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# EUROPEAN SOCIAL CHARTER

Comments from the Spanish Trade Union Confederations on the 26th National Report on the implementation of the European Social Charter

submitted by

## THE GOVERNMENT OF SPAIN

(Articles 2, 4, 5 and 6 and Articles 2 and 3 of the 1988 Additional Protocol for the period 01/01/2009 – 31/12/2012)

Report registered by the Secretariat on 04 August 2014

## CYCLE 2014

**EUROPEAN SOCIAL CHARTER CYCLE XX- 3 (2014)**
**PERIOD 2012**

# PLEADINGS OF THE TRADE UNION CONFEDERATIONS COMISIONES OBRERAS AND THE UNIÓN GENERAL DE TRABAJADORES TO THE 26th NATIONAL REPORT PRESENTED BY THE GOVERNMENT OF SPAIN TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, ON COMPLIANCE WITH THE EUROPEAN SOCIAL CHARTER

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July 23rd, 2014

Spain has presented the 26th Report, corresponding to the cycle XX-3 (2014) on the monitoring procedure for application of the European Social Charter of 1961 (hereinafter the ESC) and the Additional Protocol of 5 May 1988.

Specifically, this period corresponds to analysis of Group 3 regarding work-related Rights, which comprises the following articles of the European Social Charter of 1961:

- Art. 2 (the right to just working conditions),
- Art. 4 (the right to a fair remuneration),
- Art. 5 (the right to a trade union),
- Art. 6 (the right to bargain collectively).

It also comprises the following articles of the Additional Protocol of 1988:

- Art 2 (the right to information and consultation)
- Art. 3 (the right to take part in the determination and improvement of the working conditions and working environment).

The reference period to be taken into account is between 1/1/2009 and 31/12/2012.

In view of the information published on the Council of Europe website, Spain presented the 26th Report on 20 September 2013 (the organisation has had access to the report via the following link http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Spain26/fr.pdf ).

The Trade Union Confederations COMISIONES OBRERAS (CCOO) and UNIÓN GENERAL DE TRABAJADORES (UGT) are trade union organisations with representation throughout the whole of Spain and, consequently, are accorded full legitimacy by Spanish laws to represent the interests of all workers affected by the European Social Charter regulations applied in Spain.

There is no doubt that they exercise this legitimacy before the national institutions and, in addition, given their character as national trade union confederations, they are also part of the international workers' organisations which have a statute for participation before the Council of Europe; said legitimacy is recognised by the regulations in the European Social Charter for the presentation of pleadings on compliance with the European Social Charter and gives them the sufficient legal capacity to process them and make the claims therein.

To this end, they present to the European Committee of Social Rights the following pleadings, distinguishing between those of a formal nature and those of a material or substantive nature, in accordance with the following summary:

A) Formal comments: Failure by the Government of Spain to comply with the duty to provide a copy of the report on compliance with the European Social Charter to the trade union organisations.

B) Substantive comments.

I. On failure to comply with article 2 of the Charter (right to just working conditions),
II. On failure to comply with article 4 of the Charter (right to a fair remuneration),

II.1. Infringement of art. 4.1 of the Charter, because of the failure of the amount of the minimum wage to guarantee sufficient remuneration which provides workers and their families with a decent standard of living.

II.2. Infringement of art. 4.4 of the Charter, by approving a contracting method (contract to support entrepreneurs) with a one-year trial period in any event, with no guarantees or notice period for termination of the employment.

II.3. Failure to comply with art. 4.4 of the Charter: insufficient period for notice of termination of temporary contracts.

III. On failure to comply with article 6 of the Charter (right to collective bargaining).

III.1. Infringement of article 6.2 of the European Social Charter, through the regulatory derogation of an agreement reached on a state level by the most representative trade union and business organisations and the lack of any consultation with the trade union organisations prior to the approval of Royal Decree-Law 3/2012 by the Government of Spain.

III.2. Infringement of art. 6.2 of the European Social Charter, through the legal imposition of predominance of the company collective agreement over collective agreements of a higher authority, also prohibiting trade union and business organisations from availing themselves of this regulation.

III.3 Infringement of art. 6.2 of the European Social Charter through the imposition of compulsory arbitration to deal with failure to apply conditions established by collective agreement.

III.4. Infringement of article 6.2 of the European Social Charter, by allowing the employer the unilateral power to cease to apply the employment conditions agreed previously with workers' representatives in company agreements.

III.5 Infringement of article 6.2 of the European Social Charter, through the interference of the public authorities in the validity of the collective agreements negotiated before the labour reform measures, imposing the end of the application of the working conditions it regulated, when the regulations in force at the time it was signed guaranteed that they would be maintained until a new agreement was signed to replace it.

III.7 Infringement of article 6.4 of the Charter, through the disproportionate and unjustified criminalisation of trade union activity, for participating in informative pickets during a strike.

IV. Failure to comply with the European Social Charter and the Additional Protocol in the field of the Public Administrations in the period 2009-2012.

IV.1 Infringement of article 4 (right to a fair remuneration).
IV.2 Infringement of article 5 (right to a trade union).
IV.3 Infringement of article 6 (right to bargain collectively).
IV.4 Infringement of article 2 of the Additional Protocol .
IV.5 Infringement of article 3 of the Additional Protocol.

## A) FORMAL COMMENTS: FAILURE BY THE GOVERNMENT OF SPAIN TO COMPLY WITH THE DUTY TO SEND A COPY OF THE REPORT ON COMPLIANCE WITH THE EUROPEAN SOCIAL CHARTER TO THE TRADE UNION ORGANISATIONS.

Art. 23 of the ESC specifies the obligation of the Contracting Parties to send a copy of the Report sent to the European Committee of Social Rights (Council of Europe). Its exact wording is as follows:

### Article 23. Communication of copies.

*1. Each Contracting Party shall communicate copies of its reports referred to in Articles 21 and 22 to such of its national organisations as are members of the international organisations of employers and trade unions to be invited under Article 27, paragraph 2, to be represented at meetings of the Sub-committee of the Governmental Social Committee.*

Although the Government of Spain claims that copies of the report presented were communicated to the most representative Trade Union Organisations, in compliance with the aforementioned article 23 of the Charter, the trade union organisations CCOO and UGT would like to point out in this regard that the Government has not communicated the copy referred to, and also add that this is not the first time such non-compliance has occurred.

This prevents any assessment of compliance with the obligations taken on by Spain in the European Social Charter and other binding Instruments being subjected to the required challenges, in particular on matters related to compliance with rights of a social nature, and employment-related matters; this is particularly the case when the reforms which have been carried out in socio-employment matters, dominated by public policies which cut back social rights, directed especially at the reform of the basic institutions for labour rights, have been widely criticised by society. The Government of Spain's action in this regard, failing to comply with its obligation imposed by the aforementioned art. 23 of the Charter, is not simply a formal omission, but rather one which affects the Committee's ability to find out the situation regarding compliance with the rights set out in these international regulations, and its ability to verify this compliance.

Consequently, we ask the European Committee of Social Rights to adopt measures on this point, given that the Spanish Government has failed to meet the obligations required by the International Treaty.

## B) SUBSTANTIVE COMMENTS.

As regards Spain's compliance with labour-related rights, recognised in the aforementioned arts. 2 (right to just working conditions), 4 (right to a fair remuneration), 5 (right to a trade union), 6 (right to bargain collectively) of the European Social Charter of 1961 (hereinafter, the Charter) and articles 2 (right to information and consultation) and 3 (right to take part in the determination and improvement of the working conditions and working environment) of the Additional Protocol of 1988, (hereinafter, the Additional Protocol) the report presented by the Government of Spain presents incomplete information, which omits the scope of the serious reforms which have been carried out in the system of labour relations, particularly on the basis of Royal Decree-Law 3/2012 and Law 3/2012, and fails to describe how the labour legislation is applied, as well as the inability of the institutional mechanisms to guarantee compliance with the rights guaranteed by the European Social Charter.

To this end, we formulate the following considerations, which we have structured in relation to the non-compliances which the appearing Trade Union Organisations criticise in relation to the situation in Spain of the assumed obligations deriving from said Regulatory Instruments. This is without prejudice to how they might be classified under other provisions of the Charter or the Protocol if the Committee to which we address ourselves deems it more appropriate.

## I. ON THE FAILURE TO COMPLY WITH ARTICLE 2 OF THE CHARTER (RIGHT TO JUST WORKING CONDITIONS),

As far as this provision is concerned, the Committee had already established as a conclusion to its report on the situation in Spain (Conclusions XIX-3, 2010) that the situation in Spain is not compatible with the right to just working conditions set out in art. 2 of the ESC, from a number of different perspectives.

Art. 2 of the Charter regulates the Right to just working conditions, and states: *"With a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake:*

*1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit."*

More specifically, the Committee concluded that the situation in Spain does not comply with article 2 § 1 of the Charter insofar as the Workers' Statute defines, as a general rule, a legal reference period of one year to calculate the average duration of the working day.

The Committee recalls that the reference period for calculating the average working day must not exceed four to six months, or twelve months under exceptional circumstances (General Introduction to the

Conclusions XIV-2). The extension of the period by collective agreement up to twelve months is acceptable, provided it is justified by objective reasons or for technical reasons related to the organisation of the work.

However, in the employment legislation from 2012 onwards, and currently, this situation has not only not been corrected, but the scope in which the company operates freely to establish the working day has increased, without being subject to any conditioning factor associated with the existence of objective reasons, or technical reasons related to the organisation of the work, and with no specification of this being expressly enabled by collective bargaining.

Specifically, the employment reform introduced in 2012 – firstly by means of Royal Decree-Law 3/2012, of 10 February, on urgent measures for reform of the labour market and subsequently in Law 3/2012, of 6 July, on urgent measures for reform of the labour market - included the possibility of the employer being allowed to introduce irregular distribution of the working day throughout the year if there is no agreed regulation or collective agreement ("Where there is no agreement, the company may distribute ten per cent of the working day in irregular fashion throughout the year". Art. 34. 2 of the Workers' Statute) whereas before this reform irregular distribution was only possible if there was agreement between the company and the workers' representatives.

