, which represent three quarters of employers and one third of employees in industry.

[41] Thorsten Schulten, Line Eldring, Reinhard Naumann, “Le rôle de l’extension dans la solidité et la stabilité de la négociation collective en Europe”, *La Revue de l’IRES*, 89 (2016/2), pp. 51-87.

64. However, according to the same study, there is no clear correlation between the use of extension and unionisation. Data from Nordic countries (Sweden, Finland, Norway and Denmark) prove this: *"On the one hand, Denmark and Sweden, two of the three countries with the highest levels of union membership, have no extension instruments at all. On the other hand, in Finland, unionisation has clearly increased since the introduction of an administrative extension in the early 1970s. It is not clear in Norway as well that the increase in the use of extension has had a negative impact on the recruitment of new members.*" On the other hand, the study points out that *"other countries, such as Spain, the Netherlands and, in particular, France, seem at first sight to confirm the proposal that a high level of coverage by agreements secured by extension has a strong negative impact on unionisation. However, there are also a few other countries with low and similar rates of unionisation in which extension plays only a limited role."* In short, according to the authors, multiple combinations between unionisation rates and the existence of an extension mechanism are possible. The ability of trade unions to structure themselves and promote membership-based trade unionism is linked to a *"wide range of economic, social and political factors and cannot be reduced to a single cause such as the use of extensions"*. From this point of view, whether or not the extension of industry-wide agreements is used would be rather irrelevant.

65. Conversely, the extension of collective bargaining agreements would encourage companies to join employers' organisations. As the authors of the IRES study mentioned above indicate, *"The fact that employers know that they will in any case be covered by a CLA clearly seems to create a strong incentive for them to join an employers' organisation in order to exercise their possibility of expression (and perhaps to benefit from the organisation's other services)."*

2. PROTECTIVE EFFECTS FOR EMPLOYEES

66. Industry-wide bargaining is an essential tool for regulating labour relations, generally for the benefit of employees who have a job in the sector. Indeed, the extension of the agreement to all companies in the industry prevents any individual search for competitive advantages resulting from the application of social standards less favourable to employees than those negotiated collectively. For example, apart from the protections afforded by the minimum growth wage (SMIC) provided for in Article L. 3231-2 of the French Labour Code, the introduction of hierarchical minimum wages by industry makes it possible to limit the negative impact of competition between companies on wage levels and to rebalance the power relations between employer and employee, the latter being most often the "weak part" of the employment contract. Collective bargaining at the industry level also plays an important role in many other areas, such as job security, working time regulation, the quality of the working environment, access to training and social protection.

67. The extension mechanism thus provides stability to the collective bargaining system. Otherwise, competition from companies not applying the agreement could weaken those applying it to the point of exerting pressure that calls into question the very existence of the agreement. Thus, reducing the rate of coverage by agreements linked to a possible refusal to extend would risk weakening the social guarantees offered to employees in the industry by the promoters of the agreement.

68. As the importance of this mechanism has been recalled, refusals to extend it are intended to be considered, when it appears from the assessment made by the Minister of Labour, with the support of the group of experts when a referral is made to it, that the social progress envisaged by the agreement for employees is insufficient to offset the negative effects on the

economy, in particular on employment in the industry or the competitive intensity in the markets for goods and services concerned.

B. SEARCH FOR ECONOMIC EQUILIBRIUM

69. Several economic studies have been carried out in recent years to assess the economic effects of industry-wide agreements: from a macroeconomic (1) and from a microeconomic perspective (2).

1. FROM A MACROECONOMIC PERSPECTIVE

70. First, descriptive studies[42] based on samples from relatively large countries (e.g. OECD or EU members) present the different characteristics of collective bargaining systems in these countries: main stakeholders, existing extension procedures, necessary representativeness thresholds, possible opening clauses, etc.

71. Analysis of the macroeconomic impacts of these systems (on wages and unemployment in particular) makes it possible to identify their advantages and limitations (reduction of wage inequalities, protective function for employees, management of labour conflicts versus increase in labour costs and job destruction, problem of representativeness of extended agreements, reduction of competition).

72. These studies are also supplemented by empirical studies analysing the macroeconomic effects of collective bargaining and extensions through country-specific studies (Portugal, Germany, Netherlands, Spain, South Africa and Israel). They also make greater use of econometric methods to demonstrate the causal effect of industry-wide agreements and their extension on various variables of interest (wages, wage inequality, employment, impact on non-negotiating companies in particular).

73. Some of these studies confirm some of the beneficial effects of extensions. De Ridder and Euwals (2016)[43] show, for example, that in the Netherlands, extensions have increased the wages of workers covered by an agreement that has been extended. Similarly, Kristal and Cohen (2007)[44] show that extended agreements are a way to reduce wage inequality in Israel.

74. Others highlight the harmful effects of extended CLAs on the level of employment or on the total wage bill of a sector. Thus, Magruder (2011)[45] shows that the high level of unemployment and the low number of microbusinesses in South Africa could partly be due

[42]See for example OECD (2017), *OECD Employment Outlook 2017*, Chapter 4 - “Collective bargaining in a changing world of work”, OECD Publishing, Paris. Villanueva, Ernesto (2015), “Employment and wage effects of extending collective bargaining agreements: extending provisions of collective contracts to all workers in an industry or region may lead to employment losses”, *IZA World of Labor*. Visser, Jesse (2016), “What happened to collective bargaining during the great recession?” *IZA Journal of Labor Policy*, 5:9.

[43]De Ridder, Maarten & Rob Euwals (2016), “What are the wage effects of extending collective labor agreements? Evidence from the Netherlands”, *CPB Background document*, CPB Netherlands Bureau for Economic Policy Analysis.

[44]Kristal, Tali & Cohen, Yinon (2007), “Decentralization of collective agreements and rising wage inequality in Israel”, *Industrial Relations*: *A Journal of Economy and Society*, 46(3):613-635.

[45]Magruder, Jeremy (2012), “High unemployment yet few small firms: the role of centralised bargaining in South Africa”, *American Economic Journal*: *Applied Economics*, 4(3):138-166.

to extended CLAs. Martins (2014)[46] shows that in Portugal, total wages in a sector (taking into account wage increases linked to the agreement but also the decrease in recruitment and closure of companies) decrease as a result of extending CLAs. In the case of Portugal, Hijzen and Martins (2016)[47] add that the harmful effects of extended CLAs are concentrated in "non-affiliated" companies (i.e., those that did not participate in the negotiations of the initial agreement). They also stress the difficulty of establishing a relevant threshold of representativeness and underline the effects of the retroactivity of extensions which sometimes have lengthy administrative delays. Thus, the longer this administrative delay, the greater the negative effect on employment. Indeed, when the extended CLA modifies employees' wages, the retroactivity[48] of the extension requires companies since covered by the agreement to pay wage arrears to their employees. Similarly, Diez-Catalan and Villanueva (2014)[49] emphasize the rigidity induced by extensions, which prevent wage cuts in the event of an economic crisis, as was the case in Spain, and thus lead to job losses. Finally, Dustman et al. (2014)[50] explain Germany's competitiveness through its negotiating system, which favours company agreements over industry-wide agreements.

