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EUROPEAN SOCIAL CHARTER

Report from the Spanish Government on the comments from Spanish Trade Union Confederations COMISIONES OBRERAS (CCOO) and Union General de Trabajadores (UGT) on the

27th National Report on the implementation of the European Social Charter

submitted by

THE GOVERNMENT OF SPAIN

(Articles 7, 8, 16, 19 for the period 01/01/2010 – 31/12/2013)

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CYCLE XX-4 (2015)

REPORT OF THE GOVERNMENT OF SPAIN ANSWERING THE ALLEGATIONS SUBMITTED BY CCOO AND UGT IN RELATION TO THE 27TH REPORT OF SPAIN ON THE APPLICATION OF THE PROVISIONS OF THE THEMATIC GROUP ON CHILDREN, FAMILIES AND MIGRANTS (Articles 7, 8, 16, 17 and 19 of the European Social Charter of 1961).

(Period from 1 January 2010 to 31 December 2013)

Concerning the allegations submitted by CCOO and UGT before the Executive Secretariat of the European Committee on Human Rights (department of the European Social Charter), referring to the 27th Report of Spain on the application of the provisions of the thematic group on children, families and migrants, the following remarks are made, following the order of the mentioned allegations.

Article 7. Right of children and adolescents to protection

I. 1. BREACH OF ARTICLES 7.1 AND 7.3 CONCERNING THE INSUFFICIENT SURVEILLANCE OF CHILDREN WORK AND ITS IMPACT ON THE RIGHT TO EDUCATION

First it is alleged that Spain does not fulfil the provisions of paragraphs first and third of article 7 of the ESC in relation to the surveillance of children work and its impact on the right to education. From the **field of the Labour and Social Security Inspectorate** LSSI) on this matter comes the answer to the allegations submitted by CCOO and UGT.

The trade unions UGT and CCOO indicate that "**(…)** ***the data concerning the actions of the LSSI do not breakdown whether the detected infringements in matter of children work are due to the general ban to employ minors under 16 years of age, to the employment of people between 16 and 18 in jobs where they may not be employed, or to night work, nor is there any reference to the sectors of activity or jobs where not allowed children or youngsters' work has been detected (…)"***. This fact, in opinion of the signing trade unions, prevents a real diagnosis of the situation of work by minors.

First, it is necessary to precise – as we had indicated in our report – that the data of the inspecting actions in matters of minors, during the period covered by the ESC report (2010-2013) were included in the information system of the Labour and Social Secutiry Inspectorate, called "*Integra"* in two keys for action:

A. **A first key for action (3T)** that includes all non breaches relating to the rules on minors aged under 18 in the field of labour relations, concretely:

- The breach of the ban to admit minors under sixteen to work ((article 6.4 of Royal Legislative Decree of 24 1/1995of 24 March, approving the rewritten text of the Act on the Workers' Statute (BOE – Official Journey – of 29) (from now on WS).
- The breach of the legislation ruling the work in matter of industrial relations of the workers between sixteen and eighteen years, such as the ban of working extra time, the ban of night work, not complying with the specific limits of the working time or foreseen rest periods for workers under eighteen years (articles 6.3., 6.4., 34.3., 34.4. and 37.1 of the WS).
- All the data on activity corresponding to this paragraph are a very serious infringement, article 8.4. of Royal Legislative Decree 5/2000of 4 August, approving the rewritten text of the Act on Infringements and Sanctions in the Social Order (BOE of 8). *"The infringement of the rules on work by minors included in the labour legislation".*

B. **A second key for action (29H)**, which would bring together the results of the activity carried out in matter of security and health concerning the workers under eighteen years. For instance, breaches in matters banned for minors under eighteen years (article 6.4 WS and Decree of 26 July 1957, establishing the activities banned for minors), as well as breach of the rules concerning the obligation of carrying out an assessment of the risks at work in the jobs occupied by minors under eighteen (article 27 of Act 31/1995 of 8 November, approving the Act on Prevention of Risks at Work (BOE of 10th).

All data in this paragraph are very serious infringements, article 13.2 of Royal Legislative Decree 5/2000, which provides "*Inobservance of the specific rules in matter of protection of the minors' security and health*".

Therefore, it is not true that it is not possible to differentiate between the actions carried out in labour matter and those accomplished in matter of security and health, as could be deducted from the transcribed allegations of the trade unions UGT and CCOO.

However, concerning the **possibility to give more disaggregated data** of the inspecting action, it can be highlighted that several changes have been made in the information system of the Labour and Social Security Inspectorate *"Integra"*, in order to be able to improve the treatment of the data relating to the inspecting actions in matter of work by minors.

To be more specific, from January 2015, the information System *"Integra"* allows to differentiate the data on control of the rules on work by minors, depending from the age of the subject that commits the infringement (both in matter of work and in matter of Prevention of Risks at Work). The aim of these actions is to achieve a higher depth when disaggregating the data concerning the inspecting actions in matter of work by minors.

Thus, and from 12015 on, it is possible to differentiate the inspecting actions aimed at watching the fulfilment of each one of the specific obligations referred to the group of workers under age contained in our rules.

On the one hand, in the field of the **labour rules,**it is distinguished between :

- The key 43 T, relating to work by minors under sixteen years, bringing together the inspecting actions aimed at controlling the rules on banning the admission to work of minors under sixteen years of age (article 6.4 Royal Legislative Decree 1/1995).
- The key 3T, relating to work by minors between sixteen and eighteen, bringing together the inspecting actions aimed at the control of the regulations ruling the work in matters of industrial relations of workers between sixteen and eighteen (articles 6.3, 6.4., 34.3., 34.4. and 37.1 of the WS).

On the other hand, in the field of the **rules on Prevention of Risks at Work:**

- The key 48H, relating to the fulfilment of rules on security and health that concern the minors under sixteen years, that brings together the actions aimed at caring for the appropriate fulfilment of article 6.4. WS, of the Decree of 26 July 1957, as well as of article 27 of Act 31/1995.
- The key 29H, relating to the surveillance of the fulfilment of the rules on security and health concerning the minors between sixteen and eighteen years, that includes the breaches of article 6.4 WS of 26 July 1957 and of article 27 of Act 31/1995.

Therefore, since 2015 it is already possible to obtain the differentiated data on the inspecting actions aimed at controlling the fulfilment of the labour rules and of those on the prevention of the risks at work, in relation to sixteen years olds, of the infringements detected in relation