Furthermore, the percentage left in the hands of the employer, where there is no agreement, has been fixed at 10% by the Law 3/2012, which is higher than that established by the RDL 3/2012 (5%). Consequently, the decision to carry out irregular distribution of 10% of the working day – unilaterally and with no requirement to justify it with any cause or reason –falls to the employer, provided there is no agreement in this regard. The only requirement in the regulation is to respect the minimum daily and weekly rest periods (which may be accumulated) and a minimum of five days' notice to the worker when informing him/her of the day and time he/she is required to work.

Any differences, either excess or shortage of hours, between the working day carried out and the maximum duration of the ordinary working day by law or agreement, may be compensated in a period of twelve months from the moment they occur.

We are in no doubt that this period is excessive, omitting as it does any involvement of collective bargaining or any justification of the need to carry out such an irregular distribution of the working day. This power given to the employer has a very negative impact on a worker's, and particularly a female worker's, right to reconcile his/her working life and family/personal life.

Given the above, we request that the Committee states that:

- It continues to note that the situation in Spain does not comply with article 2 § 1 of the Charter insofar as the Workers' Statute defines, as a general rule, a legal reference period of one year for the calculation of the average duration of the working day.
- That the regulation of the irregular distribution of the working day of up to 10% of the annual working day is not compatible with article 2 § 1 of the Charter either, given that it is an excessive reference period, does not require it to be considered in the collective agreement, and does not require objective justification of the need to carry out said distribution

## II. ON THE FAILURE TO COMPLY WITH ARTICLE 4 OF THE CHARTER (RIGHT TO A FAIR REMUNERATION),

It should be noted that Spain has failed to comply with art. 4 of the Charter, which guarantees the right to a fair remuneration, from a number of different perspectives which we set out below.

This provision states:

*Article 4.*
*Right to a fair remuneration.*

*With a view to ensuring the effective exercise of the right to a fair remuneration, the Contracting Parties undertake:*

*1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living.*

*2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases.*

*3. to recognise the right of men and women workers to equal pay for work of equal value.*

*4. to recognise the right of all workers to a reasonable period of notice for termination of employment.*

*5. to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.*

*The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.*

The failures to comply which we, the undersigned trade union organisations, note are the following:

## II.1 THE INFRINGEMENT OF ART. 4.1 OF THE CHARTER, THROUGH THE FAILURE OF THE MINIMUM WAGE TO GUARANTEE SUFFICIENT REMUNERATION WHICH PROVIDES WORKERS AND THEIR FAMILIES WITH A DECENT STANDARD OF LIVING.

The aforementioned Conclusions XIX-3 have already established that "*The Committee concludes that the situation in Spain does not comply with article 4 § 1 of the Charter, because the minimum wage is clearly unfair*"

This is a situation which not only has not changed, but has reduced the ability of the minimum wage to ensure a decent standard of living for working people and their families.

At the same time, we note that this situation also impacts in a particularly negative way, and with greater intensity, on women, who are more exposed to wage levels linked to the minimum wage, or below it.

This is a matter in which the Government omits the effective participation of the trade union representatives.

In the Spanish legal system, the minimum wage is a basic legal guarantee of the principle of a living wage. It is a fundamental part of the country's economic and social policy, which has a long tradition in the Spanish legal system and is also solidly anchored in the constitution. This is confirmed by its link with the clause on the welfare State provided for in article 1.1 of the Spanish Constitution (CE), with the policy to promote genuine and effective equality referred to in article 9.2 of the Constitution, and with direct reference to the right to "sufficient remuneration" recognised to all Spanish citizens by article 35.1 of the CE.

In Spain the elements specifying the criteria used to establish the annual minimum wage (SMI) are set out in art. 27 of the Workers' Statute, but this does not impose any restriction on the Government's discretion because the general economic climate factor is so ambiguous that it allows it to justify any decision it adopts and because the regulation does not use the imperative, but rather a weaker expression like "take into account".

In Spain, the SMI reached its greatest weight in relation to the average wage in 2007 (41.5%) and has fallen to values close to 40% in 2012 (and 2013). Consequently, despite the salary improvements accumulated in the period 2004–2009, since 2007 the SMI has gradually lost weight in relation to the average wage, and has moved further away from the European objective of 60% of the average wage.

The minimum wage in Spain is one of the lowest in the EU15 countries which have one established in their legal system with general coverage, both in terms of monetary units (euros) and in purchasing power parity (discounting the price differences between countries). Only Portugal and Greece have a lower minimum

wage. This fact is not justified by differences in the hourly levels of productivity, rather by lower remuneration for the hour worked. At its current levels, the SMI is bordering on the poverty line in homes with just one member and is clearly below that level in homes comprising at least two people.

It is precisely the economic crisis, the increase in unemployment, salary adjustments and the increase in the price of products which have had an impact on the purchasing power of families.

The drop in income levels, greater inequalities and imbalance in the distribution of income are leading to a deterioration in the standard of living of the population and an increase in inequality and poverty, which in our country also includes the phenomenon of the "working poor". Added to this is the fact that various groups of workers, because they are wage-earners, cannot access goods and social services aimed at people excluded from the labour market.

Although it is true that the percentage of wage-earners receiving remuneration which is equal to or less than the minimum wage is small, it is also true that we are seeing an increase in the number of workers subject to the minimum wage, something to which the employment reform carried out by the government in 2012 has contributed substantially: its measures to restrict the extension of agreements after their expiry ("ultra-activity"), to make it easier not to apply the agreements, and to establish priority for the application of company agreements, etc. are resulting in the SMI being the reference which employers long for to reduce their labour costs.

In addition, however, the minimum wage is used to determine the minimum bases for contributions, which affects a much larger volume of workers than those receiving the minimum wage. Added to this is the fact that the freezing or smaller increase in the SMI in recent years not only involves a lower real salary for workers right now, but also involves lower future social benefits (pensions, unemployment benefits, etc.) and also translates into lower income for the Social Security system now, at a time when there is a need to strengthen public and Social Security income.

There is no doubt that the fixing of the minimum wage is an important instrument for reducing poverty and improving social protection, by guaranteeing that the basic needs of non-specialised and poorly paid workers, and their families, are met. Its periodic review is essential if it is to be effective and there is no loss of purchasing power with regard to basic consumer goods. This review must be carried out using a process which guarantees full consultation and the participation of the social partners in conditions of equality, and performed on the basis of periodic, independent surveys on domestic economic conditions.

The figures published by the INE speak for themselves, as do the differences between sexes.

## Annual Survey of salary structure. Series 2008-2012

### Salary distribution

Percentage of workers according to their earnings compared to the Minimum Wage (SMI) (compared to all workers) per type of working day and sex

Units:%

| | Both sexes | Women | Men |
|---|---|---|---|
| 2009 | | | |
| TOTAL | | | |
| % OF ALL WORKERS | 100,00 | 100,00 | 100,00 |
| From 0 to 1 SMI | 10,02 | 15,25 | 5,69 |
| From 1 to 2 SMI | 34,19 | 39,21 | 30,04 |
| From 2 to 3 SMI | 27,42 | 23,75 | 30,46 |
| From 3 to 4 SMI | 13,10 | 10,75 | 15,04 |
| From 4 to 5 SMI | 7,73 | 6,26 | 8,95 |

| | | | |
|---|---|---|---|
| From 5 to 6 SMI | 3,40 | 2,48 | 4,16 |
| From 6 to 7 SMI | 1,85 | 1,13 | 2,44 |
| From 7 to 8 SMI | 1,15 | 0,69 | 1,53 |
| More than 8 SMI | 1,14 | 0,47 | 1,68 |
| 2010 | | | |
| TOTAL | | | |
| % OF ALL WORKERS | 100,00 | 100,00 | 100,00 |
| From 0 to 1 SMI | 10,46 | 15,53 | 5,99 |
| From 1 to 2 SMI | 33,90 | 39,30 | 29,15 |
| From 2 to 3 SMI | 27,40 | 23,60 | 30,74 |
| From 3 to 4 SMI | 13,32 | 10,94 | 15,42 |
| From 4 to 5 SMI | 7,11 | 5,56 | 8,48 |
| From 5 to 6 SMI | 3,32 | 2,31 | 4,20 |
| From 6 to 7 SMI | 1,93 | 1,26 | 2,53 |
| From 7 to 8 SMI | 1,16 | 0,72 | 1,55 |
| More than 8 SMI | 1,39 | 0,77 | 1,94 |
| 2011 | | | |
| TOTAL | | | |
| % OF ALL WORKERS | 100,00 | 100,00 | 100,00 |
| From 0 to 1 SMI | 11,30 | 16,38 | 6,80 |
| From 1 to 2 SMI | 33,16 | 38,19 | 28,73 |
| From 2 to 3 SMI | 27,17 | 24,07 | 29,92 |
| From 3 to 4 SMI | 13,60 | 11,40 | 15,54 |
| From 4 to 5 SMI | 7,40 | 5,56 | 9,03 |
| From 5 to 6 SMI | 3,14 | 2,02 | 4,13 |
| From 6 to 7 SMI | 1,92 | 1,21 | 2,54 |
| From 7 to 8 SMI | 1,05 | 0,55 | 1,49 |
| More than 8 SMI | 1,25 | 0,63 | 1,81 |
| 2012 | | | |
| TOTAL | | | |
| % OF ALL WORKERS | 100,00 | 100,00 | 100,00 |
| From 0 to 1 SMI | 12,25 | 17,36 | 7,52 |
| From 1 to 2 SMI | 33,15 | 38,64 | 28,07 |
| From 2 to 3 SMI | 26,88 | 23,59 | 29,92 |
| From 3 to 4 SMI | 13,25 | 10,77 | 15,55 |
| From 4 to 5 SMI | 6,79 | 4,92 | 8,53 |
| From 5 to 6 SMI | 3,22 | 2,14 | 4,22 |
| From 6 to 7 SMI | 1,92 | 1,19 | 2,59 |
| From 7 to 8 SMI | 1,16 | 0,66 | 1,61 |
| More than 8 SMI | 1,38 | 0,73 | 1,98 |

Notes:
1) SMI in 2008: 8.400,00 euros
SMI in 2009: 8.736,00 euros
SMI in 2010: 8.866,20 euros
SMI in 2011: 8.979,60 euros
SMI in 2012: 8.979,60 euros

The following link shows a summary published by the INE: http://www.ine.es/prensa/np852.pdf

Meanwhile, in Spain the right to consultation with regard to the determination of the SMI is expressly included in art. 27 of the Workers' Statute:

> Article 27. Minimum wage
>
> *1. The Government shall fix, after consultation with the most representative trade union organisations and business associations, annually, the minimum wage."*

This right is systematically ignored by the Government. This transgression of the provisions of said regulation is of such seriousness that we might even be looking at an infringement of rights recognised in articles 7 and 28 of the Spanish Constitution (CE).