75. Some research (notably that of Hijzen et al. (2017)[51]) highlights the need to adapt the regulations to the context of each country and even each sector. In their article, they compare the Netherlands and Portugal, two countries with similar collective bargaining systems but very different labour market performance. According to them, this is explained, in particular, by the different characteristics of the two countries, such as their unionisation rates, the degree of cooperation between the parties to the negotiations or the quality of wage relations. In addition, and as Hijzen and Martins (2016) also point out, a balance must be struck between the positive effects of extensions (reduction of wage inequalities and inclusion of all companies in the industry) and their harmful effects (reduction in the number of jobs created in the industry, the effect being particularly pronounced for companies that did not participate in the negotiation of the agreement). Finally, Murtin, de Serres and Hijzen (2014)[52] point out that extensions should not be considered in isolation but should be included in a global economic system. In particular, the authors show that the effect of labour taxation on employment is amplified by the extent of extensions of CLAs. Industry-wide agreements, in particular by depriving companies of the possibility of negotiating company agreements that are less advantageous for employees, prevent companies from passing on an increase in labour taxes to employees. This inability to pass on the effects of a tax increase to wages leads to a decrease in recruitment in companies and, consequently, to an increase in the unemployment rate.

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[46]Martins, Pedro S. (2014), "30,000 minimum wages: the economic effects of collective bargaining extensions", *IZA discussion paper no. 8540*, Institute for the Study of Labor (IZA).

[47]Hijzen, Alexander & Pedro S. Martins (2016), "No Extension Without Representation? Evidence from a Natural Experiment in Collective Bargaining", I*ZA Discussion Paper no. 10204*, Institute of Labor Economics (IZA).

[48]In France, Article L. 2261-1 of the French Labour Code lays down a principle of non-retroactivity: "Agreements shall apply, unless otherwise stipulated, from the day following their filing with the competent department, under conditions determined by regulation."

[49]Diez-Catalán, Luis & Ernesto Villanueva (2014), "Contract Staggering and Unemployment during the Great Recession: Evidence from Spain", *Bank of Spain Working Paper No.1431*, Madrid.

[50]Dustman, Christian et al. (2014), "From Sick Man of Europe to Economic Superstar: Germany's Resurgent Economy", *Journal of Economic Perspectives*, 28(1):167-88.

[51]Hijzen, Alexander, Pedro S. Martins & Jante Parlevliet (2017), "Collective Bargaining Through the Magnifying Glass: A Comparison Between the Netherlands and Portugal", *Working Paper No. 618*, NOVA School of Business & Economics.

[52] Murtin, Fabrice, Alain de Serres & Alexander Hijzen (2014), "Unemployment and the coverage extension of collective wage agreements", *European Economic Review*, 71(C):52-66.

76. In general, although the effect of agreements on competition is not at the heart of these analyses, it is nevertheless sometimes mentioned, for example by Magruder (2011): "If large firms and unions agree to high standards with the goal of reducing competition from small firms, then this could limit the viability of small firm entreprise, restricting the options available to the unemployed"[53].

2. FROM A MICROECONOMIC PERSPECTIVE

77. The available microeconomic studies[54] focus on the effect of extensions on competition. In particular, they are concerned about how a collective wage agreement, subsequently extended to the whole industry, can reduce competition. These are theoretical models in which the established company or insider, i.e. already active in the relevant goods and services market, and its employer organisation, in cooperation with employee representative bodies, can increase the costs of competitors or potential new entrants. These models assume that labour is the only factor of production and that new entrants have labour productivity less than or equal to that of established companies. This assumption implies that new entrants are less efficient than established companies, which could for example materialise in markets in which economies of scale play an important role, i.e., those with a decreasing unit cost of production of a good or service as the quantities produced increase. Thus, any industry-wide agreement that increases labour costs (e.g., through clauses on wages or working conditions) has a greater negative effect on new entrants than on established companies.

78. In these analyses, the motivations of the negotiating parties are not identical: on the one hand, employers' organisations want to increase the minimum wage in order to increase competitors' costs; on the other hand, workers' unions are supposed to moderate this ambition (although supported by the workers themselves), in order to avoid the perverse effects of this increase on the total wage bill in the sector. The authors compare a situation with and without the possibility of extended CLAs and show that the possibility of extending CLAs leads, under certain conditions, to negotiating higher minimum wage levels than without extension and thus preventing the entry of new competitors.

79. These analyses sometimes use case studies to illustrate their theoretical reasoning. Heitzler and Wey (2010) use the Deutsche Post case, for example. Beginning in August 2007, negotiations took place in Germany between the postal employers' association, then dominated by Deutsche Post and its subsidiaries, and the trade unions in anticipation of the sector's opening to competition in January 2008. Negotiations included the introduction of a minimum wage for the entire sector. An agreement between the employers' association and the trade unions was reached in early September 2007 and this agreement was forwarded to the German administration for extension to the whole sector. The agreement imposed a minimum wage between 20% and 30% higher than the average wages paid by Deutsche Post's competitors and provided for an exit clause for its signatories in the event that the agreement was not extended to the entire sector. Despite protests from Deutsche Post's competitors, who stressed that the agreement was part of a strategy to impose excessive wage conditions on them in order to drive them out of the market, the German Ministry of Labour extended the agreement at the end of December 2007. According to the authors, the

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54 Haucap, Justus, Uwe Pauly & Christian Wey (2000), "Collective wage setting when wages are generally binding: an antitrust perspective", *Wissenschaftszentrum Berlin für Sozialforschung gGmbH (Ed.)*, Berlin. Heitzler, Sven & Christian Wey (2010), "Raising Rivals' Fixed (Labor) Costs: The Deutsche Post Case", *DIW Discussion Papers No. 1008*, Berlin.

extension of the agreement to the entire postal sector had a very significant effect on Deutsche Post's competitors. A German federal government press release cited by the authors indicates that between 2008 and 2009, 153 companies in the German postal sector filed for bankruptcy and approximately 19,000 jobs were lost.

80. Two major conclusions can be drawn from these different studies:

(i) the necessary competitive regulation of extended CLAs and the establishment of bodies to investigate the procedures;

(ii) the importance of centralising wage bargaining and the diversity of members of employers' organisations. Indeed, employers and employees of established companies may have identical expectations (e.g. increasing wages). By centralising negotiations - and thus involving trade unions and not employees - and diversifying the membership of employers' organisations (to include SMEs, for example), the negative effects of these agreements on competition are more limited: the authors of these studies believe that at least in theory, trade unions will moderate wage increases in order to maximise the wage bill in the sector; similarly, including SMEs in employers' organisations should have the effect of limiting anticompetitive behaviour by established companies.

81. In conclusion, while it seems widely accepted, academically, that extended CLAs can have negative effects on the level of employment, and therefore be harmful to people who would otherwise be likely to find employment in the industry ("potential employees"), it is also not excluded that they may also have an anticompetitive object or effect on the markets for goods and services produced by the industry, in particular by unfairly restricting the entry of new companies into the economic sector concerned ("potential entrants"), and thus harming consumer welfare. The *Autorité* shall examine, in the following part of the opinion, the conditions under which these risks to competition could materialise.