to the breaches of sixteen years minors specific rules foreseen for the workers aged between sixteen and eighteen years.
Secondly, and in relation to the reference to **failure to mention the activity or employment sectors** where not allowed child or youngsters' work has been detected, it can be highlighted that, in view of the results obtained in the years of reference and derived from the control and surveillance carried out by the LSSI in this field, and specially taking into account the low number of detected infringements (concretely, between the years 2010 and 2013, the total number of infringements in matter of prevention of risks at work detected has been 23), it has not been considered appropriate to carry out a more detailed breakdown of the data obtained, as it is not considered that the breakdown could produce significant statistical data that allow the LSSI to obtain information or data with sufficient entity to be able to develop or plan future actions in this field of inspecting action.
The same reasoning could be applied if the inspecting actions would be disaggregated according to the economic sector (agriculture, industry and commerce…). However, notice is taken of the appreciation of the trade unions CCOO and UGT when valuing possible changes in the Information System "Integra".
On the other hand, UGT and CC.OO. also state in their allegations that the LSSI ***"(…) does not have the material and human means to prove the conditions of work, and/or the existence of minors in the whole set of activities, enterprises and work centres, including the family households (…)".*** They understand that ***"(…) the low number of infringements detected by the LSS inspections is precisely due to this lack of resources, and not to the existence of child work (minors under 16 years of age) or of employments of minors under 18 years and over 16 years in jobs that they should not perform (…)".***
To this respect it could be highlighted that, as indicated in the 27th Report by Spain, the control and surveillance of the adequate fulfilment of the rules on minors. The Labour and Social Security Inspectorate carries out a surveillance and control of the fulfilment of the rules in matter of minors in a continuous way in all areas and matters of its competence. And not only on grounds of the rating given by the legislator to the infringements in matter of minors, but because the age factor is a repeated element of control in most matters subject to inspection.
Therefore, the data included in matter of inspecting action in relation to the surveillance and control of the rules on minors must necessarily be put in relation to all inspecting actions developed by the LSSI System, and it must be highlighted that, for instance, the total number of inspecting actions of the LSSI in 2013 was 1,247,051 actions, with a total number of inspecting visits of 344,047. In view of the inspecting actions carried out, it doesn't seem that the LSSI system could be branded as lacking resources. Therefore, the fact that few infringements are detected in relation to the surveillance of the fulfilment of the rules in matter of minors is not due to the lack of sufficient resources, but very possibly to the level of breach in the Kingdom of Spain, which is very far from the appreciations of the alleging trade unions.
These total data of activity are included in the mentioned 27th Report and are available in the Yearly Memories of activity published by the Labour and Social Security Inspectorate.
Furthermore, the Act 23/2015 of 21 July, Ordering the System of Labour and Social Security Inspection (B.O.E. of 22nd), repealing the previous Act Ordering the Labour and Social Security Inspection, Act 42/1997, could be highlighted. This Act has included as one of the new functions of the Sub-inspectors of Labour of the Employment and Social Security Scale, *"proving the fulfilment of the rules that ban the admission to work of minors under sixteen years"*, in its article 14.2.b), which reinforces and increases the number of sub-inspectors competent in matter of control and surveillance of the ban to accede to work by minors under sixteen years.

The trade unions go on by indicating that ***"(…) In sectors like agriculture, where settlements of population are still taking place and in farms far away from centres of population, the presence and the work of complete families is known and provable. They are employed and accomodated in unhealthy conditions and with labour relations that are not the legally established (…)"***

The issue raised by the signing trade unions seems to refer, apart from the conditions of work and lodging of the workers in the agricultural sector, to the presence of minors under sixteen working in the farms. In respect to this last issue, which is exactly that related to the content of article 7 of the ESC, the Labour and Social Security Inspection System is not aware of such situations occurring in the degree or dimension that seem to can be inferred from the statements of the trade unions UGT and CC.OO. As it has been indicated in the 27th Report on the implementation of the ESC, the number of breaches of the ban to admit to work minors under sixteen detected by the Labour and Social Security Inspectorate in all the economic sectors – including the agricultural sector – is really low. Therefore, and in respect to the statements of the trade unions signing the writing, it seems convenient to remember them of the possibility they have to report to the Labour and Social Security Inspectorate the concrete irregularities they know in matter of minors. This would allow the Labour and Social Security Inspectorate to carry out the needed checking actions and to take the opportune measures.

To this respect, it can be said that presently there are two ways to report or let know the Labour and Social Security Inspectorate the existence of irregularities in the field of the socio-labour rules.

A. **SUBMITTING A FORMAL COMPLAINT:** The procedure to submit a formal complaint is regulated in Royal Decree 928/1998 of 14 May approving the General Regulation on Procedures to Impose Sanctions for Infringements of the Social Order and for the Procedures for the Settlement of Contributions to Social Security (BOE of 3 June), specifically, in its article 9.1.f; the mentioned Royal Decree regulates the data that must be included in the formal complaint (personal identification data of the person submitting the complaint and his or her signature, the presumable infringing facts, date and place where it has occurred, identification of the presumed responsible persons, other important circumstances). The said complaining writing must be submitted in the register offices of the Provincial Labour and Social Security Inspectorate, as well as in the register offices of the other bodies of the State Administration and of the Autonomous Communities, as well as of the local administrations, provided that the corresponding agreement exists , it can equally be submitted by telematics through the electronic seat of the Ministry of Employment and Social Security or by mail addressed to the corresponding office of the different Provincial Inspectorates of Labour and Social Security.
B. **MAILBOX TO FIGHT LABOUR FRAUD**. The Ministry of Employment and Social Security through the Directorate General of the Labour and Social Security Inspectorate has made available to all citizens the "Mailbox to fight labour fraud", where anybody who knows any breach of the rules, on labour, social security or prevention of risks at work, can let it know to the Labour and Social Security Inspectorate. It is important to highlight that, by reporting these data to the Inspectorate, the reporter will not have to give any personal information and the mailbox will only receive the information relating to the presumed irregularities that he or she got to know.

To finish this part, the trade unions CC.OO. and UGT indicate that the LSSI ***"(…) lacks the possibility to act, on its own, if the work centre is a family household, which obviously impacts on the impossibility to proof the breach of the obligations established by the ESC, both in the case of minors working in household employment and in other activities when the work centre is a private domicile (…)"***

Article 13.1 of Act 23/2015 provides that one of the powers of the LSSI-System officers is "*to freely enter at any time and without previous notice in any work centre, establishment or place subject to inspection, and to stay in it. If the centre subject to inspection was at the same time the domicile of an individual, they must obtain his or her express consent or, if this fails, the opportune judicial authorization".* In this way it is observed that the said power is limited at any time by the right to inviolability of the domicile, acknowledged as a fundamental right in article 18.2 of the 1978 Spanish Constitution.

However, and to this respect, the possibility of the LSSI to apply for the corresponding judicial authorization when, according to the data or complains received by the LSSI, it is considered convenient to do so, can be highlighted.

I.2. BREACH OF ARTICLE 7.10: INCOMPLETE REGULATION OF THE PENAL CODE IN THE PURPOSES OF TRAFFIC OF HUMAN BEINGS WHEN IT AFFECTS MINORS AND OF PREVENTIVE MEASURES IN THE AGREEMENT OF THE COUNCIL OF EUROPE FOR THE FIGHT AGAINST THE TRAFFIC OF HUMAN BEINGS

Concerning the fulfilment by Spain of article 7 of the Charter, relating to the right of children and adolescents to protection, CC.OO. and UGT allege that Spain breaches the provisions of **paragraph 10** *(special protection against the physical and moral dangers to which children and adolescents are exposed, especially against those which directly or indirectly derive from their work*), CC.OO. and UGT base this breach on the incomplete regulation in the Spanish Penal Code of the purposes of the traffic with human beings when it affects minors, as well as on the inexistence of measures of protection for minors who are victims of traffic with human beings, or for the children who are victims of traffic.

Concerning the **regulation of the Penal Code,** it can be indicated that this has been recently reformed by Organic Law 1/2015 of 30 March, modifying Organic Law 10/1995 of 23 November of the Penal Code.

- The referred modification reaches article 177 bis of the Code – regulating the **traffic of human beings,** and completely transposes to the Spanish legislation the Directive 2011/38 of 5 April, relating to prevention and fight against traffic of human beings, and to the protection of the victims, replacing the Framework Decision 2002/629/JAI of the Council. Concerning the **under aged**, article 177 bis defines as traffic of human beings the capture, transportation or transfer, the receipt or reception of minors under age, be it in Spanish territory, from Spain, in transit or destined to it, with the purpose to sexually exploit them (including pornography), to exploit them to perform criminal activities, to extract their body organs or to use them for forced marriage. It is considered that there is traffic of human beings even if the mentioned actions are carried out without violence, intimidation or deceit, or abuse of a situation of superiority, need or vulnerability of the victim – means that are however required when the victim is full aged.

- Likewise, the mentioned article foresees in its paragraph 4 the worsening of the penalties to be imposed if the victim is a minor. In this sense, and by means of the mentioned article, the provisions of article 4 of the Agreement of the Council of Europe on fight against the traffic of human beings (Warsaw 16/05/2005), mentioned in the trade unions allegations, are literally adopted, which shows the lack of rigor in the reasoning of the said allegations.