According to art. 7 of the CE, workers' trade unions, together with business associations, "contribute to the defence and promotion of the economic and social interests which concern them". This function must be understood in broad terms, as the Constitutional Court has done.

It is impossible not to be aware, as the government appears to be, of the role and character as a trade union given to us by the CE, and of the broad and repeated constitutional policy which has taken shape over the years.

## II.2 THE INFRINGEMENT OF ART. 4.4 OF THE CHARTER, BY APPROVING A CONTRACTING METHOD (CONTRACT TO SUPPORT ENTREPRENEURS) WITH A TRIAL PERIOD OF ONE YEAR IN ANY EVENT, WITH NO GUARANTEES OR NOTICE PERIOD FOR TERMINATION OF THE EMPLOYMENT.

In the first months of 2012 the Spanish employment regulation framework was changed considerably by one of the regulations which has had most public repercussion: specifically, RDL 3/2012, of 10 February, on urgent measures for reform of the labour market, confirmed subsequently, with some modifications to be taken into account, by Law 3/2012, of 6 July (references will be made to this regulation, which is the one currently in force).

One of the new features included in this regulation was the creation of a new type of employment contract, called the "contract to support entrepreneurs".

This is an open-ended contract which can currently be drawn up for full-time or part-time work (to begin with, it was only for full-time, but from December 2013 onwards part-time contracts could also be signed) and must be done in writing.

Art. 4.3 of Law 3/2012 states the following:

> "*The legal system for the contract and the rights and obligations deriving from it shall be governed, in general, by the provisions of the Redrafted Text of the Workers' Statute Law, approved by Royal Legislative Decree 1/1995, of 24 March, and the collective agreements for open-ended contracts, **with the sole exception being that the duration of the trial period,** referred to in article 14 of the Workers' Statute, **will be a year in any event***".

As can be seen, the abovementioned contract legally establishes a trial period of ONE YEAR, which places the employer in a clearly advantageous position with regard to the worker, granting him the possibility of terminating the contract without having to pay compensation and with no need to give any reason during this whole period; neither is the employer required to respect a minimum period for communication of termination of the employment, nor does it have to notify this decision in writing, as the courts have interpreted that termination during the trial period does not require a written communication.

The reality clearly shows that this is an obviously fraudulent characteristic, the purpose of which is to draw

up a temporary contract without cause in a concealed manner which gives the employer the possibility of terminating the employment relationship at any time during the first year, freely, without having to provide any reason or respect any periods of notice or otherwise.

We recall that the European Committee of Social Rights' Decision on the merits of the case of 23 May 2012 (Claim no. 65/2011) filed by the General Federation of Workers of the National Electricity Company (ENE) (GENOP-DEI) and the Confederation of Civil Servants versus Greece (ADEDY), concluded that a contract of that duration infringes the European Social Charter.

Specifically, it was determined that a trial period of one year infringes art. 4.4 of the CSE. Consequently, we request that the European Committee applies the case law set out in that Decision on the Merits, and that, in short, it declares the following when faced with a similar situation:

1. All workers have the right to protection in matters of their social rights, which includes the right to a reasonable notice period if the employment relationship is to be terminated. Insofar as it is not possible to define a general concept of what should be understood by reasonable, each case must be analysed individually, taking into account the time the worker has been providing the services.

2. The purpose of the notice period is to give the worker the chance to look for another job before having lost the previous one, with the possibility of compensation being paid to workers who are not given notice.

3. Immediate dismissal is only possible in cases of serious infraction committed by the worker.

4. The European Committee of Social Rights had not made any statement until now on the duration of a trial period, understanding that it is an admissible figure insofar as it is established to allow the employer to check the worker's qualifications and his/her adaptation to the demands of the position he/she is going to occupy.

This, however, cannot allow the duration of this period to be very long, because it would be depriving the worker of his/her rights in terms of notice and compensation, estimating that a one year duration is excessive.

Consequently, the European Committee of Social Rights unanimously determines that a trial period of one year infringes art. 4.4 of the European Social Charter (ESC) given that it is not reasonable if one adheres to an interpretation thereof given by the case law of this organisation.

This trade union wishes to point out to the European Committee of Social Rights that Court no. 2 in Barcelona applied this case law directly, firstly, in its judgment of 19 November 2013, declaring that the termination of a worker's employment when there were just a few days left before the end of the trial period was unfair, directly applying art. 4.4 of the European Social Charter and the case law of the European Committee of Social Rights issued in the Decision on the Merits already mentioned (a word-for-word copy of the full judgment is attached).

Specifically, the judgment assesses the case of a worker, in the unskilled category, who carried out a task consisting of transporting tyres from one place to another, who is hired on 30 March 2012 and has his employment terminated on 22 March 2013, with the reason given being that he failed to successfully complete the trial period which was in force.

The Court's judgment contains references as important as the fact that the European Social Charter "(...) *is an international regulation which forms part of domestic law (...) and which has the same binding value as the European Union treaties and, consequently, in the regulatory hierarchy, is above national Law* (...)".

Bearing in mind that the *de facto* assumption made is identical to that of the Decision on the Merits, it determines that art. 4.3 of Law 3/2012 "(...) *infringes art. 4.4 of the Charter because it does not establish either a notice period or compensation for termination of contract during the one-year trial period, and a one-year trial period cannot be seen as reasonable in the case which is the object of this legal action, as the Committee points out, because the requirements of the plaintiff's job position, an unskilled worker transporting tyres from one place to another, do not require a year for the employer to assess his abilities to carry out his tasks* (...)".

The judgment recalls, admitting the case law of the European Committee of Social Rights, that the [economic] crisis cannot "(...) *have as a consequence a reduction in the protection of the rights recognised in the Charter and, consequently, that Governments were obliged to adopt the measures necessary to guarantee that the rights in the Charter were guaranteed all the more at a time when the need for protection is felt more greatly* (...)".

Finally, it concludes that "(...) *section 4.3* (...) *may not be applied because it contravenes a higher-ranking regulation, art. 4.4 of the Charter, as it does not establish either notice or compensation for termination of an open-ended contract within the one-year trial period, a period which is excessive and lacking a motive and, consequently, what must be applied is the Workers' Statute, which refers to the Collective Agreement which applies in the matter (...)".*

Finally, the trade union organisations would like to add that the Government, instead of taking account of the case law of the European Committee of Social Rights and the European Social Charter, as recalled by the Judgment of Court no. 2 in Barcelona of 19 November 2013, proceeded one month after the Barcelona Court Judgment to increase the possibilities of signing a contract of this nature, given that to begin with it could only apply to full-time work, yet after the reform carried out in December 2013, it extended it to part-time contracts (Royal Decree-Law 16/2013, of 20 December, on *measures to encourage stable contracting and improve workers' employability).*

The legal doctrine of the Barcelona Court Judgment was continued with two further decisions, specifically the Judgment of the Employment Court no. 1 in Tarragona, of 2 April 2014, and the Judgment of Court no. 1 in Tarragona, of 29 April 2014, which decided not to apply the domestic laws on the basis that they are contrary to international regulations, specifically the European Social Charter, amongst others, and the case law of the European Committee of Social Rights.

It should be stated that, in addition to the above, a number of appeals and questions of unconstitutionality are still awaiting a decision from the Constitutional Court, insofar as the regulation contained in said law, on the trial period, may clash with the constitutional guarantee of the right to work, and the effective protection of the court. However, in our Constitution there is no clear protection against the need for sufficient notice prior to termination of an employment relationship during the trial period. Furthermore, as determined by the Constitutional Court itself, the duration of the trial period is not incompatible with the Constitution, at least from the perspective considered in the appeals for which it has given a decision.

Consequently, full compliance with the obligations set out in the Charter has not been re-established, and it appears unlikely that such compliance will occur as a result of the determinations of the Constitutional Court.

Consequently, we request that it be declared expressly that Spain is infringing art. 4.4 of the European Social Charter and the case law of the European Committee of Social Rights with a law that allows the signing of a contract with a one-year trial period.

## II.3 FAILURE TO COMPLY WITH ART. 4.4 OF THE CHARTER: INSUFFICIENT NATURE OF THE NOTICE PERIOD FOR TERMINATION OF TEMPORARY CONTRACTS.

The Committee already understood (Conclusions XIX-3) that the situation in Spain does not comply with article 4 § 4 of the Charter for the following reasons:

- Workers with fixed-duration contracts of less than one year whose contract is broken before this have no right to notification;
- Workers with a fixed-term contract of more than one year in which the contract is broken before its term have a right to fifteen days' notice

These are matters which have still not been resolved in legislation and domestic practice, where temporary workers are not guaranteed a minimum notice informing them of the termination of their employment relationship, and employment legislation has not corrected the situation which was already examined, in its day, by the very Committee to which we address ourselves.

Consequently, the persistence of these non-compliances should be noted in the reference framework of this report.

## III. ON THE FAILURE TO COMPLY WITH ARTICLE 6 OF THE CHARTER (RIGHT TO BARGAIN COLLECTIVELY).

We hereby note that the Spanish State fails to comply with the right to collective bargaining recognised in art. 6 of the Charter, in the terms which we denounce.

*Article 6.*
*Right to bargain collectively.*

*With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:*

*1. To promote joint consultation between workers and employers.*

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

*3. To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*

*And recognise:*

*4. The right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.*

Spain's infringements of this regulation come from a number of very different perspectives, particularly from the employment reforms operated in the collective bargaining system in 2012, which have very seriously conditioned the real possibility of the trade union organisations assuming the capacity to determine working conditions through collective bargaining. To this effect we report the following non-compliances:

## III.1 INFRINGEMENT OF ARTICLE 6.2 OF THE EUROPEAN SOCIAL CHARTER, THROUGH THE DEROGATION BY LAW OF AN AGREEMENT MADE AT STATE LEVEL BY THE MOST REPRESENTATIVE TRADE UNION AND BUSINESS ORGANISATIONS AND THE ABSENCE OF ANY

CONSULTATION WITH THE TRADE UNION ORGANISATIONS PRIOR TO THE APPROVAL OF ROYAL DECREE-LAW 3/2012 BY THE GOVERNMENT OF SPAIN.