III. Assessment of risks to competition

82. The analysis of decision-making practice and case law shows that the examination of anticompetitive risks should take into account the actual economic conditions of the business sector in which the CLA is concluded (A). This analysis also makes it possible to establish, for theoretical purposes, a typology of the risks of distorting competition (B).

A. NEED TO TAKE INTO ACCOUNT REAL ECONOMIC CONDITIONS WHEN ASSESSING RISKS TO COMPETITION

83. According to settled case law of the European Union judge[55], the practical application of the competition rules to a particular case requires that account be taken of:

(i) the economic context in which the stakeholders concerned operate,

[55] Judgement of 12 December 1995, *Oude Luttikhuis*, C-399-93, paragraph 10.

(ii) the products and services covered by the decisions of these stakeholders, and

(iii) the structure and actual operating conditions of the relevant market.

84. The *Autorité* considers that the same logic should prevail with regard to the *ex-ante* examination of the anticompetitive risks potentially attached to the extension of a CLA. This methodology is the one it and its predecessor, the *Conseil de la concurrence*, have followed since the early 1990s, when it examined, in the context of its litigation or advisory activities, the compatibility of various CLAs with competition law.

85. Prior to the fundamental judgements *Albany* by the CJEU and the *Syndicat des exploitants des réseaux d'eau et d'assainissement* by the French Administrative Supreme Court, for example, the *Conseil de la concurrence* had ruled in litigation on the anticompetitive nature of a CLA in the audiovisual sector[56]. In its decision, it considered that CLAs cannot, by their nature, be excluded from the application of the competition rules (referring then to Articles 7 and 8 of the Order of 1 December 1986, which became Articles L. 420-1 and L. 420-2 of the French Code of Commercial Law). However, after comparing the potential restrictive effects of one of the clauses of the agreement in question with its social advantages, it had come to the conclusion that this clause was not incompatible with the competition rules. It had, *inter alia,* taken into account the fact that *"the profession of performing artists is affected by a permanent unemployment rate of around 80%, intermittent work and, as a result, very low retirement pensions"* and that the audiovisual producers' sector was characterised by *"the small size of companies and the low level of their equity capital"*. However, nothing in the file provided *"evidence of a common desire on the part of broadcasters to weaken producers"* by creating a transfer of costs on them.

86. In the context of its advisory activity, the *Conseil de la concurrence* also issued an Opinion on 21 January 1992[57]on the question of the application of the competition rules to a CLA designating a single provident institution[58]. In its view, the designation of such an institution reflected the choice of the social partners, who would have been able to express their opposition before adopting this clause and retained this option when revising it, so that their freedom of choice was preserved. In this specific context, the *Conseil* had considered that the designation clause was not contrary to competition law.

87. The analysis of the Court of Justice of the European Union (CJEU) in the *Pavlov* judgement[59] also illustrates the consideration of the real economic context in the presence of agreements resulting from collective bargaining. Even if it was not a collective bargaining agreement, the Court's reasoning is enlightening. The CJEU considered whether the decision, presented as a labour decision, by members of a liberal profession to set up a pension fund to manage a supplementary pension scheme could have as its object or effect the prevention, restriction or harm to competition within the common market. According to the CJEU, compulsory

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[56]Decision of the *Conseil de la concurrence* 90-D-21 of 26 June 1990 on agreements concluded between performers' unions, audiovisual communication organisations and certain producers of television programmes.
[57]Opinion of the *Conseil de la concurrence* 92-A-01 of 21 January 1992 on issues raised by the Syndicat français des assureurs-conseils concerning the designation by a CLA of a single provident institution.
[58]These clauses, which aim to designate an institution to provide supplementary health and/or provident cover for employees, were censored for the future by the Constitutional Council (*Conseil constitutionnel*) in a decision of 13 June 2013 and the Social Security Finance Law for 2014 thus amended the provisions of the Social Security Code (*Code de la sécurité sociale*), now allowing recommendation clauses. In any event, it should be ensured that the right to denounce or terminate a contract with a recommended institution is always possible and that the recommendation has been effectively preceded by a competitive tendering procedure for the institutions concerned.
[59]CJEU Judgement of 12 September 2000, *Pavlov*, C-180/98, EU:C:2000:428.

membership aimed at harmonising the costs and supplementary pension benefits of specialist doctors had the effect of restricting mutual competition between professionals in order to obtain cheaper insurance. However, it considered that the effect on free competition of this obligation was limited since *"the cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered"*. On the contrary, the clause had competitive advantages, allowing economies of scale in the management of contributions and pension payments. Consequently, it concluded that the decision of members of a liberal profession to set up a fund to manage supplementary pensions, in which membership was compulsory, did not appreciably restrict competition in the common market.

88. For its part, the *Conseil de la concurrence*, when asked for an opinion in the water and wastewater networks sector[60], also took into account the real operating conditions of the sector before taking a position. It found that the water production, treatment and distribution activity was dominated by an oligopoly consisting of three major groups, two of which together accounted for about 80% of the total turnover. It therefore considered that the market was *"extremely concentrated"*, an analysis that the French Administrative Supreme Court followed in its aforementioned decision of 30 April 2003.

89. More recently, in an opinion of 29 March 2013[61] on competition concerns caused by the designation of an institution in relation to supplementary health insurance in a CLA, the *Autorité* took into account, in its competitive assessment, like the CJEU and the *Conseil de la concurrence*, the context and functioning of the market. The benefits of pooling health costs, which could have justified exemption from the designation clauses of the competition rules, appeared to it to be too limited to compensate for the risks of harm to competition. Indeed, in the present case, the issue was the absence of competition between these institutions prior to designation. In its analysis, the *Autorité* relied on economic data showing that *"most of the clauses concluded to date entrust the management of industry-wide provident schemes to provident institutions to the detriment of mutual benefit societies and insurance companies"*[62]. To demonstrate the low value of mutualisation, it also took into account the low margins generated by supplementary insurance institutions, thus proving that the social partners in the industry were no better placed than the employer individually to negotiate attractive contribution amounts.

90. These examples show the need to take into account the state of effective competition and to analyse in depth the functioning of the sector before considering that a request for the extension of an industry agreement carries too many anticompetitive risks for the Minister of Labour to accept it.

91. **A "case-by-case" analysis is therefore necessary, both to anticipate the negative impact of the extension on the level of employment in the industry or on the intensity of competition on the markets for the goods and services in question and to assess the proportionality between the social progress made possible by the agreement and these two types of harm to the proper functioning of the economy.**

[60]Opinion 00-A-30 of 4 December 2002 of the *Conseil de la concurrence* on a request for an opinion from the Fédération nationale des collectivités concédantes et régies on the CLA for water and sanitation utilities.

[61]*Autorité de la concurrence* Opinion 13-A-11 of 29 March 2013 on the effects on competition of industry-wide collective supplementary pension coverage for employees.

[62]Opinion 13-A-11 of 29 March 2013 on the effects on competition of extending supplementary collective benefit coverage for employees, paragraph 95: "[...] In 2012, provident institutions accounted for 90% of the designations of the 224 existing industry-wide schemes, i.e., 337 designations granted out of the 377 designations recorded that year."