This information can be extended by explaining that, in spite of the fact that it was not expressly defined in the Code in force at the time, the criterion expressed by the Public Prosecutor for Foreign Affairs in its report sent on 23 June 2014 to the National Reporter for the traffic of human beings in order to inform on the complete transposition of Directive 2001/36/EU, relating to the prevention of traffic of human beings and fight against it, and to the protection of the victims, which is below quoted, is very clarifying:
"(...) Article 177 bis PC, has opted for the description of three specific modalities of traffic, also in an alternative way (for whatever purpose) and in three differentiated groups. Therefore, it is sufficient that one of the said purposes is accredited for the crime to exist.

(a) The imposition of forced work or services, slavery or practices similar to slavery, servitude or mendacity. Even if exploitation to carry out criminal activities is not expressly included, the truth is that for international law, which is binding for Spain (acting furthermore as integrating the ruling element of the crime), the concept of work comprises not only any productive labour activity, ruled or not (agricultural, industrial, of services, household work, etc.), but also other activities of quite different nature, like recruitment of minors to intervene in armed conflicts of to commit crimes (Convention ILO 1999, on the worst forms of child work), and anyhow, it would be covered under the meaning of slavery, understood as the condition of an individual on whom the attributes of the property right are exerted, or some of them (article 1.1. Convention on slavery of 1926, article 7, Supplementary Convention on the abolition of slavery, traffic of slaves and institutions and practices analogous to slavery of 1956; article 7.2 c of the Statute of Rome of the International Penal Court of 1998). Hence, the Spanish public prosecutors are obliged to prosecute these cases as traffic of human beings (Circular letter 5/2011 GSPP). Anyway, moreover and to elude any doubt, the Government has prepared a Bill to reform the Penal Code where this activity is included as a specific sub-modality. (…)".

Furthermore, as it is underlined in the Report by the Public Prosecutor for Foreign Affairs, in 2014 a reform of the Penal Code was being prepared. Presently it is already in force (OL 1/2015 of 30 March. Modifying the Penal Code), which expressly includes among the purposes "the exploitation to carry out criminal activities" (article 177 bis c).
Following the mentioned report of the Public Prosecutor for Foreigners Affairs, and concerning the recommendation of article 19 of the Convention of the Council of Europe (according to the provisions in article 18.4 of Directive 2011/36/EU) it is indicated:
"This recommendation of the Directive – referred to the use of the services of a slaved person – alludes to the behaviour of somebody who, without any participation in the crime of traffic (previously committed), later carries out any action of personal profiting from the victim. There is no doubt in the Spanish law about the fact that whoever uses the services of a slave

in any work activity will commit a crime against the rights of the workers defined in articles 311 or 312 of the PC. On the contrary, the true conflict arises in relation to the cases of sexual exploitation where the user of the service of the victim is the client of prostitution, which is not directly foreseen, as free and consented prostitution is not a banned activity in our law.
However, the client who has sexual access with a victim of traffic knowing that this person was not in a position to oppose, as she was slaved or treated as such, may commit a crime against sexual freedom (violation, sexual aggression or sexual abuse, depending on each case. Article 178 and ff. of the Penal Code)".

- The new reform of the Penal Code also addresses the cases relating to minors who are victims of traffic and suffer **sexual exploitation.** The article 188 regulates in express form the induction, promotion or favouring of minors prostitution. Likewise, it punishes that a sexual relation with a minor is solicited, accepted or obtained, with the penalties becoming aggravated if the victim is under aged: the account of the prescription will commence on the day when this reaches full age, and if he or she would die before reaching it, from the date of death. – this allows the prosecution of traffic crimes when the victim is of young age, since, contrary to what happened before the approval of the reform, it will not be possible that the crime prescribes before the majority of age of the victim, and this may exercise the penal action him or herself, if he or she has no legal representative who does it for him or her,
- The reform introduces legal instruments to favour the recovery of the goods resulting from the crime of traffic of human beings, by extending the **seizure** to the crimes of traffic. The Organic Law 5/2010 of 22 June, modifying Organic Law 10/1995 of 23 November of the Penal Code, had already extended the seizure to the effects, goods, instruments or profits coming from criminal activities committed in the framework of a criminal organization or terrorist group. However, this reform did not include the cases of traffic that were not committed within a criminal organization. Therefore, the new article 127 bis, introduced by Organic Law 1/2015 of 30 March, includes in an express way the seizure extended to traffic of human beings, as it is considered a criminal activity sustained in time from which import economic profits can be derived.
- Furthermore, the reform modifies the **crimes against the workers.** This way, article 311 bis is added, which punishes those who employ or give an occupation to foreign citizens or minors who have no work permit.
- Likewise, Organic Law 1/2015, or 30 March, reaches the crimes against foreign citizens included in article 318 bis, clearly defining the behaviours making up the crime of **illegal immigration.**
- Finally, article 89 excludes the crime of traffic of human beings from those to which the benefit of **expulsion of the** sentenced **foreigner** instead of prison is applied

I.3. BREACH OF ARTICLE 7.10: ABSENCE OF PROTECTION AND OR INSUFFICIENT PROTECTION TO MINORS VICTIMS OF TRAFFIC OF HUMAN BEINGS AND FOR CHILDREN OF VICTIMS OF TRAFFIC, INCLUDING HEALTH CARE

Concerning the **measures of protection** aimed at the minors who are victims of traffic of human beings, it is necessary to refer to the **Act 4/2015 of 27 April on the Statute of the Victim of Crime.**

- As the **implementation field** is concerned, the Act 4/2015, of 27 April, includes the minors who are victims of traffic of human beings or the children of those. The Act starts from a broad concept of victim, which includes the direct victim who suffers the damage – specially physical or psychical lesions, emotional damages or economic damages – and the indirect victims in cases of death or disappearance – spouse or person who until his or her death was united to the victim by an analogous link of affectivity, children, relatives in straight or collateral line within the third degree, who were under his or her guardianship, persons subject to his or her tutelage or who were under his or her family fostering.
- It could likewise be mentioned that, concerning this article 7.10, the eighth final provision of **Act 26/2015, of 28 July, on modification of the system for the protection of children and adolescents,** has included the group "victims of traffic of human beings" as a group object of measures to promote employment, by including a new paragraph 4 ter in article 2 of Act 43/2006, of 29 December, for the improvement of growth and employment, which is transcribed below.

"The employers who hire for an unlimited period of time victims of traffic of human beings, identified according to the provisions of article 59 bis of Organic Law 4/2000, or 11 January, on rights and freedoms of foreigners in Spain and their social integration, and who, for their part, have obtained authorization to reside and work on exceptional circumstances, without the condition of being unemployed being necessary, will be entitled to a monthly bonus of the employer's contribution to Social Security or, as the case may be, to its daily equivalent, for each contracted worker, of 125 euros/month (1,500 euros/year) during two years and from the date of contract signing.
In case temporary contracts are signed with these persons, the employer will be entitled to a monthly bonus of the employer's contribution to Social Security or, as the case may be, to its daily equivalent, for each hired worker of 50 euros/month (600 euros/year) during the whole validity of the contract.

- Concerning the foreseen **measures of protection**, the Act includes a whole catalogue exclusively devoted to the needs of protection of the victims. This way, the outreach of their right to protection is regulated, as well as the right to avoid the contact with the infringer, to the protection during the criminal investigation, as well as the right to protection of their intimacy. In respect to the minors, it is expressly banned to disseminate any information that may facilitate the identification of the victims. Also the mechanisms for the individual assessment by the judge of the characteristics of the victim under aged and/or victim of traffic of human beings – are included. Both parameters are taken into account for the assessment – with specific measures of protection being foreseen, like the declaration in given places or by specially trained professionals in order to reduce or to limit the damages caused to the victim by the criminal act. These measures are foreseen both for the preliminary investigation phase and for the hearing phase. Finally, the Act 4/2015, of 27 April, regulates and extends the field of action of the Offices for the Assistance to the Victims and

foresees the training of legal operators and personnel at the service of the Administration of Justice in this field.