As we have already pointed out in the first part of this Complaint document, on 25 January 2012 the trade union organisations CCOO and UGT signed with the employers' organisations the Spanish Confederation of Business Organisations (CEOE) and the Spanish Confederation of Small and Medium-Sized Enterprises (CEPYME) the "2nd Agreement for Employment and Collective Bargaining [AENC] 2012, 2013 and 2014", published in the Official State Gazette (BOE) of 6 February 2012.

It is a collective agreement of a compulsory nature, valid for three years, which obliges the signatories to intensify their efforts so that all their organisations, in the framework of their business autonomy, assume and adapt their behaviours "for the application of the criteria, guidelines and recommendations" contained in the Agreement. The parties made declarations in similar terms at the signing of the 2nd AENC, stating that the objective of the text signed is to "orientate the negotiation of collective agreements while the agreement is in force, establishing criteria and recommendations to undertake in collective bargaining processes". The Agreement addresses the topic of the structure of collective bargaining, agreeing on and developing a set of rules to provide a structure and backbone for governing collective bargaining in the future. The parties continue to believe that collective bargaining at state level, or autonomous region level if that is not possible, is the way forward to structure the negotiation, and they do not accept the disappearance of the provincial agreements as they consider that they provide coverage for a considerable number of companies and workers. Likewise, a call is made for company negotiation, both through collective agreements and also company agreements, to discuss matters relating to "working day, functions and wages", a negotiation which in terms of internal flexibility is detailed in other parts of the Agreement.

The fact is that just two weeks later, the Government of Spain approved Royal Decree-Law 3/2012, of 10 February, on urgent measures for the reform of the labour market (BOE of 11 February), repealing and nullifying the majority of the points negotiated and agreed in the 2nd AENC, particularly those referring to the structure of collective bargaining and regulation of internal flexibility. To such an extent that claims have been made that the emergency state regulation "has not assumed its content, not even partially; it has pushed it to one side and marginalised it".

The aforementioned Royal Decree-Law was drawn up and promoted immediately after the signing and subsequent publication of the 2nd AENC, and the Government did so without any participation or negotiation with the trade unions. There were no prior consultations on the merits of the regulation, nor was any attempt made at a consultation period which was either functional or appropriate for an exchange of opinions and differing views of the reform. The Government is aware and can testify perfectly that such a consultation did not exist, nor was it attempted on the part of the public authorities, despite the requests of UGT and CCOO.

In fact, for a Royal Decree-Law to nullify a collective Agreement of the importance and scope of the 2nd AENC implies a direct infringement of the principle of free and voluntary collective bargaining between the most representative business and trade union organisations and unacceptable interference by the Government. On this point, the doctrine of the ILO's Committee on Freedom of Association is more than clear, as stated in "Freedom of Association. Digest of decisions and principles of the CFA of the ILO's Governing Body". 5th edition revised. Geneva, 2006: "*1008. The suspension or derogation by decree – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force."(See Digest of 1996, paragraph 876; 307th report, case no.1899, paragraph 84 and 323rd report, case no. 2089, paragraph 491.)*

This is why a note should also be made of Spain's failure to comply with article 6.2 of the European Social Charter, which ensures the establishment of procedures for voluntary negotiations between employers or employers' organisations, on the one hand, and workers' organisations on the other, with a view to regulating the terms and conditions of employment by means of collective agreements.

III.2. INFRINGEMENT OF ART. 6.2 OF THE EUROPEAN SOCIAL CHARTER, THROUGH THE LEGAL IMPOSITION OF PRECEDENCE GIVEN TO THE COMPANY COLLECTIVE AGREEMENT OVER COLLECTIVE AGREEMENTS OF A HIGHER AUTHORITY, ALSO PROHIBITING TRADE UNION AND BUSINESS ORGANISATIONS FROM AVAILING THEMSELVES OF THIS REGULATION.

The new wording of article 84.2 of the Workers' Statute according to Royal Decree-Law 12/2012, after the aforementioned Law 3/2012, states that:

> "*2. The regulation of the conditions set out in a company agreement, which may be negotiated at any time during the validity of collective agreements of a higher authority, will have priority application over state sector, autonomous region or lower-ranking agreements, in the following matters:*
>
> *a) The amount of the basic wage and wage complements, including those linked to the company's situation and results.*
>
> *b) Payment or remuneration for overtime and specific remuneration for shift work.*
>
> *c) The timetable and distribution of working time, the shift work system and annual planning of holidays.*
>
> *d) The adaptation to the company environment of the workers' professional classification system.*
>
> *e) The adaptation of the aspects of the contracting methods which this Law attributes to company agreements.*
>
> *f) The measures to encourage reconciliation between working, family and personal life.*
>
> *g) Any others relating to the agreements and collective agreements referred to in article 83.2.*
>
> *Equal priority in application will be given to collective agreements on these matters for a group of companies or more than one company linked for organisation or production reasons and identified by name, as referred to in article 87.1.*
>
> *The agreements and collective agreements referred to in article 83.2 may not benefit from the priority of application provided for in this section."*

Consequently, priority is given to the company agreement over any sectoral agreement of a higher authority, including the inter-professional agreements provided for in art. 83.2 of the Workers' Statute, which fix the structure of collective bargaining, in relation to the basic conditions which determine the content of the employment relationship, such as wages, working day, working time, functions, reconciliation measures and additional social benefits.

This is not a case of the Royal Decree-Law establishing the priority of the company agreement as a mechanism to limit the effectiveness of sectoral bargaining when the company has difficulties which might justify the adoption of extraordinary measures different from those in the sectoral collective agreement. Rather what it has done, purely and radically, with no conditioning factors, is suppress the binding effectiveness of sectoral collective bargaining, regardless of whether this bargaining was agreed and signed by the most representative trade union and business organisations on a state or Autonomous Region level, and even though those Agreements, exercising collective autonomy, like the aforementioned 2nd AENC of 25 January 2012, might have fixed the structure of collective bargaining, determining the matters which should be settled by the company agreement, or had drawn up minimum employment rights, such as a minimum wage for the sector, or a maximum working day, or similar measures.

The immediate consequence of the change in legislation is to deprive the most representative trade union organisations and business associations, on a state or autonomous region level, of the freedom to reach agreements, in accordance with their mutual interests, on the rules regulating both the business structure and the solution of conflicts of competition between collective agreements designed to govern a specific sector or in a specific territorial area covering different professions.

The previous consequence infringes head-on and openly the constitutional right to collective bargaining, in relation to or connected with the right to freedom of association in terms of collective activity, recognised in arts. 37.1 and 28.1 CE, as well as the rules and principles guaranteed by the ILO Conventions 98 and 154, and by art. 6 of the European Social Charter.

Because the right to collective bargaining, which derives from the parties' freedom to negotiate and enter into contracts, involves a system of rules of action and organisation through which the representatives of workers and employers defend their own economic and social interests. The guarantee of the right to collective bargaining is thus based "on a right to freedom" which, exercised fundamentally with regard to the State, "protects the social parties against possible [unjustified] interferences or restrictions".

Thus, depriving the most representative trade unions in the sector of the power to negotiate the contract structure in full with the employers, establishing at which levels a contractual agreement may or not be opened and defining the rules for dealing with possible conflicts of competition, constitutes a serious impediment or obstacle to the exercise of trade union action which is contrary to the right to freedom of association.

## III.3 INFRINGEMENT OF ART. 6.2 OF THE EUROPEAN SOCIAL CHARTER THROUGH THE IMPOSITION OF COMPULSORY ARBITRATION IN THE EVENT OF NON-APPLICATION OF TERMS AND CONDITIONS ESTABLISHED IN COLLECTIVE BARGAINING.

On the basis of RDL 3/2012 and Law 3/2012, art. 82.3ET has been amended so as to establish compulsory arbitration by the Consultative Committee on Collective Bargaining of art. 82.3 ET, as per the language given to it in Law 3/2012. Thus the labour reform established a legal regulation for compulsory public arbitration by the said Committee:

> *"Should the consultation period conclude without any agreement being reached, and where the procedures referred to in the preceding paragraph are not applicable or if these have not resolved the discrepancy, either of the parties may submit the matter for resolution by the National Consultative Committee on Collective Bargaining when the non-application of the working conditions affects company work centres located in the territory of more than one region, or by the competent bodies of the respective regions in all other cases. The decisions adopted by these bodies, which they may adopt themselves or by means of an arbiter designated by them for the purpose with all due guarantees to ensure impartiality, must be handed down within a term of note more than twenty-five days counted from the date the conflict is submitted to the said bodies. Their decisions shall have the same effectiveness as agreements reached during the consultation period and appeals may only be lodged in accordance with the procedure and on the basis of the grounds established in article 91.*

The body empowered for the imposition of compulsory arbitration is the National Consultative Committee on Collective Bargaining (CCNCC) or the equivalent body in the respective Region. And although an attempt is now made in the Preamble to the Royal Decree-Law to justify that the first of these is a tripartite body, it is in fact an administrative body of indisputable public nature, and although it expresses the institutional participation of the trade union and employers' organizations, it does not thereby lose any of its nature as it is subject to administrative regulation in its

composition, operating rules and adoption of decisions. And with regard to the "equivalent" regional bodies, the very regulation itself implies subordination to regional authority for the rues on composition and the adoption of resolutions.

The heart of the matters lies, therefore, in discerning whether the composition of a conflict of interest adopted coercively and against the shared will of both parties, or at least that of the workers, is compatible with independent negotiating powers. If the answer is the negative, the tripartite nature of the body adopting the decision to submit to a compulsory arbitration solution neither adds nor takes away a single iota from the judgement reached. The decision-taking body is the instrument used by the lawmaker to organize its particular political option, consisting in obligatorily cutting short legitimate differences of opinion that might arise in the course of negotiations concluding without any agreement, through the coercive imposition of a solution to the conflict structured through a third-party decision.

In any hypothesis considering the failure of the negotiation process begun in order to declare collective bargaining non-applicable in a company, the solution is identical: namely the initiative of only one of the parties, which in the real world of labour relations will always be the employer, as this is the only party interested in such an "opting-out" of the collective bargaining agreement, would be able to trigger the coercive mechanism and have the conflict resolved by a single will, that of a public body erected as the decision-maker in a specific conflict between particular interest through the unacceptable remedy of deeming that, in any such conflict, there is always a hypothetical general interest to be defended, in this case, as indicated in the Preamble, "the defence of productivity".