B. A TYPOLOGY OF RISKS TO COMPETITION

92. Before turning to the case law of the French Administrative Supreme Court assessing extension orders in the light of the infringement of the general principle of free competition (2), decision-making practices and case law of the European Union and national courts concerning the strict application of the law on anticompetitive practices to extension decisions will be reviewed (1).

1. THE APPLICATION OF THE LAW OF ANTICOMPETITIVE PRACTICES TO DECISIONS TO EXTEND AGREEMENTS CONCLUDED IN THE CONTEXT OF COLLECTIVE BARGAINING

a) Antitrust law

93. First, it will be recalled that the CJEU has consistently held since its Judgement of 21 September 1999, *Albany*, C-67/96, EU:C:1999:430 that agreements concluded in the context of collective bargaining between the social partners intended to improve employment and working conditions must, by their nature and purpose, be regarded as not falling within the scope of Article 101(1) of the Treaty. While the Court acknowledged that certain restrictive effects of competition could be inherent in the conclusion of CLAs between organisations representing employers and employees, it also stressed that *"the social policy objectives pursued by such agreements would be seriously compromised if the social partners were subject to Article 85(1)* [now Article 101(1) of the TFEU]"[63].

94. If one of the conditions is lacking (1° agreements concluded in the context of collective bargaining between the social partners; 2° whose purpose is to improve working conditions), the agreement falls within the scope of the prohibition of Article 101(1) of the Treaty or Article L. 420-1 of the French Code of Commercial Law.

95. As regards the first condition, the CJEU ruled, in its Judgement of 12 September 2000, *Pavel Pavlov et al.*, C-180/98 to C-184/98, that the exemption cannot be extended to agreements concluded outside the framework of collective bargaining, an organisation of signatory doctors being an association of firms and not a representative trade union organisation.

96. Similarly, a CLA between employers and self-employed workers, who are not employees, does not avoid the application of competition law (CJEU, Judgement of 4 December 2014, *FNV Kunsten*, C-413/13, EU:C:2014:2411).

97. As regards the second condition, the exemption does not apply to provisions of CLAs which are not relevant to the improvement of employment and working conditions, i.e. which concern matters which do not fall within the scope of collective bargaining or which are intended to directly affect relations between employers and third parties, such as customers, suppliers, competing employers or consumers, by adversely affecting competition[64].

98. Thus, in a decision of 29 January 1991 (91-D-04), the *Conseil de la concurrence* declared anticompetitive clauses in agreements concluded between unions of mutual benefit societies and trade unions which prohibited mutual benefit societies affiliated to these unions from negotiating agreements on an individual basis, such clauses having as their object and effect

[63] CJEU, 21 September 2000, C-222/98, EU:C:2000:475.

[64] Opinion of Advocate General M.F.G. Jacobs, submitted on 28 January 1999, Cases C-67/9, *Albany* and Joined Cases C-115/97, C-116/97, C-117/97, *Brentjens* and C-219/97, *Maatschappij Drijvende Bokken*, paragraph 192.

the protection of each mutual benefit society from possible competition from a society of the same union (non-competition clause between mutual benefit societies).

99. Secondly, it is settled case-law that, while Article 101 TFEU itself concerns only the conduct of firms and does not refer to legislative or regulatory measures emanating from the Member States, it requires Member States not to take or maintain in force measures of a legislative or regulatory nature likely to eliminate the effective effect of the competition rules applicable to firms, in conjunction with Article 4(3) of the Treaty on European Union. This is the case where a Member State either imposes or promotes the conclusion of agreements contrary to Article 101 TFEU or strengthens the effects of such agreements, or withdraws from its own rules its state character by delegating to private operators the responsibility for taking intervention decisions in economic matters (see, to this effect, *Commission v Italy, C-35/96,* EU:C:1998:303, paragraphs 53 and 54; *Corsica Ferries France*, C-266/96, EU:C:1998:306, paragraphs 35, 36 and 49, and *Albany*, cited above, paragraph 65).

100. In this respect, it should be noted that, since an agreement does not fall under Article 101(1) TFEU, public authorities are free to make it compulsory for persons who are not formally bound by it.

101. **As a result, the administrative decision to extend a CLA benefiting from the exemption cannot be challenged on the basis of EU or national competition law.**

102. **On the contrary, the decision to extend agreements excluded from the scope of the exemption and containing an anticompetitive clause by object or effect will be unlawful.**

b) Abuse of a dominant position

103. Some CLAs may grant exclusive rights to a company. For example, they may provide for compulsory membership of a supplementary health reimbursement scheme, qualified as an enterprise, by conferring on it the exclusive right to collect and manage contributions paid by employers and employees in the sector concerned.

104. The decision to extend this type of agreement will only be lawful if the granting of exclusive rights is itself lawful, i.e., if it does not lead the company thus designated to abuse its dominant position within the meaning of Article 102 TFEU or Article L. 420-2 of the French Code of Commercial Law.

105. It is settled case-law that the mere fact of creating a dominant position by granting exclusive rights within the meaning of Article 106(1) TFEU is not, as such, incompatible with Article 102 TFEU. A Member State infringes the prohibitions laid down by these two provisions only where the company in question is led, by the mere exercise of the exclusive rights conferred on it, to exploit its dominant position in an abusive way or where those rights are liable to create a situation in which that company is led to commit such abuses (see the judgements in *Höfner and Elser*, paragraph 29; *Albany*, paragraph 93; *Brentjens'*, paragraph 93; and *Drijvende Bokken*, paragraph 83).

106. Such an abusive practice contrary to Article 106(1) TFEU exists, in particular, where a Member State grants an company an exclusive right to carry out certain activities and creates a situation in which that company is manifestly unable to satisfy market demand for such activities (see, to this end, the above-mentioned judgements in *Höfner and Elser*, paragraph 31, and *Pavlov et al.* paragraph 127).

107. The abuse of a dominant position was also analysed in the *Pavlov* case by the CJEU, which ruled that the fund, which had been granted an exclusive right to manage part of the

compulsory supplementary pension scheme, held a dominant position in a substantial part of the common market. However, it considered that it was not proven that the fund could be induced, by the mere exercise of an exclusive right conferred by the public authorities, to exploit its position in an abusive way.

108. The French Administrative Supreme Court, which reviewed the legality of an extension order in the case of the *Syndicat national des entreprises d'esthétique et de coiffure à domicile*, examined whether the extension could have the effect of placing "traditional hairdressing" companies, competitors of home hairdressing companies, in a situation of abuse of a dominant position, contrary to Article 8 of the Ordinance of 1 December 1986 (now Article L. 420-2 of the French Code of Commercial Law). Like the CJEU, the High Court held that it was not proven that these companies could constitute a "group of companies". Thus, the dispute was not serious[65].

109. Thus, abuse of a dominant position remains conceivable in industries where one or more companies hold, alone or jointly, such a position, and there may be an attempt to exploit collective bargaining at the industry level. Without giving rise to any litigation, the Deutsche Post case in Germany is a perfect example of a monopoly company which, according to the authors of the study[66], tried to lay down labour rules even before its competitors entered the market in order to dissuade such entry. This practice could be likened to an abuse of a dominant position, made possible by the use of collective bargaining. The analysis of the competitive risk associated with the extension may lend itself to the search for the assumption that this mechanism would create or increase a dominant position, for example, by artificially increasing the costs of potential entrants or companies on the competitive fringe to an unsustainable level.