- Likewise, the launching of the Integral Plan to fight traffic with purposes of sexual exploitation, in force until 2012, now waiting for the imminent publishing of the second phase in 2015, must be indicated.
- It can be indicated, referring to the report by the trade unions UGT and CC.OO., that the **Labour Inspectorate** is competent only for what refers to administrative infringements, and therefore any action related to the traffic of human beings (a crime defined in the Penal Code) is exclusive competence of the Security Forces and Corpses. Therefore, the Inspectorate carries out no actions aimed at the investigation of this crime, but at the detection and later reporting to the bodies which are competent for the prosecution of it.
- Concerning the care and assistance to the victims under age and their derivation once detected, Spain has a **Framework Protocol for the Protection of the Victims of Traffic of Human Beings**, subscribed on 28 October 2011, promoted by the Government delegation for Gender Violence, which establishes the mechanisms and procedures for the appropriate derivation, with the Ministry for Health, Social Services and Equality being in charge of dictating the general patterns of action in case of health care for the victims of traffic.
- This Protocol has been signed by the Ministries of Justice, of the Interior, of Employment and Immigration, of Health, Social Services and Equality, besides the General State Prosecutor and the General Council of the Judicial Power.
- The Framework Protocol foresees in its paragraph XIV the specificities of action with victims of traffic of human beings under aged, according to the regulation in the Directive 2011/36/EU, of 5 April, in relation to the prevention of and the fight against traffic of human beings and to the protection of the victims.
- For its part, **the Ombudsman, in its 2012 report "The traffic of human beings in Spain: invisible victims"**, devotes a special reference to the identification and protection of the minors who are victims of traffic. In the updating of the mentioned report in October 2013, the Institution analysed the progresses achieved in this field, but kept stressing the need of "going further in the preparation of an appropriate framework that allows an efficient identification, protection and assistance to the minors who are victims of the traffic of persons".

In this sense, it made the following recommendation to advance in an efficient protection of the victims who are minors in Spain:

"In the framework of the coordination bodies existing between Autonomous Communities and the General Administration of the State, promoting the work to prepare a national protocol for the detection of and the assistance to the minors who are victims of traffic that includes, among other issues, a common catalogue of the signs of traffic adapted to the special circumstances of the minors. Also establishing a speedy procedure that allows that, once the minor has been detected and provided that reasons of security so advise, he or she can move within the national territory to the residence best adapted to his or her needs."

The Secretariat of State for Social Services and Equality committed itself to promote the work for the mentioned protocol, and all Autonomous Communities and the autonomous

cities of Ceuta and Melilla showed their will to collaborate in its preparation, as did the Non Governmental Organizations that work to put an end to this serious problem.
In this sense, the Plenary of the Infancy Observatory approved the creation a specific work group for the elaboration of a **national protocol for the detection of minors who are victims of traffic and the assistance to them**, with the collaboration both of the Autonomous Communities and of other Departments of the General State Administration involved in the mentioned themes, as well as with the support of the associations movement. The work of the mentioned work group continues presently.
Following the need of an efficient and specific protection system for minors who are victims of traffic, it must be indicated that, in April 2013, the **II Strategic National Plan of Infancy and Adolescence 2013-2016 (II PENIA)** was approved by agreement of the Cabinet. The Plan has been promoted from the DGSFI (MSSSI). This Plan, of national outreach, includes the objectives and measures from an inter-institutional and integral prospect related to the wellbeing of the infancy in general and in particular those aimed at the prevention of violence of any kind in childhood and to the protections of minors.
The Objective 4 of the II PENIA is literally defined as "Protection and social inclusion. Promoting the care and social intervention to children and adolescents in situations of risk, lack of protection, disability and/or situation of social exclusion, establishing shared criteria of quality and practices prone to assessment."
It contains two measures that affect to the improvement of situations that directly or indirectly can increase the risk of children traffic and exploitation.
Measures 4.5. Developing agreed measures within the III PESI, carrying out their follow-up and assessment, in collaboration with the Integral Plan against Traffic of Human Beings with purposes of sexual exploitation.
Measure 4.6. Accomplishing the transposition of Directive 2011/93/EU, of the European Parliament and the Council, of 13 December 2011, relating to the fight against sexual abuses, sexual exploitation of children and children pornography, in all issues not taken into account in the legislation in force, and more specifically, those relating to possible aggressions and bullying through the network, as well as investigation and indictment in cases of crimes relating to abuse, sexual exploitation and children pornography.
Likewise and following with the ruling sphere, it should be said that in the present year 2015 the following rules, extending the **assistance benefits** to the victims of traffic of minors and guaranteeing them, have been approved:

- Act 4/2015 of 27 April, on the Statute of the victims of crime.
- Organic Law 8/2015, of 22 July, modifying the system to protect children and adolescents.
- Act 26/2015, of 28 July, modifying the system to protect children and adolescents.

At the same time, the continuous fight against traffic of human beings of the Security Forces can be highlighted. Different mechanisms, like the Agreement on Collaboration between the Ministry of Employment and Social Security and the Ministry of the Interior, signed on 30 April 2013, on coordination between the Labour and Social Security Inspectorate and the State Security Forces, in matters of fight against irregular employment and fraud to Social Security, with the purpose to improve the operating and functional coordination for the prosecution of the administrative crimes and infringements, among others, traffic of human beings for their labour exploitation have been launched for this purpose, to which Instructions, Service Orders and Procedures for Action or the leading bodies of the State Security Forces should be added. Their aim is to provide with rules of action that allow an efficient, integral and coordinated answer of all the units belonging to the said Corpses.

Likewise the trade unions CC.OO. and UGT allege that there is a breach of paragraph 10 of the mentioned article 7 of the ESC, stating that: ***"In matter of treatment with purposes of labour exploitation, regardless of whether the victims are under aged or not, the Labour and Social Security Inspectorate does not include within its annual programme any actions aimed at the investigation of these cases in those sectors of activity where these behaviours are most frequent.***

The field of action of the **Labour and Social Security Inspectorate** is exclusively limited to the phase of detection of possible cases of traffic of human beings. The activities performed in this matter are developed by the LSSI in the framework of the provisions in the "Framework Protocol of Protection of the Victims of Traffic of Human Beings", which, in its paragraph V.C., expressly refers to the *"Detection by the Labour and Social Security Inspectorate".* Given the competences of the Inspectorate, its intervention will focus on possible cases of traffic of human beings with purposes of labour exploitation. In the framework of the said Framework Protocol, joint inspections with the Security State Forces have been carried out, whose results, when it is detected that these situations may be a crime, the State Security Forces and the Prosecutor are competent to initiate the corresponding penal actions.

The information system *"Integra"* of the Labour and Social Security Inspectorate includes from the year 2011 a specific key relating to the *"Traffic of human beings for the imposition of forced work or services".* However, the disaggregation by age of the included data is not allowed, which hinders that those relating to minors affected by these situations can be facilitated.