The following must be taken into en consideration

The European Social Charter encourages voluntary procedures for extrajudicial resolutions (art. 6.3 of the ESC) but in no case compulsory ones.

This measure also contravenes the right to strike protected by art. 6.4 of the Charter, insofar as this compulsory arbitration prevents the effective employment of this right to strike, in that the new instrument sets working conditions without guaranteeing trade union participation and limiting the possibility of organizing a strike to amend the working conditions so established.

And in the same way, this regulation breaches art. 3 of the Additional Protocol, as the possibility of negotiating on the part of the organizations representing the workforce has been restricted through the imposition of compulsory arbitration.

## III.4. INFRINGEMENT OF ARTICLE 6.2 OF THE EUROPEAN SOCIAL CHARTER BY ALLOWING THE EMPLOYER UNILATERALLY TO DECIDE TO STOP APPLYING THE WORKING CONDITIONS AGREED PREVIOUSLY WITH THE WORKERS' REPRESENTATIVES IN COMPANY-LEVEL AGREEMENTS.

Royal Decree Law 3/2012 has profoundly revised the legal regime for "substantial modification of working conditions" established in art. 41 of the Workers' Statute (ET), granting employers the unilateral power to alter significant working conditions established in collective agreements signed with the workers' representatives duly authorized to enter into generally effective agreements following the holding, albeit only on certain occasions, of a consultation period concluded without agreement being reached.

It is true that certain internal flexibility mechanisms must exist in companies in order to enable their adaptation whenever there are demonstrable reasons hindering their feasibility or employment, and this has given rise to the commitment on the part of the trade union organizations signing the present Complaint to encouraging the concept known as "negotiated flexibility" and hence the

contents of the important “Second Agreement on Employment and Collective Bargaining 2012, 2013 and 2014”, mentioned above, signed on January 25th,this year 2012,with the most representative of the employers’ associations in our country, the Confederation of Spanish Employers’ Organizations (CEOE)and the Spanish Confederation of Small and Medium-Sized Enterprises (CEPYME), and reflecting ways and means to facilitate that negotiated adaptation.

But the existence of operational difficulties facing companies does not justify the attribution to employers of a unilateral power to alter the contents of collective negotiation and other agreements and stand aloof from their obligations, as this effect is out of all proportion and incompatible with the effectiveness to be expected of collective negotiation.

This power attributed to employers to amend as suits their free will the working conditions reflected in a collective agreement or other arrangement, including matters of such significance as wages or working hours, even when running counter to the opinions of the workers’ representatives, constitutes a breach of the guarantee of the binding force of collective bargaining agreements, whose essential content entails the attribution of an automatic and imperative effectiveness to any instrument arising out of collective negotiation “between representatives of the workforce and employers”, regardless of its personal effectiveness and contents.

## III.5 INFRINGEMENT OF ARTICLE 6.2 OF THE EUROPEAN SOCIAL CHARTER THROUGH INTERFERENCE BY PUBLIC AUTHORITIES IN THE VALIDITY OF COLLECTIVE BARGAINING AGREEMENTS NEGOTIATED PRIOR TO THE LABOUR REFORM MEASURES BY IMPOSING THE END OF THE APPLICATION OF THE WORKING CONDITIONS REGULATED THEREUNDER, WHEN THE REGULATIONS IN FORCE AT THE TIME THEY WERE SIGNED GUARANTEED THEIR CONTINUITY UNTIL SUCH TIME AS NEW COLLECTIVE BARGAINING AGREEMENTS WERE SIGNED TO REPLACE THEM.

The final paragraph in article 86.3 of the Workers’ Statute (ET) was amended by Royal Decree Law 3/2012, and its language maintained in Law 3/2012 repeals the legal rule ensuring the extension of the contents of all collective bargaining agreements until another subsequent agreement replaces them, in order to establish the following:

*After a year has elapsed from the declaration of non-continuity of a collective bargaining agreement without a new agreement having been agreed or an arbitration decision having been handed down, the collective bargaining agreement of higher level, if any, that may be applicable shall, unless otherwise agreed, cease to be valid.*

However, its practical scope is mucho greater than the mere foresight of working conditions being agreed to continue throughout the year following the notification that a collective bargaining agreement will not be continued.

The Fourth Transitional Provision of Law 3/2012 stated that:

*Fourth Transitional Provision. Continued validity of discontinued collective bargaining agreements.*

*In those collective bargaining agreements that have already been discontinued as of the date of the entry into force of this Law, the term of one year referred to in section 3 of article 86 of the Workers’ Statute (ET), as amended by the said Law, shall begin to be counted from the said date of entry into force.*

Therefore, the limitation of the temporary validity of the collective bargaining agreement had a retroactive effect, by also affecting those collective bargaining agreements negotiated within the legal framework guaranteeing their application until another one replaces them. In this way, those negotiators signing an agreement had assumed- as stated by the law in force at that time - that the content of the collective bargaining agreement, unless otherwise agreed, would remain in force

until another new agreement was reached by the negotiators themselves. The negotiators themselves could have opted to exclude that effect but they did not do so and accepted the automatic extension on the terms indicated.

But the subsequent reform of the pre-existing regulatory framework, with its express impact on those agreements negotiated before its entry into force, has completely altered the balance between the negotiating parties by providing for the termination of validity of the collective bargaining agreement, thus leading to a situation in which, in the event of the potential collapse of negotiations, workers lose their working conditions as a whole, or at least, the binding force of the collective bargaining agreement ensuring their continuity. This is interference by the Public Authorities in collective negotiations with perverse effects by allowing companies, and the employer's representatives, by their mere will of refusing to renew the collective bargaining agreement, to generate a regulatory vacuum. It might be said that the agreement so affected did not prevent this, but it was negotiated in a legal context that ensured this effect and, as the new law affects the agreements negotiated before it entered into force, the negotiators, and specifically trade union representatives, were given no opportunity to prevent this effect, precisely through the inclusion of a clause that at the time was superfluous as the desired effect was legally guaranteed and it was unnecessary for the agreement to reflect it.

This interference in collective negotiation disrupts the negotiating balance for the renewal of collective bargaining agreements, viewed as an economic policy measure to implement wage devaluation and a weakening of the negotiating position of workers' representatives.

## III.6 INFRINGEMENT OF ARTICLE 6.4 OF THE CHARTER: IMPOSITION OF COMPULSORY ARBITRATION TO BRING A STRIKE TO AN END.

The Committee declared in its Conclusions that the situation in Spain does not comply with article 6 § 4 of the Charter on the basis that the law allows the Government to impose arbitration in order to bring a strike to an end in those cases that go beyond those foreseen in article 31 of the Charter.

This is a matter that has not been reviewed, particularly as what has been seen in practice is the use by the public authorities of a number of mechanisms in order to render the right to strike ineffective.

With respect to the chapter on "Conclusions" in article 6, the European Committee of Social Rights asks whether, in connection with section 4 of that article on collective action, the language of article 10.1 of Royal Decree-Law 17/1977 restricts the right to strike. In fact, legal thinking is of the opinion that declaration of the said article as unconstitutional in a judgement dated April 8th, 1981, refers to the government's power to impose a return to work, but not to the power to institute compulsory arbitration.

The restriction on the right to stems rather from paragraph two of this article, which establishes the government's power to determine the minimum services. Historically, in the case of strikes affecting public services or services considered essential for the community, where no agreement has been reached on minimum services, the government has imposed disproportionate minimum services implying a *de facto* restriction on the right to strike. Although such situations can be reported to the judicial authorities, they are resolved only long after the strike takes place and, in the meantime, the minimum services imposed must compulsorily be complied with.

Practically all the judicial rulings relating to accusations of abusive minimum services have vindicated the trade unions' stance but the strike had already taken place and the workers' rights had already been deliberately curtailed through an abusive use of the legal ability to impose incomprehensibly high levels of minimum services.

On the other hand, minimum services are established even for services that are not essential for these purposes and this fosters misunderstanding when negotiating minimum services for private establishments. Thus, pursuant to a judgement about the need to establish minimum services in education, due to the need of parents to go to work in other sectors (i.e. due to the need for a child-care service rather than any teaching function, as schools close Saturdays and Sundays and on certain midweek non-teaching days established in the employment calendar without any problem), an attempt is made to establish minimum services at university centres.

## III.7 INFRINGEMENT OF ARTICLE 6.4 OF THE CHARTER THROUGH THE DISPROPORTIONATE AND UNJUSTIFIED CRIMINALIZATION OF TRADE UNION ACTIVITY IN THE PARTICIPATION OF INFORMATIVE PICKET LINES IN the COURSE OF A STRIKE.

On this point, together with art. 6.4 of the Charter, its interpretation and scope are closely tied to art. 5 of the Charter itself, which stipulates:

> *Article 5. Trade union rights.*
>
> *In order to guarantee or promote the freedom of workers and employers to establish local, national or international organizations for the protection of their economic and social interests and to become members of these organizations, the contracting parties undertake to ensure that the national legislation does not undermine this freedom and is not applied in such a way as to harm it. Similarly, the principle establishing the application of these guarantees to the members of the armed forces and the metric for their application to this category of individuals must be determined by national laws and regulations.*

Within Spanish legislation, Part XV of Book II of the Spanish Criminal Code (CP) regarding crimes against workers' rights, classifies actions against the exercise of the fundamental rights of trade union freedom and the right to strike under article 315. However, the same precept also classifies as a crime any coercion on the promotion of striking and we shall now analyse this point.

Art. 315 CP reads as follows:

> *1. Punishment by imprisonment of six months to three years and a fine from six to twelve months shall be handed down to those who, by deceit or abuse of a situation of need, were to prevent or limit the exercise of Trade Union freedom or the right to strike.*
>
> *2. Should the conduct described in the preceding section be carried out by force, violence or intimidation, the higher degree penalties shall be imposed.*
>
> *3. The same penalties as in Section 2 shall be imposed on those who, acting in a group or individually although in collusion with another, coerce other persons to begin or continue a strike.*

Insofar as the behaviour classified as criminal coercion is concerned, it is appropriate to recall here the basic kind of coercion established in art. 172.1 CP, whereby: "*Whoever, without being lawfully authorized, were to use violence to prevent another from doing something the law does not prohibit, or who forces him to do something he does not want to do, whether just or unjust, shall be punished with a sentence of imprisonment of six months to three years or with a fine of twelve to twenty-four months, in view of the coercion or the means used.*"

Therefore, art. 315.3 of the Criminal Code imposes a punishment of imprisonment from three years and a day to four and a half years and a fine from twelve months and one day to 18 months on those who, acting in a group or individually although in collusion with another, coerce other persons to begin or continue a strike.