2. Evaluation of extension decisions in the light of the principle of free competition by the French Administrative Supreme Court

110. In addition to the cases mentioned above where the rules on anticompetitive practices are invoked, the French Administrative Supreme Court has also highlighted a general principle of free competition, which is part of the general principles of law and must be reconciled with them.

111. Extension orders are subject to this general principle, which must be reconciled with the social objectives pursued by the rules concerned.

112. The articulation of two objectives - preservation of labour policy and preservation of competition policy - is particularly difficult, since the interests involved are sometimes antagonistic. In his conclusions in the above-mentioned 2003 case[67], the Government Commissioner also points out that the transversal nature of the competition rules does not mean that *"they are exclusively applicable and that they must lead to the exclusion of particular legislation or to the denial of the objectives pursued by such legislation; but this implies that they must be reconciled and combined with these particular objectives."* In other words, it is an issue of seeking a balance between the social objectives of a CLA, requiring

[65]French Administrative Supreme Court, 16 January 2002, *Syndicat national des entreprises d'esthétique et de coiffure à domicile*, no. 223859.
[66]Heitzler, Sven & Christian Wey (2010), "Raising Rivals' Fixed (Labor) Costs: The Deutsche Post Case", *DIW Discussion Papers No. 1008*, Berlin.
[67]Conclusions of Government Commissioner Jacques-Henri Stahl on the judgement of the French Administrative Supreme Court (see references of the judgement, note 32).

the establishment of rules or mechanisms to protect employees, and the possible competitive impact on the markets concerned. In its 2003 decision[68], the French Administrative Supreme Court ruled that *"in the implementation of the powers that the Minister of Labour has under the above-mentioned provisions of Article L. 133-8 of the French Labour Code, it is its responsibility to ensure that the extension of a CLA does not have the effect of preventing, restricting or distorting competition in a market, in particular by limiting access to that market or the free exercise of competition by other firms; (...) this is particularly the case in sectors where firms are candidates for public services or public procurement; (...) in this respect, it is incumbent on the Minister to reconcile, under the supervision of the court judging abuses of power, labour objectives likely to justify making the rules defined by the signatories of a CLA mandatory for all employees and employers in the sector and the requirements relating to the preservation of free competition in the sector in question."*

113. It thus annulled an order extending a CLA in the water and sanitation networks sector on the grounds that this agreement contained a clause providing, in the event of market loss, for the new holder to take over the employment contracts of employees assigned to customers for at least six months

114. The main complaint against this clause was that such an obligation to take over placed an additional burden on the new concession holder which would make it difficult, if not impossible, for it and, more generally, for companies not belonging to the signatory organisation to obtain new contracts. While in the case of a business acquisition, the costs incurred by the application of Article L. 122-12 of the French Labour Code (now Article L. 1224-1 of the same Code) may be anticipated, and consequently set aside as a provision by the buyer of the business, the anticipation of specific costs by a bidder may degrade the economic equilibrium of its bid and, consequently, dissuade the bidder from applying.

115. Without qualifying the CLA providing a clause providing for keeping on employees as an "anticompetitive agreement", the French Administrative Supreme Court held that maintaining this clause for new holders of a contract or public service delegation in the sector concerned, including those who did not sign the agreement, was an *"excessive harm to free competition"* due to:

    (i) competitors who are deterred from applying;

    (ii) increased staff costs resulting from the takeover obligation;

    (iii) Increased harm to competition among outgoing concessionaires and bidders.

116. On the other hand, in a 2008 decision, the French Administrative Supreme Court validated an order extending CLAs on the organisation and reduction of working time in the context of port towage activity[69]. While the introduction of a new working system known as "discontinuous port service" (alternating working hours and rest periods for sailors) subjected small and newly created companies to work organisation constraints leading to additional costs that could increase the price of their services, it ultimately concluded that the content of the agreement did not disproportionately affect free competition.

117. **In the light of the above, it seems possible that employers' organisations which are signatories to CLAs, representing the economic stakeholders of a professional industry, may have to negotiate clauses which, even if they improve employees' working conditions (and therefore obtain the agreement of the trade unions), may also have the**

[68] Ibid.

[69] French Administrative Supreme Court, 21 May 2008, *Société nouvelle de remorquage du Havre (SNRH) and Société de remorquage maritime de Rouen (SORMAR),* 291115.

purpose or effect of disproportionately damaging competition by inducing additional costs which hinder the entry or retention on the market of certain stakeholders, in particular microbusinesses and small and medium-sized enterprises or newly created companies.

118. **The economic context in which the industry-wide agreement is concluded, as well as the structure and functioning of the market in which the economic stakeholders operate, may make it possible to assess more precisely the anticompetitive risk of an extension, in particular with regard to economic stakeholders who are not signatories to a CLA.**

IV. Recommendations

119. In order to enable the group of experts to carry out its tasks as effectively as possible, the *Autorité* first focused on making an inventory of the criteria for identifying possible problematic clauses in industry-wide agreements (A), then on recommending the development of impact studies to assess the economic cost of an extension (B) and the adaptation of the corporate statistics system (C).

A. IDENTIFICATION OF POSSIBLE PROBLEMATIC CLAUSES IN CLAS

120. On the basis of the above findings, the *Autorité* considers that the matters covered by the CLA (1), the economic sector to which it is intended to apply (2) and the conditions of its negotiation (3) are all elements to be analysed in detail in order to identify clauses that are "at risk" in terms of competition.

1. MATTERS COVERED BY THE AGREEMENT

121. The extent of the changes or contributions of a CLA is the first criterion for assessing the appropriateness of its detailed analysis. More specifically, the risk to competition will not be the same depending on whether the agreement:

(i) is limited to implementing rights arising directly from the requirements of a law relating to labour relations between employers and employees or, in the case of an amendment, to updating a previous agreement;

(ii) goes beyond improving working conditions and affects the relationship between companies in the industry and their customers, suppliers and competitors.

122. For example, in the case of the *Sociétés de remorquage du Havre et de Rouen* brought before the French Administrative Supreme Court, the agreement introduced a completely new system for organising working time (in this case, "continuous" or "discontinuous" service), which imposed heavy additional constraints, including obligations to be on call. For French ports, commercial towing companies, concomitant with their competitive activity, perform a public towing service, which may be imposed by the port master's office and requires the availability of tugs during given periods. In addition, the introduction of a working time

organisation rather than another (e.g., a “continuous” rather than “discontinuous” mode within a port, as was the case for example for the port of Le Havre) could limit access to the port towage market to a new entrant that has organised its activity in a discontinuous mode. In these situations, a more detailed analysis of the agreement appears necessary.

123. The clauses of CLAs that are potentially “at risk” are not necessarily linked to salary conditions but may cover all matters negotiated within the industry. Case law and decision-making practice show that anticompetitive risks can result from a wide range of clauses relating to:

- the organisation of working time (distribution, organisation of working hours, working time, recovery time), when this entails an additional organisational cost for certain stakeholders and new entrants;
- the level of minimum wages;
- the continuation of employment contracts in the event of a transfer of an enterprise pursuant to Article L. 1224-1 (formerly Article L. 122-12) of the French Labour Code[70];
- the recommendation of a provident institution, the choice of which must result from a competitive bidding process prior to signing of an agreement;
- training (obligation to obtain a diploma specific to the exercise of a profession);
- limitation of employee mobility (e.g. non-competition clause negotiated as part of a CLA);
- in the event of a change in the contractor of a public or private contract, clauses for maintaining employees in proportion to the turnover lost by the former contractor.