However, it should be taken into account that, in those cases where the possible existence of a crime like the one relating to labour exploitation can be deducted from the inspecting actions, it will be acted according to the provisions in article 17.3 of the Act 23/2015 of 21 July, Ordering the Labour and Social Security Inspection System (BOE, 22). Thus, the said article foresees that *"If the possible commission of a crime would be appreciated, the Labour and Social Security Inspectorate, following the organic way to be determined, will remit to the Prosecutor a list of the facts, including circumstances, that it had known, as well as of the subjects who could be affected".*

As the **health care** is concerned, the unions allege that *"Royal Decree Law 16/2012 put an end to the universality of the public health care, directly excluding from it the foreigners in an irregular administrative situation, who from then only have access to urgencies in case of severe disease or accident, whatever its cause until the situation of medical discharge and of assistance to pregnancy, delivery and post-delivery, and indirectly, due to the imposed requirements, it also excludes Community foreigners (registered or not in the Register for Foreigners) and non Community foreigners in regular situation. The RD-Law indicates in its article 1.3. that foreigners under 18 years of age will receive health care under the same conditions as the Spanish citizens; Royal Decree 576/2013, in its fourth three additional provision, provided that the victims of traffic of human beings, whose temporary stay in Spain had been authorized during the period of recovery and reflection, will receive health care as long as they are in this situation, with the extension foreseen in the basic common portfolio of services of the national health system, regulated in article 8 bis of Act 16/2003. Likewise, medical care, or of any other type, will be given to the victims of traffic of human beings with special needs. The basic common portfolio includes exclusively the care activities of prevention, diagnosis, treatment and rehabilitation provided in health or socio-health centres, as well as urgent health transport; but it does not include pharmaceutical or ortho-prosthesic benefit. The true is that, in the case of minors, to whom the rule gives a degree of care that should be equal to that of an insured, or of victims of traffic, although these with limitations concerning health care, these exceptions do not imply that they have the condition*

of insured and/or beneficiaries; therefore, they also have no health card that accredits their right, and this has given rise, as shown in the report of the Commissioner for Human Rights of the Council of Europe after his visit to Spain from 3 to 7 June 2013, that health care has been denied to minors, a situation that has not changed, since situations of denial of care or of the intent to charge money for the care given in urgencies or in other health services", and, therefore, according to the unions, the breach of the obligation to give the due protection to minors who are victims of traffic of human beings or children of victims of traffic of human beings, is proven.

To this respect, and we say it with full respect to the signing trade unions signing the report, it is considered that the statements made in the transcribed paragraphs are not true, since:

- The **Royal Decree-Law 16/2012** of 20 April, on urgent measures to ensure the sustainability of the National Health System (NHS) and to improve the quality and the security of its benefits, **has been the rule that has extended health care in Spain in an universal way**, as it has extended the right to health care, among other groups, to the workers who, having some income, have exhausted the benefits and allowances for unemployment, and integrating for the first time the scheme of public health insurance to groups like lawyers, engineers or architects, who previously did not have the said right.
- **The said rule does in no case exclude Community foreigners or persons legally residing in Spain.** It is sufficient to simply read article 1 of Royal Decree-Law 16/2003, of 28 May, on cohesion and quality of the National Health System, to verify that in no case are Community citizens or persons with legal residence in Spain excluded, as the trade unions state.

In our country, as it has been duly indicated in the 27th Report by Spain, of 15 July 2013, the citizens acquire the condition of insured by their link to Social Security (workers, pensioners, receivers of periodical benefits, including those of unemployment, as well their beneficiaries). Apart from these cases, and through legal residence in Spain, the entitlement is granted to those persons who do not exceed the income limit of 100,000 euros per year:

> *Article 3.3. of Act 16/2003*, of 28 May, *on cohesion and quality of the National health System*
>
> *In those cases where none of the previously established conditions is fulfilled, the persons with Spanish nationality or of any Member State of the European Union, of the European Economic Area or of Switzerland, who reside in Spain, and the foreigners holding an authorization to reside in the Spanish territory, may have the condition of insured, provided that they accredit that they do not exceed the legally determined income limit.*

For their part, to the persons who are not legally in Spain, the Royal Decree Law guarantees the right to be cared for, with a level of coverage which is over the existing ones in the rest of Europe in generosity and quality.

> *Article 3 ter of Act 16/2003, Health care in special situations.*
>
> *Foreigners who are not registered or authorized as residents in Spain shall receive health care in the following modalities:*
>
> *a) Urgency on grounds of severe disease or accident, whatever its cause, until the situation of medical discharge.*
>
> *b) Care to pregnancy, delivery and post delivery.*

Anyhow, the foreigners under eighteen years will receive health care under the same conditions as the Spanish citizens.

- This coverage schema extends to more cases, among others, persons who are **victims of traffic of human beings**, whose protection is guaranteed by the fifth additional provision of *Royal Decree 1192/2012, of 3 August, regulating the condition of insured and beneficiary to the effect of health care in Spain, to be paid with public funds, through the National Health System.*

  Also in this case the literal quotation of the rule is very clarifying about the high level of coverage given at the charge of public funds.
  Fifth additional provision: Health care benefit for victims of traffic of human beings in period of recovery and reflection
  The victims of traffic of human beings whose temporary stay in Spain has been authorized during the period of recovery and reflection will receive, as long as they remain in this situation, health care to the extension foreseen in the basic common portfolio of care services of the National Health System, regulated in article 8 bis of Act 16/2003, of 28 May.
  Likewise, the needed care, medical or of any other type, will be given to the victims of traffic of human beings with special needs.
  As can be observed, the coverage given is not necessarily limited to the common basic portfolio of services of the National Health System, as the trade unions state.
  The common basic portfolio, in spite of its name, is very far from being a minimum or essential level, since it includes a broad catalogue of benefits, namely: all preventive care activities, diagnosis, treatment and rehabilitation carried out in health or socio-health centres, and the urgent health transport; benefits which, besides, are granted guaranteeing the continuity of the care, under a multi-discipline approach focused on the patient, guaranteeing the best quality and security in it, as well as the conditions of access and equity for the whole covered population.
  We are therefore not before a minimum portfolio of benefits, but before one of the most complete and advanced of the countries in Europe, with its level of coverage being possibly compared by consulting the content of the mentioned benefits detailed in *Royal Decree 1030/2006, of 15 September, establishing the common portfolio of benefits of the National Health System and the procedure for its updating.*
  But, furthermore, those persons who are victims of traffic of human beings and who have special needs will receive the care they need, not only medical care (beyond even the available through the basic common portfolio), but also of any other social, cultural, educational, etc. condition.
- Besides what has been indicated, which is already sufficient to dismantle the arguments of the trade unions allegations, it is not pointless to remind here of the three basic issues already reported at the time by Spain in its 27th Report:

1.- That minors and pregnant women (during pregnancy, delivery and post-delivery), whatever their administrative condition of residence or stay, are guaranteed the same rights and to the same extend as the rest of the Spanish citizens, including the whole portfolio of services and also the pharmaceutical and ortho prosthesic benefits, among others. It is not possible to serve a higher coverage.
Those persons who are in what the legislation on health calls "special situations" also have the pharmaceutical and ortho-prosthesic benefit guaranteed, as the Eighth Additional Provision of RD 1192/2012, of 3 August, already mentioned, establishes even the type of contribution by the user for the benefits that require it (among them, the pharmaceutical and

the ortho-prosthesic benefits), which will be the corresponding to the working insured (in practice, the most favourable is applied, 40%).

Eight additional provision: Public health care in special cases:

1. *Foreigner aged under eighteen not registered or authorized as residents in Spain to which article 3 ter of Act 16/2003, or 28 May, refers, will be entitled to public health care by the National Health System with the same extent acknowledged to the persons who are insured, with the type of contribution by the user for the benefits of the portfolio of services of the National Health System that require it the corresponding to the working insured.*
2. *The foreign pregnant women not registered or authorized as residents in Spain, to which article 3 ter of Act 16/2003, of 28 May, refers, will be entitled to the assistance of the National health Service during pregnancy, delivery and post-delivery with the same extent acknowledged to the persons who are ensured, the type of contribution of the user for the benefits of the portfolio of services of the National Health System will be that corresponding to the working ensured.*

2.- That, in case of urgency due to severe disease or accident, whatever its cause and whatever the situation of residence or stay, the complete health care is guaranteed until the situation of medical discharge. This implies that the care is not limited to the assistance in the urgency hospital or ambulant services, but the whole care needed until the physician issues the discharge.

3.- That in the three mentioned cases (minors, pregnant women and urgency care), the care is not derived from the condition of insured or beneficiary (which, as has already been seen, is linked to the Social Security schemes), but from a supposed state of need y vulnerability, where both the administrative situation and the available income are ignored, with the service of this health care outweighing those other issues.