This is a concept of criminal law that has been widely applied in all kinds of disputes and incidents on the occasion strikes, particularly when general strikes have been called. In practice, they imply petitions by the Office of the Public Prosecutor for sentences requiring imprisonment for over three years and aimed mainly at persons with trade union responsibility, or else people with significant participation in the course of incidents in which the security forces have identified those taking part.

This concept is a disproportionate restriction on the right to strike. The crime defined in art. 315.3 CP provides sentences that are certainly exaggerated in both qualitative (deprivation of freedom and fine) and quantitative terms (3 to 4.5 years in prison and a fine of 12 to 18 months). Such a sentence prevents anyone found guilty from accessing the benefits foreseen in articles 80 and 88 CP regarding the suspension of custodial sentences that do not exceed two years and the replacement of such custodial sentences not exceeding two years by additional days' fine or community service.

The lack of proportionality in such sentences is markedly noticeable from two perspectives:

- comparing the severity of the sentence for the protection of the legal right not to go on strike regarding a specific area of personal freedom namely freedom to work, with the same punishment established for the protection of the fundamental rights to strike and trade union freedom.

The right of the State to impose punishments is illogically applied with the same intensity in the protection of two clearly distinct legal rights, inexplicably considering them both equivalent for the purposes of criminal law and abandoning any analysis of the different constitutional, personal and social scale of each one. Thus, the right to strike implies an action of self-protection of the greatest relevance in the defence and promotion of workers' interests, as the ultimate measure to be adopted in the event of a conflict of collective scope and even entailing certain harm for workers in terms of employment and Social Security, making it an instrument used only sporadically in accordance with its significance, appropriately in situations of the greatest importance for the defence of that same collective interest in turn including the defence of workers' personal interests. This exceptional nature of strikes in terms of duration and significance for the defence of a collective interest contrasts with the ordinary right to join a company, also affecting an interest of personal scope, albeit not necessarily subject to protection, that by its very nature entails significantly less intensity in the protection of the collective interest.

- comparing the severity of the punishment in art. 315.3 CP with that for the basic crime of coercion under art. 172, which protects other aspects of a person's freedom, including the exercise of other constitutional rights.

In this case, the sentence in the basic crime of coercion may be imprisonment for 6 months to 3 years or, in the alternative, a fine of 12 to 24 months, depending on the severity of the coercion or the means used. The precept includes an aggravated form when coercion is intended to prevent the exercise of a constitutional right, implying the application of the sentence in the upper part of its range: from 1.5 to 3 years in prison or, in the alternative, a fine of 18 to 24 months, so even in situations of severe coercion preventing people from exercising their fundamental rights, the maximum sentence that can be imposed is no more than 3 years' imprisonment in any case, and may not exceed a 2 year custodial sentence, meaning that the sentence could be suspended or replaced by another that does not entail depriving guilty parties of their personal freedom.

The legal treatment dispensed in these matters is also defective and generates, in the absence of clear and express regulatory criteria on essential elements regarding both the description of the behaviour, its purpose, and the persons involved in the circumstances, an enormous dispersion in the criteria applied in judicial thinking, ranging from positions that clearly restrict the elements within the crime to others in which prison sentence in excess of three years are imposed for actions that are absolutely lacking in any objective severity or even not worthy of legal reproach.

Such regulations, together with the lack of homogeneous criteria applied by the Office of the Public Prosecutor when lodging accusations, generate an enormous degree of legal uncertainty and we observe that they are being used to prosecute numerous trade union officers, subjecting them to the threat of lengthy prison sentences for the sole reason of assuming a leading role in the management of labour conflicts, even when they have not been involved in any overstepping of the boundaries in the exercise of their fundamental rights.

For this reason, in order to avoid the enormous distortions caused by this concept of criminal law in the scope of labour relations, it is reasonable to propose the repeal of article 315.3 of the Criminal Code, insofar as it is redundant, unnecessary, flawed, and stems from the premise, unacceptable in a Democratic State, of imposing an aggravation of a punishment for the mere circumstance that the person accused was attempting to exercise a fundamental right.

The general classification of the crime of coercion is sufficient to eradicate violent behaviour and has sufficiently consolidated criteria in place for its interpretation and application through jurisprudence in order to generate legal certainty, as well as a severity that conforms better to the severity of the behaviour, without incorporating any aggravation through the exercise of the right to strike.

Thus, it is noteworthy that those cases in which the crime foreseen in art. 315.3 of the Criminal Code is attributed by the Office of the Public Prosecutor generate petitions for a punishment and, in some cases, a custodial sentence in excess of three years' imprisonment, even though there are, in practically all of the scenarios considered, no instances of violence, nor any breach of significant legal interests.

In addition, it is striking that, in almost all the prosecutions brought, the accusations involving these offences are addressed to trade union officers or leaders or to the legal representatives of the workforce, regardless of their specific participation in the circumstances.

Not even in those highly exceptional cases of physical altercations or one-off incidents are criteria based on the personal participation of the accused in the events at hand used for their prosecution, but rather general presumptions attributing to the trade union officers the behaviour of certain isolated individuals, especially when not identified.

On the other hand, we wish to state for the record the situation arising in the light of a total of 81 case files open at the legal services of both UGT and CCOO, which have been notified to us by the respective organizations, without prejudice to the fact that each of these files contains in turn information that refers, due to the absence of any disaggregation, to numerous administrative and criminal proceedings, and that these involve the bringing of proceedings for the imposition of penalties or criminal sentences affecting in many cases more than one person: at least 260 trade unionists have been involved in administrative and criminal proceedings, without prejudice, as we have said, to the absence in some of these proceedings of any specification of the identity of the people being prosecuted.

*1. Andalusia.*

*Case files opened respectively in Cádiz (Algeciras), Granada, Málaga, Huelva and Seville. In all cases, these involve criminal proceedings affecting a total of 32 workers in connection with conflicts related to the general strike held in September, 2010, in Cádiz, the general strike in November, 2012, in Málaga and another conflict in the course of a company strike in 2009, in Granada. In the case of Huelva, the conflict refers to the general strike called in November, 2012 and has given rise to both administrative proceedings and also a criminal prosecution against the same person responsible for the Provincial Union. In Seville, the case also refers to the strike in November, 2012.*
*The criminal prosecutions allege crimes of bodily injury, assault on authorities and, in particular, crimes of coercion to instigate a strike under art. 315.3 CP attributed in the cases in both Granada and Málaga.*
*Similarly, a judgement has been handed down in Granada by Criminal Court nº 1, subsequently confirmed by the Appeals Court, sentencing two people to three years ad one day in prison and the payment of a fine of 2,880 euros, plus legal costs and compensation of 767 euros. The verdict invokes the crime foreseen in art. 315.3 CP as it declares*

*the accused to have illegally urged the owner of commercial premises in Granada city to close during the general strike on March 29th, 2012, with the facts of the case consisting in the hurling of insults, the use of stickers and graffiti causing damage to the amount of 767 euros. In the middle of July, 2014,one of the persons affected, a 25-year-old Medicine student, effectively went to prison and the other person is expected to go to prison at the end of that same month.*
*In San Fernando (Cádiz), a Court has ordered a trial to be held after investigating three workers at the NAVANTIA shipbuilding company in connection with the conflict arising out of a demonstration on November 6th, 2012. He Office of the Public Prosecutor has applied for prison sentences of 9 months, 14 months, and 2 years and 3 months for the three workers on the grounds of alleged crimes of breach of the peace, assault on authorities with the use of dangerous means and a minor offence of bodily injury. Specifically, one worker has been accused of having thrown a microphone at the policeman addressing the group of UIP agents without the object hitting the officer. Another worker is accused of using an umbrella to strike a policeman forming part of a police cordon outside the headquarters of the People's Party, hitting him on the right forearm, and the other worker is accused of attacking a police officer with an umbrella without any record that the victim was struck although the police shield was cracked.*
*In Seville, the sentence sought is 1 year of imprisonment plus a fine for a crime against road safety.*

*2. Aragon.*

*We have a record of criminal proceedings under investigation in Zaragoza in connection with the general strike in March, 2012. The crimes alleged refer to assault and bodily injury through alleged jostling of the police close to Merca Zaragoza market. Similarly, another person is awaiting trial in connection with a cleansing department strike in 2013.*

*3. Asturias.*

*These proceedings include an extensive range of scenarios, with particular emphasis of criminal prosecutions totalling 15 case files under way in different Criminal Investigation Courts in Mieres, Oviedo, Lena, Siero, Cangas de Narcea, Grado, Laviana, Langreo and Avilés. These case files affect 43 people facing requests for custodial sentences ranging from 6 months to 4 years in prison.*
*In the criminal prosecutions, the allegations very generally refer to crimes of breach of the peace affecting ten different case files. The allegations also include very often the crime of assault in six cases. Elsewhere, criminal damage has been alleged in five cases. There are also allegations of crimes of bodily injury in two cases, highlighting the scant repercussion of the social conflicts on the physical wellbeing of those involved, despite the extensive prosecution effort under way.*

*4. Balearic Islands.*

*We are aware of the existence of criminal proceedings under way before the Criminal Investigation Courts in Palma de Mallorca in connection with conflicts during the general strike in March, 2012. These proceedings are of particular significance as the person accused is the General Secretary of the CCOO Union in the Balearic Islands and the Office of the Public Prosecutor has petitioned for custodial sentences in excess of four years. The current situation of these proceedings is that the Court has ordered a trial to be held and is awaiting the defence's written position as the Office of the Public Prosecutor has submitted its accusation for a crime against workers' rights.*