124. **In assessing competitive risk, it is thus recommended to ensure that all the matters dealt with in the agreement are examined, each of which may have a negative impact on competition as soon as it induces an additional cost that would appear disproportionate in relation to the social objectives promoted by the agreement.**

2. THE BUSINESS SECTOR TO WHICH THE AGREEMENT IS INTENDED TO APPLY

125. The study of the employer coverage rate makes it possible to identify the sectors of activity where the rate of membership of companies in the employers' organisations that have signed the agreement is low and where the impact on competition could therefore be the highest. According to the DARES study[71], the three main sectors “at risk” from this point of view are those where activity is fragmented: the “wholesale and import-export” sector, the “legal and accounting professions” and the “non-food retail trade”[72].

126. In addition, the economic context of the sector of the agreement and the actual structure and operating conditions of the market are also relevant parameters for identifying the CLAs that potentially pose the most “at risk”, which would merit further analysis by the group of experts in the context of the extension procedure.

[70] Article L. 1224-1 of the French Labour Code: “When there is a change in the employer's legal situation, in particular by succession, sale, merger, transformation of the fund, incorporation of the company, all employment contracts in force on the date of the change remain between the new employer and the company's employees.”
[71] DARES Analyses study, November 2018, no. 053, “Les extensions des accords de branche : quels sont les entreprises et les salariés concernés?”
[72] Ibid. See Graph 1, “Employer coverage according to the Cris nomenclature”.

127. The following questions could thus serve as a guideline for evaluators in the French Ministry of Labour to assess whether the risks to competition associated with the extension of an agreement justify referral to the group of experts. In practice, these criteria can be used flexibly in three possible ways:

- "Alert": an indicator, if positive, may, on its own, be sufficient to justify a thorough analysis prior to any extension;

- "Multiple indicator cluster": several indicators, if combined concurrently, may together constitute a multiple indicator cluster and thus call for a thorough analysis of the possible effects of the agreement before its extension;

- "The call for vigilance": one or more indicators may lead the auditor to point out to the social partners that certain clauses may pose a problem, without necessarily calling for an in-depth analysis.

128. **Here are the indicators developed by the *Autorité* in the form of a questionnaire:**

What is the market structure (concentrated or, conversely, rather fragmented)?

129. ***If the market is fragmented, i.e., if it is composed of many competing companies, each with a small market share,*** then further analysis may not be necessary. However, if the situation is associated with a low employer coverage rate (indicating that a majority of companies in the industry are not members of a signatory employer organisation and benefit from the advantages of agreements via the extension), a detailed analysis could be useful (for details on the employer coverage rate, see below).

130. ***If the market is concentrated (presence of a monopoly[73], duopoly[74] or oligopoly with a competitive fringe[75]):*** this situation alone may alert the auditor and lead him to analyse more closely certain CLAs concluded in an industry where certain markets are so structured. The risk of collective bargaining becoming instrumentalised - or of the clauses of an agreement having a restrictive effect on competition for certain companies - may be higher in the presence of a small number of companies controlling a large part of the market and a "competitive fringe" made up of microbusinesses and SMEs, each holding a portion of the remaining part of the market share. Their more limited resources may hinder these microbusinesses and SMEs not only from taking part in collective bargaining, but also, and above all, from implementing the agreements negotiated within their industry at the risk of being forced to leave the market. In addition, in the face of such a market structure, a low rate of signature of agreements by companies from the competitive fringe may be a sufficient indicator to carry out an in-depth analysis.

[73]Glossary of terms used in EU competition policy, Antitrust and control of concentrations, European Commission, July 2002: "Market situation with a single supplier (monopolist) who – due to the absence of competition – holds an extreme form of market power. It is tantamount to the existence of a dominant position. Under monopoly, output is normally lower and price higher than under competitive conditions [...]"

[74]Ibid. "In competition cases the term is often also used to refer for situations where two *main* sellers dominate the competitive structure and a fringe of smaller sellers adapt to their behaviour."

[75]Ibid. "A market structure with few sellers, who realise their interdependence in taking strategic decisions, for instance on price, output and quality. In an oligopoly, each firm is aware that its market behaviour will distinctly affect the other sellers and their market behaviour. As a result, each firm will take the possible reactions from the other players expressly into account. In competition cases, the term is often also used for situations where a few big sellers jointly dominate the competitive structure and a fringe of smaller sellers adapt to their behaviour. The big sellers are then referred to as the oligopolists."

131. ***If one or more companies in the industry have already been convicted of anticompetitive practices:*** this situation alone should also be sufficient to justify a thorough analysis of the CLAs negotiated in the industry.

In a monopoly or oligopoly with a competitive fringe, do one or more of the firms represented by the negotiating employers' organisations hold, alone or jointly, a dominant position[76] in the relevant market?

132. While such a position is not in itself contrary to the rules of competition, the risk of abuse is higher in these circumstances, as some clauses of the agreement may be favourable to maintaining this position to the detriment of potential entrants (see example of Deutsche Post described above).

133. ***If one or more enterprises hold a dominant position:*** this alone should be sufficient to check whether the extension does not present the risk of increasing this position, and thus preventing or limiting access to the market of current or potential competitors.

Is the market characterised by the presence of high regulatory barriers to entry?

134. ***If the market is characterised by such barriers:*** Authorities can set up regulatory barriers, for example to protect national producers (customs duties, quotas) or for safety reasons (market authorisation) or to prevent occupational risks (obtaining a specific professional title). If there is no precedent in this specific area, it is possible to reason by analogy with similar risks identified in regulatory texts. With regard to vocational training and the improvement of occupational risk prevention, the *Autorité* has, for example, had the opportunity to identify a barrier to unjustified entry in a draft decree amending Article R. 4461-27 of the French Labour Code to make the professional title of "public works diver" mandatory for workers working in hyperbaric environments in the context of construction, maintenance and repair activities[77]. Such situations should call for the auditor's vigilance on certain CLAs negotiated in the sectors affected by these regulatory barriers. In addition, combined with one or more other indicators, this situation may constitute an alert requiring further analysis of certain CLAs.

Have there been any recent changes in the market structure (or is there likely to be any in the near future)?

135. In the situation of a changing market, the following market structures require the auditor's vigilance.

136. ***If the market is being opened up to competition or privatised:*** there is a higher risk that the incumbents of the market shares will exploit CLAs, for example, by negotiating labour rules

[76]Glossary of terms used in EU competition policy: "A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding such market power would have the ability to set prices above the competitive level, to sell products of an inferior quality or to reduce its rate of innovation below the level that would exist in a competitive market."

[77]Opinion 18-A-07 of 24 May 2018 on a draft decree amending the provisions on the protection of workers against the risks due to electromagnetic fields and those on the protection of workers working in hyperbaric environments.

that new companies will not be able to assume in order to reduce the intensity of competition that new entrants are likely to exercise.