These persons who accede to public health care through the so called "special situations" or do not have a health care like the insured (as their access to the system is verified without having to accredit a relation with the Social Security system), or do not need the said card to be cared for, since they have an identifying code that allows then to accede to the public health. On this point, Royal Decree 1192/2012, in its fourth additional provision, provides as follows:

> *"Only to the effect of the necessary personal identification and management of their clinical data, the persons who do not have the condition of insured or beneficiaries of the National Health System (...), but receive health care from the National Health System,* ***are assigned a personal identification code (CIP-SNS), which will be unique and common for all the health services of the National Health System****, and which will remain permanently associated to their clinical information."*

Taking into account the transcribed regulations and the indications contained in this report, it should be clear that in Spain **IN NO INSTANCE HAS ANYBODY BEEN denied health care**, also not to minors, who are treated like the Spanish minors, or to full aged persons, whatever their administrative situation of stay or residence in our country.

And even less has the legislation on health care to victims of traffic of human beings or to children of the mentioned victims, as the trade unions claim, being desirable that the reporting trade unions, if they maintain their statements, contribute the accrediting information available to them on the concrete cases where a supposed denial of health care to persons entitled to it has taken place.

What has been previously said is understood without prejudice to the fact that, exactly as it happens with the Spanish nationals, those persons who are outside the very broad schemata

of public insurance (because they have incomes over 100,000 euros per year and do not meet the requirements to have the condition of insured or beneficiary of an insured, or because they are not in one of the "special situations" mentioned along this report, among them also the victims of traffic of human beings and the applicants for international protection), must pay the health care expenses in which they incur, as it happens in all countries of our environment.

But even for this group a possibility of voluntary insurance has been designed by subscribing a special agreement regulated in *Royal Decree 576/2013, of 26 July, establishing the basic requirements of the special agreement for the benefit of health care to persons who are not insured or beneficiaries of the National Health System, and Royal Decree 1192/2012, of 3 August, regulating the condition of insured and beneficiary to the effect of health care in Spain, at the cost of public funds, through the National Health System.*

It is therefore obvious that the statements **of the reporting trade unions in relation to the breach of article 7.10 of the European Social Charter lack the least truthfulness,** as in Spain, a complete health care for all persons, above all those in situations of special vulnerability is guaranteed by law and by regulation.

Particularly for minors under 18 years (children and adolescents to which the implementation field of article 7.10 of the European Social Charter refers), the care is given at the highest level of coverage and quality, under the same terms and with the same outreach as that given to Spanish minors.

Article 8. Right to protection of female workers

II.1. ON THE BREACH OF ARTICLE 8.2. IN THE SPECIAL LABOUR RELATIONS OF THE FAMILY HOME WORK AND HIGH DIRECTION.

According to the trade unions, Spain breaches this article of the European Social Charter by keeping the **dropping of the claim** as a specific formula to terminate the work contract of the home workers and high direction staff, different from dismissal, and that can occur during the maternity permit or from the date when pregnancy is reported to the employer, without it being null and void.

The trade unions also claim that the Group of Experts has not been set up, nor has the assessment of the impact on employment and on work conditions been carried out, as it was foreseen in the second additional provision of Royal Decree 12620/2011, regulating the labour relation of special nature of the family home service, where, precisely among the issues that should have been analysed, was the possible inclusion of the dropping of the claim in some of the common causes of extinction of the work contract.

This peculiar formula to terminate a work contract, applicable in the two labour relations of special nature to which the trade unions refer, is justified, as it is based on the loss of confidence in the worker, which makes it impossible to continue the activity. This relation of confidence is essential both in the case of the high executive who, by definition, exercises special powers inherent to the legal title of the enterprise, and in the case of the family home service, linked to personal and family intimacy, completely alien to the usual labour relations.

II.2. BREACH OF ARTICLE 8.3. OF THE CHARTER FOR FAILURE TO ENSURE SUFFICIENT FREE TIME TO GROW CHILDREN.

The trade unions consider that the fulfilment by Spain of this paragraph shows many deficiencies, as the extension of the paternity permit has been postponed already six times and specially through the Act 3/2012, of 6 July, on urgent measures for the reform of the labour market, it has made legislative modifications that have limited the possibility to reconcile work and child care, for instance, removing the possibility to accumulate the

reduction of the daily working time in full days, making the concretion of hours and the determination of the period to enjoy this reduction of the daily working time conditional from the needs of production and organization, allowing extra time in part-time hiring, or making also the exercise of the right to adaptation of the duration and distribution of the working time, foreseen in article 34.8 of the Workers' Statute, conditional from the improvement of the enterprise's productivity.

In view of these allegations, it must be pointed out that by no means can it be stated that Spain breaches the provisions of article 8.3 of the Charter (*to guarantee to the mothers who raise their children sufficient time to do it"),* since, as has been set out in the 27th report submitted by Spain, the Spanish labour legislation regulates and guarantees, through permits, reductions of working time and extended leaves of absence, sufficient free time to female (and male workers) to care for their children, fulfilling furthermore the minimums required by the European legislation, as Directive 2010/18/EU, through which the framework agreement on the parental leave is applied.

Likewise, in the allegations of the trade unions it is not taken into account that Royal Decree-Law 16/2013, of 20 December, on measures to favour the permanent hiring and to improve the employability of the workers, has modified article 12.4.c) of Royal Legislative Decree 1/1995, establishing among the measures included to make part time contract more flexible, **the removal of the possibility that workers hired to work part-time can work extra time,** except the cases foreseen in article 35.3 of the Workers' Statute (to prevent or repair accidents) and other extraordinary and urgent damages). Presently, in the part-time contract it is possible, although subject to the clearly established limits in article 12 of the Workers' Statute, to work for complementary time, both previously agreed between the enterprise and the worker, and –without previous agreement- voluntarily done after an offer of the enterprise; but, anyhow, the sum of ordinary and complementary hours may not exceed the legal limit of part-time work (the final working time has to be anyhow shorter than the working time of a comparable full-time worker). Concerning the agreed complementary hours, it must be underlined that, besides the fact that the rule foresees that the agreement may have no effect in some cases, through renounce of the worker by means of a previous notice of fifteen days, once a year has elapsed since the contract was signed. And one of the cases is precisely *the attention to family responsibilities named in article 37.5 of this Act"* (direct care of a minor under twelve years, or of a person with physical, psychical or sensorial disability, who does not perform a remunerated activity).

To this it must be added that the complementary hours are paid like the ordinary ones, and the said remuneration is taken into account for contributions and Social Security benefits. So it is established by article 12.5.j) of the Workers' Statute, according to which *"The complementary hours effectively worked will be paid as ordinary hours, and are counted to the effect of contribution bases to Social Security and exclusion periods and regulatory bases of the benefits. To this effect, the number and remuneration of complementary hours performed must be included in the individual receipt of salaries and in documents of contribution to Social Security."*

Besides, it must be reminded that also was the mentioned Royal Decree-Law 16/2013 of 20 December that one that, in order to facilitate the control of the effectively accomplished working time in these contracts not only establishes the obligation of the enterprise to register the working time in the part-time contracts, but also the supposition, except proof to the contrary, of full-time work for the case of breach of the referred obligation. Thus, article 12.5.h) of the Act on the Workers' Statute provides as follows:

"h) The working time of the part-time workers will be registered day by day and totalized every month, giving a copy to the worker, together with the receipt of the salaries, of the

summary of all hours worked every month, both ordinary and complementary, to which paragraph 5 refers.
The employer must keep the monthly summaries of the registers of working time during a minimum period of four years.
In case of breach of the said obligations to register, the contract will be presumed to have been signed for full-time, except if otherwise proven, accrediting the part-time nature of the services."
Finally, it is in this same rule where the age of the minor whose legal guardianship may justify a reduction of the daily working time, with a proportional decrease of the salary, is **extended from eight to twelve years**, in this way extending the free time that can be available for mothers (and fathers) to care for their children, and to which article 8.3. of the Charter refers.
Concerning the **progressive comparison of time in the paternity and maternity benefit,** it must be indicated that the twenty second final provision of Act 22/2013 of 23 December, on General State Budgets for 2014, modified the second final provision of Act 9/2009, of 6 October, on extension of the duration of the paternity benefit in cases of birth, adoption or admittance, in the sense of postponing its entry into force until 1 January 2015, in this way retarding the extension of the said leave.
This measure has being included every year to the Act on the General State Budgets, due to the adverse economic circumstances of the country, which make it not possible to increase the social protection in cases of paternity, as this would mean an increase of the expense for the Social Security system, which would be forced to take on the payment of the paternity benefit during a higher number of days.
Therefore, and without forgetting that it would be desirable that the mentioned Act would enter into force as soon as possible, the policy of reduction of the expenses to which Social Security has been directed makes it advisable to maintain this postponement until an economic recovery.
From the field of competences of the **Labour and Social Security Inspectorate,** this has among others, the control of the working time of the workers, including workers with a part-time contract. In recent years, the inspecting activity has intensified its actions in matter of part-time contracts, especially concerning the control of daily working time, in order to let come to the surface the undeclared work, be it by increasing the percentages of declared part-time or by transforming the fraudulent part-time contracts into full-time contracts.
To be more concrete, in the year 2013, a total of 14,097 actions in matter of working time were carried out (the data on the inspecting action on this matter can be seen in the Annual Memories of Activity published by the Labour and Social Security Inspectorate). This control includes the whole labour legislation regulating the working time, as well as the possible implications that the breach of it may have on the guarantee of security and health of the workers.
The breach of the said legislation is a severe infringement in matter of industrial relations, described in article 7.5 of Royal Decree 5/2000.*"The infringement of the legal rules and limits in matter of working time, night work, extra time, complementary hours, time of rest, holidays, leaves and, in general, working time to which articles 12, 23 and 24 to 38 of the Workers' Statute refer".*
The said infringement is punished with a fine, in its minimum degree, of 626 to 1,250 euros; in its medium degree, from 1,251 to 3,125 euros, and, in its maximum degree, of 3,126 to 6,250 euros.
Furthermore, where, as a result of the detected breach, the contract is presumed signed for full-time work, if the payment of the salaries corresponding to the said working time had not been accredited, the payment of the corresponding difference of salaries will be required, and,

if this was broken, the economic damages suffered by the worker will be included in the minutes, with the obligation to state them with requirements for the validity of the claims, to the effect of acting according to article 148.a) of Act 36/2011of 10 October, regulating the social Jurisdiction (BOE of 11th).

For purposes of the Social Security, the appropriate settlement actions will be carried out by the Inspectorate, in order to regularize the contributions corresponding to the detected excess of working time.

Finally, the trade unions indicate in this field that **"(…) the extra time does not contribute to social security to the effect of the unemployment benefit (…)"**

In relation to this statement, an important remark can be made. Concretely, and in relation to the remuneration obtained for extra time, a double contribution must be distinguished:

- **As increase of the contribution base for professional contingencies,** since, according to article 109.2.e) of Royal Decree 1/1994of 20 June, approving the Rewritten Text of the General Act on Social Security (BOE 28th), the remuneration obtained for extra time becomes part of the contribution base for work accidents and professional diseases. Besides, the contribution base for Unemployment, Salary Guarantee Fund and Vocational Training of all schemes of Social Security with these contingencies covered will be that corresponding to the contribution base for work accidents and professional diseases.

  However, it can be highlighted that, to the effect of calculating the unemployment benefit, and in spite of having paid these amounts, the remunerations received for extra time are excluded for the calculation of the regulatory base, as provided for by article 211.1 of the General Act on Social Security. *"in the calculation of the regulatory base of the unemployment benefit, the remuneration for extra time will be excluded, regardless of its inclusion in the contribution base for the said contingency established in article 224 of this Act".*

- **As additional contribution**, regulated by article 111 of Royal Decree 1/1994,which provides that *"The remuneration obtained by the workers for the item of extra time, regardless of the contribution to the effect of work accidents and professional diseases, will be subject to an additional contribution by employers and workers, according to the rates to be established in the corresponding Act on General State Budgets".* This additional contribution will not be accounted for the calculation of the regulatory base of the benefits, as provided for by article 24 Royal Decree 2064/1995,of 22 December, approving the General Regulation of Contribution and Settlement of other Social Security rights (BOE 25 January) and it will be different, depending on whether the extra time is structural extra time or due to force majeure.
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ii.3. BREACH OF ARTICLE 8.4.B) OF THE CHARTER IN RELATION TO THE PROTECTION OF THE FEMALE WORKERS' HEALTH AT THE SERVICE OF THE FAMILY HOME

According to the trade unions, "in as much as the labour relation of the family home service is excluded from the implementation field of article 8.4.b), as there is not a determination of tasks, agents or situations of home work that can be appropriate for women and specially for

those who are in situation of pregnancy and/or recent delivery and natural breast-feeding, for its dangerous, painful or unhealthy nature."

First, it must be reminded of the exact content of article 8.4.b) of the European Social Charter, which includes the commitment of *"banning female work in mining underground work, and, as the case may be, in any other work which is not appropriate for women due to its dangerous, painful and unhealthy nature".*

Therefore, although the legislator has excluded the special labour relation of the employees at the service of the family home from the implementation field of the Act on Prevention of Risks at Work, given the special features of these services, it did include the obligation of the holder of the family home to determine that the said work is performed in sufficient conditions of security and health that must prevail when the worker is in situation of pregnancy or recent delivery.

The said obligation, included in article 3 of Act 31/1995for the holder of the family home has been developed in Royal Decree 1620/2011of 14 November, regulating the labour relation of special nature of the service to the family home (BOE 17th), providing in its article 7.2as a right of the employee at the service of the family home that: *"The employer is oblige to care that the work of the home employee is performed under the due conditions of security and health, for which he or she will take efficient measures, duly taking into account the specific features of the home work. The severe breach of these obligations will be sufficient cause for resignation of the employee".*

In this way this article reinforces the right of the employees at the service of the family home, as it foresees as one of the causes of resignation of the employee the breach by the employer of his or her obligation to care for the performance of the said works in conditions of sufficient security and health.

Article 15. ***Right of the family to social, legal and economic protection***

In their allegations, CC.OO. and UGT mention the *breach of article 16 due to* **the progressive reduction or disappearance of benefits that condition to protection to the family"**. Concerning the Social Security benefits, it must be indicated that the trend in the number of beneficiaries and in expenditure has been of progressive increase, as can be seen in the following charts:

NUMBER OF BENEFICIARIES OF PERIODICALLY PAID FAMILY BENEFITS

Data in July of each year

YEAR	CHILDREN WITHOUT DISABILITY		CHILDREN WITH DISABILITY				TOTAL
	From 0 to 2 years	From 3 to 18 years	From 0 to 2 years TOTAL 33%	From 3 to 18 years 33%	>18> 65%	>18 5%	
2009	122.569	679,048	4,116	78,754	102,676	58,931	1,046,094
2010	267,936	670,521	244,477				1,193,053
2011	971,345		6,803	80,537	107,094	60,162	1,234,113
2012	1,001,725		254,596				1,274,543
2013	1,068,103		91,940		109,423	61,405	1,349,116
2014	1,153,627		262,768				1,443,031
2015	1,195,506		98,069		112,232	62,517	1,492,320
			272,818				
			102,849		114,682	63,4482	
			281,013				
			107,851		116,978	64,575	
			289,404ç				
			112,185	19,071	65,558	296,814	

EXPENDITURE IN FAMILY BENEFITS

Million euros

YEARS	Periodically paid	For child birth	For multiple birth	For birth of a child (article 188 bis	**TOTAL**
2007	940.78	4.88	18.60	33.96	998.22

2008	1,024.71	16.56	21.82	141.81	1,204,090
2009	1,109.64	21.79	22.91	134.74	1,289.09
2010	1,183.75	22.77	22.46	144.14	1,372.62
2011	1,244.37	22.19	23.07	16.90	1,306.52
2012	961.44	13.32	13.99	0.03	990.77
(*)	1,312.57	23.72	21.63	0.02	1.357.94
2013	1,679.11	32.50	25.32	0.01	1,741.50
2014	1,324.79	28.25	24.87		1,371.58
2015	1,467.28	28.25	24.87		1,520.40
2016					

Source: Accounts and Balances of Social Security 2017-2014. Budget 2015 and 2016.
(*) The decrease in expenditure in 2012 is compensated through accounting adjustment in 2014.