*5. Castilla La Mancha.*

*We are aware of the existence of several criminal prosecutions in the provinces of Albacete and Ciudad Real, respectively affecting four trade union officers in the casein Albacete, and three in Ciudad Real.*
*In the Ciudad Real case, the events took place in Puertollano during the general strike in September, 2010, and involve, among the three trade union officers accused, the General Secretary of the Provincial Union, in connection with the lighting of a bonfire on a roundabout and an informative picket, without the formal accusation having yet been specified.*
*In the Albacete case, the facts alleged against the four trade unionists also refer to the General Strike in September, 2010, due to the action of an informative picket at the Municipal Market accused of throwing tacks and striking a vehicle. The Office of the Public Prosecutor initially classified the actions as a crime of coercion to cause a strike, although this accusation was later changed to charges of damage. The hearing is pending.*

*6. Castilla y León.*

*Criminal proceedings are known to be under way in Ávila, León, Soria and Valladolid, and administrative penalties are being considered in Burgos, Segovia and Valladolid.*
*The criminal prosecutions refer to a total of six persons accused of breaches of the peace, threats, insults and offence against law and order.*
*In the case of Ávila, the criminal prosecution ended in the imposition of a sentence of a 100 euro fine for a breach of the peace. Another prosecution ended in a not guilty verdict.*

*In Valladolid, a criminal prosecution arising out of the general strike in September, 2010,caused the Office of the Public Prosecutor to accuse three trade unionists of crimes against law and order, subsequently reduced to minor offences in the hearing stage, at which point those involved accepted the reduced charges and paid a fine of 120 euros each; another trade union officer was found not guilty by the Court in the light of inconsistencies in the police statements.*

*7. Catalonia. There is a record of several criminal prosecutions arising out of a number of employment conflicts:*

*The2010 General Strike generated proceedings against 4 trade unionists in Terrassa, against whom the Office of the Public Prosecutor is asking for 4 years' imprisonment for crimes against workers' rights. In order to avoid a trial, a plea bargain was brokered for a sentence of 6 months, thus avoiding going to prison, provided that they are not involved in any kind of criminal activity in the next two years, as this would entail the fulfilment of the prison sentence. In addition, a fine for the overall sum of € 3,450 was imposed on the four accused, as well as the obligations to cover the damage caused.*
*The 2012 General Strike led to charges being brought in Vic against the action of an informative picket, without any formal accusation having yet been submitted.*
*In Barcelona, the proceedings following the 2012 General Strike refer to the actions of informative pickets in the university area, with allegations of criminal damage, assault, resisting arrest and bodily injury, with the formal accusation pending submission.*
*The strike in Barcelona's metropolitan transport service in November, 2012, gave rise to proceedings before the Courts of Barcelona, where an accusation of criminal damage has been alleged against a member of the Barcelona Underground works committee.*
*The strike called in support of the negotiation of a sectoral collective bargaining agreement in Tarragona in May, 2013, led to proceedings before the Investigative Courts in Valls and Barcelona, with allegations of crimes of coercion, without any clarification as yet of whether or not they include the special case of coercion to impose a strike. In addition, the strike in the Panrico bakery company has generated six criminal prosecutions currently in the early stages of judicial investigation, without any formal indictments or specification of the punishment measures requested.*

*8. Galicia.*

*We are aware of two criminal prosecutions before the Investigative Courts in Pontevedra that ended in guilty verdicts by the Lower Criminal Courts but these have been overturned on appeal.*
*In one case, a not guilty verdict has been handed down with regard to the accusations brought against three people in a conflict related to the strike in November, 2009.*
*In the other case, related to a sectoral strike in 2012, the Court of Appeal in Pontevedra, by means of a judgement dated April 3rd, 2014, not only confirmed the guilty verdict in the first instance but has also upheld the petition from the Office of the Public Prosecutor to increase the prison term from 6 months initially imposed by the Lower Criminal Court to three years and one day for two workers.*
*In the case where the Court of Appeal in Pontevedra has confirmed the sentence, this refers to two workers who, although not holding any official position in the trade union, have requested its involvement following the judgement handed down in the appeal. This situation hinders the possibility of legal intervention as all the judicial resources have already been exhausted and the only appeals now lying are for the protection of constitutional rights.*
*Similarly, we must note a 3 year prison sentence related to the general strike in September, 2010.*

*9. La Rioja.*

*We are aware of a criminal prosecution brought in Logroño following the events in September, 2010,in which five people, including the General Secretary of the CCOO Union in La Rioja together with other trade union officers have been charged. During the investigation stage, the allegations included criminal damage and coercion with a view to holding a strike, with the Office of the Public Prosecutor applying for two years in prison, although this was subsequently reduced in the trial to an accusation of generic crime of coercion, implying a qualitative reduction in the sentence requested and excluding any imprisonment. The final verdict was not guilty.*
*A trial is still pending for a worker facing five years in prison for his participation in the strike on March29th, 2012.*

*10. Murcia.*

*We are aware of a criminal prosecution before the Investigative Courts of Murcia in which a crime against law and order is alleged against three people as a consequence of the burning of tyres and interruption of traffic during the general strike in March, 2012.*

*11. Madrid.*

*Proceedings are under way before the Courts of Getafe against a group of eight trade unionists from the AIRBUS company as a result of the actions of informative pickets during the September 2010general strike. In this case the commission of a crime against workers' rights is alleged, as well as assault and bodily injuries; the Office of the Public Prosecutor has lodged a formal accusation requesting, among other punishments, an eight year prison sentence for*

*each of the trade unionists. The defence has submitted its pleadings and also lodged a demurrer requesting the proceedings be declared null and void due to serious procedural irregularities in the charges brought by the Office of the Public Prosecutor, as well as the infringements of the right to Trade Union Freedom and the right to strike. This demurrer has not yet been resolved by the Investigating Judge and it will be possible to lodge an appeal for the protection of the Constitutional Tribunal in the event this demurrer is dismissed. The accusation in this prosecution has been organized by a group of members of the State security forces involved in the violent breakup of the picket, also accusing a member of the company's workforce, albeit without identifying the person causing the battery. A custodial sentence has been requested for two trade unionists in the Food Service sector following their participation in the strike on March29th, 2012. The punishment requested is 7 years in prison for each of them. Two workers in Alcalá de Henares (1 from Coca Cola and 1 from other sectors) are facing a judicial investigation with a request from the Office of the Public Prosecutor for prison sentences ranging from 2 to 4 years.*

*A criminal prosecution is under way before Investigative Court nº 5 in Getafe against four people, one of them for a crime of coercion in the promotion of a strike under art. 315.3 of the Criminal Code. The facts of the case stem from June 4th, 2012, when a strike had been called in the John Deere Ibérica, S.A. company and the general manager and various other executives in the company brought charges alleging that they were unable to reach their workplaces in order to carry out the safety services entrusted to them, in view of the statements and comments made by the said trade unionists, who were acting in their capacity as members of the works committee and the strike committee. Division Four of the Provincial Court of Appeal in Madrid has also confirmed a judgement dated March 31st, 2014, sentencing a worker for an offence of coercion under art. 620.2 of the Criminal Code, confirming the judgement of Investigation Court nº 39 in Madrid dated December 9th, 2013, following the events arising out of the general strike on November 14th, 2012. The verdict was fundamentally based on statements made by the trade unionist to the manageress of a McDonald's outlet at Barajas airport asking her to close the premises.*

*12. Valencian Community.*

*Note is taken of six judicial proceedings affecting 10 people, two of which have been stayed, one is under way before Investigation Court nº 4 in Liria, as well as Criminal Court nº 8 in Alicante and Court nº 4 in Alicante, affecting a total of 11 people. There are also proceedings under way in the police station in Elche comprising 19 people facing allegations of crimes of coercion. To these, we must add 7 trade unionists who are pending the provisional considerations of the Office of the Public Prosecutor.*

## IV. BREACH OF THE EUROPEAN SOCIAL CHARTER AND THE ADDITIONAL PROTOCOL IN TH SCOPE OF THE PUBLIC ADMINISTRATIONS IN THE PERIOD FROM 2009 TO 2012.

### IV.1 BREACH OF ARTICLE 4 OF THE EUROPEAN SOCIAL CHARTER (RIGHT TO A FAIR WAGE).

As in the previous section, the Government does not reflect in its Report any of the measures enacted with regard to remuneration for public employees, which can be summed up in wage cuts and salary freezes.

The cornerstone of recent governments' policies has consisted in systematically reducing the remuneration paid to public employees as a whole in all the Public Administrations, placing them on a par with 2007 and with a loss of purchasing power over the period analysed (2009-2012) of 17.6%. These measures have been enacted by means of Royal Decree Laws (RDL) and numerous General State Budget Acts in these years, all general and fundamental in nature.

The losses in earnings are shown in the following table:

| YEAR | C.P.I | WAGE INCREASE | DIFFERENCE |
|---|---|---|---|
| 2009 | 0.8% | 3.5% | 2.7% |
| 2010 | 3% | -5% | -8% |
| 2011 | 2.4% | 0% | -2.4% |
| 2012 | 2.9% | -7% | -9.9% |

In addition to the measures analysed in previous sections, and in the wake of the general basic measures imposed, many Administrations have emphasised further cutbacks on aspects of

salaries within their exclusive remit in their Regional Budgets (supplements for career postings, specific appointments, productivity, bonuses, etc.).

Specifically, RDL 8 dated May 20th, 2010, adopted extraordinary measures to trim the public deficit and cut 5% of the remuneration paid to public employees. Its article 1 amended the General State Budget Act (Law 26 dated December 23rd, 2009) in such a way that, where previously an increase of 0.3% in payroll had been foreseen, a basic -5% cut was applied indiscriminately to all public employees and all Public Administrations for an indefinite period.

In addition, RDL 20 dated July 13th, 2012, *on measures to ensure budget stability and encourage competitiveness,* eliminated the payment of the winter bonus due in December, 2013. Its article 1 amended the General State Budget Act (Law 2 dated June 29th, 2012) by eliminating payment of the winter bonus due in December, 2012, implying, on average, a loss of 7% in purchasing power.

Furthermore, starting with RDL 20 dated December 30th, 2011, contributions to pension plans for public employees were prevented. Article 2 Section Two of this Royal Decree Law establishes, as a basic general requirement, that the Public Administrations will not be able to make contributions to employment-related pension plans or collective insurance contracts including retirement coverage. Later, additional provision 24 of the General State Budget Act (Law 2 dated June 29th, 2012) reduced contributions to Social Action Plans organized by the Public Administrations.