137. ***If the incumbent has subsidiaries with economic activities outside the scope of its exclusive rights:*** operators granted exclusive or special rights are likely to diversify their activities in other segments of the competitive market. This situation may be conducive to the implementation of anticompetitive practices, as the *Autorité* could see in its advisory practice[78]. By analogy, it may be envisaged that restrictions of competition may be exercised through collective bargaining, and without this being intentional.

138. ***If the incumbent operator with exclusive rights is vertically or horizontally integrated in the related upstream or downstream markets :*** in this case, the *Autorité* has had the opportunity on several occasions to recommend that competitors should be able to access related markets, either upstream or downstream. By analogy, in such circumstances, it is necessary to ensure that there are no restrictions of competition resulting from collective bargaining.

Does the capital[79] intensity of companies have asymmetries in the market?

139. In a market with wide disparities in capital intensity, investments made by firms that mobilise more capital than labour in their production function proportionally than their competitors can be significant, so that labour productivity is higher and firms can afford to pay higher wages.

140. One strategy may be for these companies to accept wage inflation to block the arrival of new entrants, whose production function provides a different combination of capital and labour factors and who, if they wish to be competitive, will have to support both heavy capital investment and high wage levels.

141. A strong asymmetry of capital intensity between the operators of a sector thus calls for the vigilance of the auditor. Combined with other indicators, such as those related to the subject matter of the agreement, this situation warrants further analysis. This may be the case, for example, if the setting of abnormally high minimum wages or the modification of classification grids leading to abnormal minimum wages are found for certain companies. Such a wage increase, combined with high tangible or intangible investments, may be difficult to sustain for a newly created company or a new entrant which, unless it uses a radically different production technique, would incur higher production costs than incumbents, who have already accumulated some experience in the market.

What is the degree of openness to European or international trade?

[78]In network industries: Opinion 97-A-07 of 27 May 1997 on a request for an opinion from the Association française des opérateurs privés de télécommunications on the issues raised under competition law by the coexistence of telecommunications activities carried on in a competitive situation and under monopoly within the same legal and commercial structure in France Télécom; Opinion 98-A-05 of 28 April 1998 on a request for an opinion on the principles to be respected or the provisions to be laid down to ensure the competitive functioning of the electricity market within the framework laid down by European Directive 96/92/EC, p. 16; Opinion 94-A-15 of 10 May 1994 on a request for an opinion on the problems raised by the diversification of EDF's and GDF's activities with regard to competition.

[79]Capital intensity is the ratio of gross tangible assets to full-time equivalent employees.

142. In an integrated market among the Member States of the European Union or highly open to international trade, companies are *de facto* subject to greater competitive pressure, with domestic production competing with external production.

143. ***If the market is open to this type of trade flow:*** such a context seems *prima facie* less favourable to the negotiation of clauses that would impose constraints that are too heavy for companies in France, or likely to hinder their development or limit their competitiveness compared to their competitors based outside France. More concretely, since the signatory companies must themselves apply the rules they have negotiated, which will however not apply to their competitors located elsewhere in or outside the European Union, it is not in their interest to pursue a strategy such as that described in the previous point.

144. ***If the market is protected from competition from foreign companies:*** conversely, the same risk seems higher in principle. It then requires the auditor's vigilance, or even if combined with other indicators, may require further analysis.

Is the market undergoing rapid technological change?

145. ***If the market is faced with the development of new business models, the analysis will be different depending on whether the innovation is driven by companies located within or outside the industry:*** the probability that a collectively negotiated agreement will enable the incumbent stakeholders to prevent the entry of innovative competitors varies depending on whether or not they are expected to be subject to the negotiated agreement once extended.

146. If innovators are subject to other agreement rules, further in-depth analysis does not seem to be a priority. Otherwise, the auditor must be vigilant.

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147. In conclusion, for these indicators relating to the business sector to which the agreement is intended to apply, it is important to distinguish between markets (or sectors of activity; this will also depend on the scope of analysis chosen) in which economic stakeholders are in a relatively symmetrical position and those in which there is an asymmetry between the stakeholders. In the first case, the problem will be to ensure that the extended CLA does not excessively reduce the intensity of competition in general; in the second, that it does not lead to a reduction in competitive pressure to the benefit of a single category of stakeholders, the most powerful, to the detriment of all others, particularly microbusinesses and SMEs.

3. CONDITIONS FOR NEGOTIATING THE AGREEMENT: EMPLOYER COVERAGE RATE AND INDUSTRY STRUCTURE

148. Studying the employer coverage rate[80] (i.e., the proportion of member companies and employees employed in these companies) makes it possible to assess the impact of extensions on companies and employees. It is useful to specify that the use of such a rate, when combined with other indicators, may, depending on the case, alert or constitute a multiple indicator cluster requiring more detailed verification of the risks to competition that may result from the extended CLA, or simply call for the auditor's vigilance.

[80]See DARES study, references note 34.

149. In support of these data, a first observation can be made: the lower the employer coverage rate in the industry, the less representative the companies that participated in the negotiations and signed the agreement, and the more companies that are likely to be affected by the extension are on the market (it should be borne in mind that in 95% of cases - according to the General Directorate of Labour - the implementation of a negotiated agreement is dependent on its extension).

150. **Thus, the lower the employer's coverage rate, the greater the probability that an agreement will have a negative impact on competition.** On average, only a quarter of companies, which employ two thirds of employees, are members of an employers' organisation and therefore benefit from the agreements without resorting to the extension mechanism. However, in some cases, this analysis deserves to be tempered in the presence of a negotiated agreement, as in the Deutsche Post case mentioned above, by a monopoly facing a forthcoming liberalisation of its market (opening to competition). In this case, an employer coverage rate of 100% does not remove the competition concerns associated with extending the agreement to potential entrants.

151. **The risk to competition associated with the extension may be higher if there is an agreement signed by an employers' organisation covering a small number of companies and employees.** As an indication, an employer coverage rate for "companies" of less than 10% could, combined with other indicators, prompt an in-depth analysis.

152. In addition, the majority of member companies are large companies. Thus, there are mainly microbusinesses and SMEs among the non-signatory companies likely to be penalised by extended agreements they didn't negotiate. However, the extension potentially increases the anticompetitive risk for these companies if certain clauses have the effect of inducing additional costs that they will find it difficult to bear.

153. Thus, the structuring of the industry can be a relevant indicator, combined with others, to guide the search for CLAs that potentially pose a risk to competition. However, taken in isolation, it is not sufficient to carry out a thorough analysis of the CLAs likely to be affected, but should be combined with others. The following criteria may be taken into account in particular:

(i) the size of the companies in the industry: the smaller the companies, the less they are represented in the negotiation of the agreement. The culture of social dialogue is stronger in companies with a significant number of employees. Often, due to a lack of sufficient human and financial resources, microbusinesses and SMEs are unable to actively negotiate within the industry.

(ii) the size of the companies that sign the industry-wide agreements: analysis of the rate of signing the agreements by microbusinesses and SMEs may be relevant. A low signature rate in sectors with many microbusinesses and SMEs may be a sign that their interests have not been sufficiently taken into account in the negotiations.