## IV.2 BREACH OF ARTICLE 5 OF THE EUROPEAN SOCIAL CHARTER (TRADE UNION RIGHTS).

*Once more, the Government has failed to make any mention whatsoever of the Public Administrations, despite having applied extremely negative measures in this area.*

It is essential for the European Committee Social of Rights to be aware that the strategy of the current Government of Spain involves weakening the trade unions by reducing their power to act and influence workplaces, as well as lowering their prominence in the right to collective negotiation, a matter that will be discussed below.

This reality can be confirmed in the following details:

1. The radical elimination of all collective bargaining agreements and other arrangements that improved or extended legal minimums, rendering ineffectual the contents of the working conditions that had been negotiated on such essential matters as remuneration, sick leave supplements, leave days, vacations, trade union action measures, working hours, etc.

This has diminished the effectiveness of the main instrument for the exercise of trade union freedom.

2. Electoral boundaries were unilaterally altered in order to propitiate a reduction in the number of representatives to be elected and the collateral rights and guarantees derived therefrom (art. 12 of RDL 20/2012). An artificial re-definition has been implemented for their scope of action and this has nothing to do with the work centre or production organization, substantial restricting the number of representatives, despite the fact that the previous system already implied a smaller proportion of elected representatives depending on the headcount at each company or workplace.

This represents a worrying reduction in the single-person representative bodies for public employees (Personnel Boards, Works Committees, and Union Delegates). A matter that will in turn cause a reduction in the human resources, guarantees and means available for trade union action.

3. Preventing the normal holding of trade union elections in the Foreign Sector of the General State Administration by preferring economic criteria over the right of association for over 6,000 public employees to elect their representatives. (Resolution dated March14th, 2012).

## IV.3 BREACH OF ARTICLE 6 OF THE EUROPEAN SOCIAL CHARTER (RIGHT TO COLLECTIVE BARGAINING).

*On this occasion, the Government has merely described, on the one hand, the regulatory framework for collective bargaining in the Public Administrations with major omissions; on the other hand, it has given a false analysis of the status of collective bargaining in the Public Administrations.*

The Government's Report makes a series of allusions to collective bargaining in the Public Administrations and, in some regards, it limits its remarks to a partial reproduction of the regulatory framework foreseen in the Public Employees (Basic Statute) Act (Law 7/2007). This Law effectively represented a major push for collective bargaining, through the creation of the General Negotiation Boards, etc. It also analyses in summary the status of collective bargaining in the Public Administrations and lists a number of alleged "achievements" reached through collective bargaining (Agreement dated September 25th for 2010-2012, AFEDAP, RD 868/2010, creating the Public Employment Observatory, the Equality Commission, the Manifesto dated October 25th, 2012, the RDL adapting the legislation on Occupational Risk Prevention, etc.).

This situation is, however, incomplete and biased hiding as it does the serious impacts on collective bargaining rights within the sphere of the public employment and the Public Administrations.

As indisputable proof of all this, it is necessary to refer to ILO Report 371 in response to the Complaint posed by the trade union organizations with respect to RDL 20/2012. That Report found that the Government failed to comply with collective bargaining rights.

The Government's unilateral actions, with the excuse of the economic crisis, whereby it has imposed working conditions within the Public Administrations without due process and without observing the negotiation mechanisms foreseen in legislation, as shown below:

1. The establishment of remuneration levels established in the 2010-2012 Agreement between the Government and the Trade Unions for the public function has been dismantled by RDL 8/2010 as well as by the rest of the measures adopted in RDL 20/2012, which lowered the wages of all personnel in the public sector, rendering ineffectual all collective bargaining agreements or other arrangements regulating these matters.

2. Royal Decree Law 20 dated July 13th, 2012, on measures to ensure budget stability and encourage competition, prevents collective bargaining from discussing extremely important matters: working hours, leaves of absence, vacations, time off, etc.

- Through Additional Provision 71 in the 2012 State General Budget Act (Law 2 dated June 29th, 2012), the Government established a basic working week of at least 37 and a half hours per week for all Public Administrations. It addition, it declared null and void all agreements or other arrangements that established a lower number of hours;

- The number of vacation days was reduced by article 8 of RDL 20 dated July 13th, 2012, on measures to ensure budget stability and encourage competitiveness(published in the Official State Gazette ("BOE") on July 14th, 2012), which amended the contents of article 50 of the Public Employees (Basic Statute) Act (Law 7 dated April 12th, 2007). This precept contained the regulation of minimum holiday periods (at least 22 working days for vacations) and this could be extended by means of collective bargaining. This is something that had happened in a great many of the Public Administrations, with additional vacations days being generated according to length of service. Following this amendment, all of the agreements and other arrangements that established such additional days were eliminated, and the 22 days foreseen

in the aforementioned Law 7/2007 became the maximum available in the Public Administrations as a whole, without any possibility of extending them through negotiation.

- The number of days for personal business were reduced through the elimination of the additional days that were generated previously on the basis of length of service, and the repeal of all agreements and other arrangements extending those foreseen in article 48.1 letter k) of Law 7/2007. Article 8 of Royal Decree Law 20 dated July 13th, 2012, on measures to ensure budget stability and encourage competitiveness (published in the Official State Gazette ("BOE") on July 14th, 2012), amended article 48.1 of the Public Employees (Basic Statute) Act ("EBEP"). It also introduced basic regulations on the maximums for leaves of absence to be enjoyed by public employees, again preventing them from being extended through collective bargaining and repealed all agreements and other arrangements extending those foreseen in the original article 48 of Law 7/2007.

3. Not only did it repeal negotiated contents, it also established a regulatory system to enable each public administration to fail to comply unilaterally with agreements and other arrangements. The new article 32 of the EBEP, as amended in RDL 20 dated July 13th, 2012, on measures to ensure budget stability and encourage competitiveness, limits and reduces the effectiveness of Collective Bargaining Agreements for personnel on employment contracts. In fact, that new norm empowers the governing bodies of the different administrations to amend or suspend collective bargaining agreements and the regime for employees' rights and working conditions for reasons they may unilaterally perceive based on an appeal to intervening circumstances of an economic nature. This in effect extended to personnel on employment contracts what the EBEP from 2007 already contemplated for civil service personnel by ceasing to recognize the binding nature of collective bargaining agreements for the public entity as it was unilaterally able to cancel their effectiveness and amend them.

4. There has also not been any political will to provide any contents for negotiating bodies such as the General Negotiation Board for the Public Administrations, the National Health Sector Board, the Public Employment Observatory, or the Commission for Equality between Women and Men in the Public Administrations

## IV.5 BREACH OF ARTICLE 2 OF THE ADDITIONAL PROTOCOL OF THE EUROPEAN SOCIAL CHARTER (RIGHT TO INFORMATION AND CONSULTATION).

*Although the Government's Report does not mention the Public Administrations, even though this right has not been complied with in certain circumstances, there have been major actions during the reference period that have undermined the right to information and consultation of workers' representatives, substantially affecting the means for trade union action.*

*For this purpose, we can highlight the following actions:*

1. As we have already criticized above, the reduction in the single-person representative bodies for public employees pursuant to RDL 20/2012.

2. The failure to convene participation bodies such as the Public Employment Observatory, the Commission for Equality, etc., has prevented trade union organizations from making use of their legally foreseen right to information and consultation

3. The use of data protection legislation so as to restrict our access to key information on the working conditions of personnel with respect to whom the trade union representatives exercise their functions without the existence of any general rules or criteria to guarantee access to the economic information and working conditions applicable to them.

4. The use of outsourcing procedures for public services and privatization processes without any prior dialogue with the trade unions, despite the involvement on occasions of transfers of civil service and employed personnel and the generation of notable changes in working conditions, without the existence of any regulatory framework to ensure the information and consultation with sufficient time in advance and with a suitable degree of respect for the administrative contracting procedures that imply an impact on personnel previously occupied at that entity.

## IV.6 BREACH OF ARTICLE 3 OF THE ADDITIONAL PROTOCOL OF THE EUROPEAN SOCIAL CHARTER (RIGHT TO TAKE PART IN THE DETERMINATION AND IMPROVEMENT OF WORKING CONDITIONS AND THE EMPLOYMENT CONTEXT).

*The Government's Report mentions the Public Administrations for the mere purpose of listing the regulations on risk prevention produced by the General State Administration.*

The first thing that has to be said is that article 3 of the Protocol transcends the Risk Prevention and Occupational Health, the subject matter to which the Government's Report limits itself (and a subject matter already specifically contemplated in article 3 of the European Social Charter from 1961). In addition, it should be clarified that the references made to RD 67/2010, on the adaptation of Occupational Risk Prevention legislation to the General State Administration, did not receive any support whatsoever from the trade union movement as they do not respond to the reality that exists on this subject.

In addition, in this matter related with health and social attention, other aspects must be highlighted as having suffered significant modifications in the working conditions, without any trade union participation, such as by the reform of *article 9 in RDL 20/2012, which drastically reduces the remuneration of public employees when they are immersed in a situation of Temporary Sick Leave arising out of ordinary contingencies (accidents and common illnesses), by reducing and eliminating Social Action Funds.*

From all of the above, it can be seen that the Spanish Government, through all these measures, has attempted to reduce or eliminate basic working rights with the justification of the situation of economic crisis affecting the country, overlooking the jurisprudence of the European Committee of Social Rights which has pointed out that "the economic crisis must not be translated into a reduction in the protection afforded to the rights acknowledged in the Charter. Therefore, Governments must adopt all necessary measures to ensure that these rights are effectively guaranteed at the same time as the need for such protectionism particularly felt" (*GENOP-DEI and ADEDY vs. Greece*, Complaints nº 65/2011 and nº 66/2011, decisions on the merits dated May 23rd, 2012, § 16 and § 12).

For all of the above reasons, the Comisiones Obreras and Unión General de Trabajadores Trade Union Confederations respectfully submit the preceding observations and comments on the report submitted by the Government of Spain to the European Committee of Social Rights, with the request that it confirm for itself the failure to comply with the European Social Charter and its Additional Protocol in those aspects, ways and factual accounts described above, and that it adopt the necessary measures to ensure the social and employment rights guaranteed by the aforesaid instruments.

In Madrid, on July Twenty-Third, Two Thousand and Fourteen.