(iii) the types of companies that make up the sector: some sectors, such as sports, include both companies representing professionals and those representing amateurs. These companies may rightly have divergent interests and the agreements concluded may, in this case, be prejudicial to one of the parties.

B. THE *AUTORITÉ*'S RECOMMENDATIONS CONCERNING IMPACT STUDIES TO ASSESS THE ECONOMIC COST OF AN EXTENSION

154. During its investigation, the *Autorité* noted the lack of analyses aimed at quantifying or, at the very least, assessing *ex ante,* i.e., before the extension, the economic cost of the extended application of the CLA to non-signatory firms.

155. This contrasts with a trend towards the generalisation of this type of study, particularly in the context of the drafting of normative texts, which is also promoted by the government, as evidenced by a circular from the Prime Minister of 7 July 2001[81] on the quality of law: “The quality of the rule of law is at stake, which is crucial to the attractiveness of our legal system and our economic competitiveness [...]. Each new draft standard must therefore be subject to as detailed an examination of necessity and proportionality as possible, having regard to its foreseeable effects and the requirements of stability of the legal situations.”

156. At the legislative level, the Organic Law of 15 April 2009[82] on the presentation of government bills submitted to the National Assembly or the Senate, adopted pursuant to the third paragraph of Article 39 of the Constitution, requires the performance of such impact studies.

157. A similar mechanism has also been provided for draft regulations[83] applicable to local authorities that have “a significant impact on businesses and the public”[84]. Law 2013-921 of 17 October 2013 established a National Standards Evaluation Committee (CNEN) applicable to local authorities and their public establishments, which is responsible for evaluating the technical and financial impacts of the “flow” of new standards, as well as the “stock” of regulatory standards in force. This committee makes proposals to simplify and streamline the standards applicable to local and regional authorities. As the CNEN pointed out in 2017[85],“[...] the 355 draft bills submitted for an opinion to the CNEN in 2017 generated a gross cost to local and regional authorities of more than €1 billion for 2018 (compared with €6.9 billion for 2017 out of the 544 bills examined in 2016)”. A similar approach requires the preparation of impact studies in other areas of standardisation, for example with regard to the restructuring of state services or public establishments that may have significant consequences on the economic equilibrium of an employment area[86].

158. To help them identify possible competition concerns when preparing these impact assessments, the *Autorité* for its part has produced a practical guide to assessing the impact on competition of draft legislation for those who prepare it[87].

159. The normative value of CLAs extended by order of the Minister of Labour could justify a similar approach in the context of collective bargaining. The aim would therefore be to anticipate as precisely as possible, in an annex to the request for extension of the agreement (or some of its clauses), the possible consequences of the agreement on the cost structure of companies in order to ensure that there are no risks for employment policy and the competitive functioning of markets. The assessment would be of twofold interest: not only could the negotiators of an agreement improve it as the negotiations progress, but the

[81] *JORF* of 8 July 2011, text 2.
[82] Organic Law 2009-403 of 15 April 2009 on the application of Articles 34-1, 39 and 44 of the Constitution.
[83] Decree 2015-510 of 7 May 2015 on the Charter of Devolution; Circular of 12 October 2015, 5817.
[84] Circular of 12 October 2015, op. cit.
[85] CNEM 2017 Public Activity Report.
[86] Article 128 of Law 2008-776 of 4 August 2008 on the Modernisation of the Economy.
[87] This guide is available online on the *Autorité*'s website (www.autoritedelaconcurrence.fr), under the heading “Publications”.

services of the Ministry of Labour, if necessary with support from the group of experts if a referral has been made to it, would also have all the information necessary for a legal review, of which the principle of competition is an integral part.

C. ADAPTING THE STATISTICS SYSTEM TO FACILITATE ANALYSING THE EFFECTS ON COMPETITION OF INDUSTRY-WIDE AGREEMENTS

160. The use of the indicators presented above may require adapting the availability of business statistics. Most of the usual indicators produced by official business statistics are based on the Nomenclature des Activités Française (NAF). This publication makes it possible to reconstruct results by industry, which does not necessarily cover the scope of the industries. Consequently, the business sectors within the meaning of the NAF nomenclature or the business sectors of an industry are not identical and may then encompass several relevant markets, a key concept used in competitive analysis.

161. Indeed, as the European Commission indicates[88]: *"The definition of a relevant market is a tool to identify and define the boundaries of competition between firms [...]. Market definition makes it possible, inter alia, to calculate the respective market shares of the undertakings active on the relevant market, which convey meaningful information regarding market power for the purposes of assessing dominance [....]." In the same vein, the OECD specifies that: "The starting point in any type of competition analysis is the definition of the "relevant" market. There are two fundamental dimensions of market definition: (i) the product market, that is, which products to group together; and (ii) the geographic market, that is, which geographic areas to group together;"*[89]

162. Thus, the exact correspondence between industries and relevant markets for products (or services) within the meaning of competition law is, in the light of the available data, difficult to establish. This point, which is essential for determining market shares and identifying possible barriers to entry, may thus require complex and time-consuming customised statistical work.

163. An overall reflection on these issues by public statisticians may therefore be necessary in order to facilitate the analysis of the effects on competition of extended CLAs which it is the responsibility of the Minister of Labour to carry out as part of a preliminary legal review, if necessary with the support of the group of experts when a referral has been made to it.

CONCLUSION

164. The constitutional amendment of July 2008 laid the foundations, in Article 39 of the Constitution, for an obligation to assess government bills in advance, the content of which was specified by the Organic Law of 15 April 2009. This system now places France among the countries where the practice of impact assessment on draft normative texts is the most systematic. It contributes to strengthening the quality of the law and measuring the cost of regulation, particularly for businesses.

165. The analysis of the foreseeable consequences of the extended CLAs on competition and employment, as introduced by the 2017 Ordinances, is fully in line with this trend. In order

[88] Glossary of terms used in EU competition policy
[89] Glossary of Industrial Organisation Economics and Competition Law, OECD, 1993.

to carry out its task of assessing the foreseeable socio-economic effects of extended CLAs, the group of experts will have to develop its own doctrine over time.

166. This opinion proposes a number of principles, which may or may not be the responsibility of the group of experts to endorse, that could be used by the drafters of CLAs to assess *ex ante* the risk of harming the principle of free competition. Taking into account the criteria listed in this opinion when negotiating the agreement or when the request for extension is examined by the Ministry of Labour should make it possible to identify the most potentially problematic cases. In such cases, the group of experts will then be able to examine in detail the specificities of the economic operators concerned and anticipate, before the extension of the CLA, the difficulties that it could raise in terms of employment and competition in the industry.

167. The usefulness of the proposed tools will obviously depend on how the Minister wishes to implement the new prerogatives. It will depend on the volume of agreements studied by the group of experts and the size of the resources at its disposal.

Deliberation on the oral report by Ms Olivia Pingret, rapporteur *(case officer)*, and the intervention of Mr Thomas Piquereau, Deputy General Rapporteur, by Ms Isabelle de Silva, President, Ms Irène Luc, Vice-President and Mr Savinien Grignon-Dumoulin, Member.

Hearing Secretary,	President,
Caroline Orsel	Isabelle de Silva

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