The most important expenditure item for economic benefits corresponds to the benefits for dependent child, which show an increasing behaviour, without prejudice to the step in 2012, which is due to budgetary reasons and is compensated in the year 2014 (326 million).

As the disappearance of the benefit for birth or adoption of a child, with effects since 2011, it can be indicated that this was due to the economic crisis, which forced the Spanish Government to take a series of measures aimed at meeting the objectives of reduction of the deficit by means of Royal Decree 8/2010 of 20 May.

Likewise, the trade unions CC.OO. and UGT state: *"In spite of the traditional defence of the family, the family protection system in Spain is the worst in Europe, aggravated by the repeated use by the Government of the taxation instruments, that are highly regressive and excluding".*

Against this statement, it must again be reminded that, by means of Act 35/2006, of 26 November, on the Income Tax, and of partial modification of the Acts on the Corporate Tax, on the Non Residents Tax and on Wealth (BOE 29 November), from now on LIRPF (initials in Spanish), which entered into force on 1 January 2007, it has been tried to achieve an important reduction of the tax burden of the contributors, in this way increasing their available income, especially for the contributors with least resources or with higher family charges.

The advantages for the contributors with least resources or with higher family charges are not exclusively in the LIRPF, but also in other taxes, like the local taxes, regulated in the rewritten text of the Act Regulating the Local Treasuries (TRLRHL), approved by Royal Legislative Decree 2/2004, of 5 March, which establishes the following tax advantages in relation to housing.

- In paragraph 2 of article 73, a bonus of 50 per cent of the total contribution of the Tax on Immovable Assets (IBI) for the state subsidized apartments, during the three taxation periods following the granting of their definitive rating. Later, the municipalities may establish a bonus of up to 50 per cent of the total contribution of the tax, applicable to the mentioned immovable assets.
- In paragraph 4 of article 74, an optional bonus in the IBI of up to 50 per cent of the full contribution for those passive subjects who are title holders of numerous families.
- In letter d) of paragraph 2 of article 103, an optional bonus in the Tax on Constructions, Installations and Works (ICIO) of up to 50 per cent of the contribution for constructions, installations and works in state subsidized apartments.
- In the letter e) of paragraph 2 of article 103, an optional bonus in the ICIO of up to 90 per cent of the contribution for constructions, installations or works which favour the access and habitability of people with disabilities.

Article 19. ***Right of migrant workers and their families to protection and assistance.***

Given the terms used by the reporting trade unions on the fulfilment by Spain of article 19 of the European Social Charter, it is considered necessary to preliminarily indicate that Part I of the Charter, which is the one that includes the conditions under which the rights may become effective, indicates the following in its point 19:

19. The emigrant workers who are nationals of each one of the Contracting Parties and their families have the right to protection and assistance in the territory of any other Contracting Party.

Therefore, it must be indicated here that the referred rights to the migrant population are only applicable, in what concerns the fulfilment of the European Social Charter, to the nationals of some of the States that have ratified the said instrument, not to the nationals of other countries.

Once this has been said, we transcribe article 19 of the Charter with the purpose to delimit the inaccuracy of some of the allegations contained in the report by CC.OO. and UGT.

"Article 19

Right of the migrant workers and their families to protection and assistance

In order to guarantee the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties commit themselves to:

1. *To maintain and ascertain that there are the adequate free services to help these workers, particularly to give them exact information, and to take the appropriate measures – as far as national Laws and Regulations allow it – against any deceitful propaganda on emigration and immigration.*
2. *To take, within the limits of their jurisdiction, the appropriate measures to facilitate the exit, the journey and the receipt of these workers and their families, and to provide them, during the journey, within the limits of their jurisdiction, with the necessary health and medical services, as well as with god hygienic conditions.*
3. *To promote the collaboration required in each case between the public and private social services of the emigration and immigration countries.*
4. *To guarantee to these workers who are legally within their territory a treatment not less favourable than the one given to their nationals concerning the matters expressed below, as far as these are regulated by Laws or Regulations or are subject to the control of the administrative authorities, namely:*
   a) *Remuneration and all other employment and work conditions*
   b) *Membership with the trade unions and enjoyment of the advantages offered by collective agreements*
   c) *Accommodation*
5. *To guarantee to these workers, as soon as they are legally within their territory, a treatment not less favourable than the one received by their own nationals in what concerns taxes, fees and contributions relating to the work performed by the worker.*
6. *To facilitate as much as possible the regrouping of the foreign worker's family who has been authorized to established him or herself within their territory.*

7. *To guarantee to the said workers who are legally within their territory a treatment not less favourable than the one given to their own nationals concerning procedural actions on the issues mentioned in the present article.*
8. *To guarantee to the said workers as soon as they legally reside in their territory that they may not be expelled, except if they threaten the security of the territory, the public order or the good customs.*
9. *To allow, within the limits established by the Laws, the transfer of any part of their wages or savings of the said migrant workers that they wish to transfer.*
10. *To extend the measures of protection and assistance foreseen in this article to the migrant workers who work in self-employment, as far as these are applicable to them."*

The obligation deducted from the mentioned article for Spain, in what concerns the underlined in paragraph 2, which requires to provide with health and medical services, and good hygienic conditions during the migration journey of the workers and their families, beyond the said obligation, which doubtless is fulfilled in our country without any difficulty, and that has not been questioned by the trade unions, article 19 of the Charter does not provide for any other additional obligation in what refers to health matters.

Once this has been said, nothing else could be indicated here on the inappropriateness of the allegations set out by the unions, which forget that the now examined 27th report has not included within its material field the right to protection of health, a right that is included in article 11 of the Charter, and that therefore is not one of those examined in the present procedure (which is only about the fulfilment of articles 7, 8, 16, 17 and 19 of the European Social Charter).

Notwithstanding this, and given the seriousness and inaccuracy of the allegations contained in the report of the trade unions, it is considered opportune to clarify the following:

- **It is not true that,** as the trade unions allege, **Royal Decree-Law 16/2012, of 20 April, excludes from health care the immigrants in irregular situation nor is it that it makes it difficult to accede for the foreigners in a regular administrative situation.**

On the contrary, the regulation introduced by the mentioned Decree-Law clearly defined the legal regime of health insurance in Spain, putting an end to the undesirable effect of the health tourism and to an important pocket of irregularities in the access to the health card which, as it is known, even was object of a Reasoned Report issued by the European Commission in the framework of the infringement procedure (2009/2341.

In what refers to the health care of the foreign citizens in irregular administrative situation (whose details and extension were indicated in the epigraph 2 of the present report), our country is one of the most generous in Europe. After the Royal Decree-Law 16/2012 a clear and defined assistance system for these persons has been achieved. The system offers health care coverage to more than 185,000 immigrants in irregular situation – a figure that does not include the care given to these persons in cases of urgency and until the medical discharge – with an annual cost higher than 244 million euros. These figures give an idea of the effort of Spain to ensure the health of the whole population, including that which is in an irregular situation.

For their part**, the access to the public health system has not been made more difficult for foreigners legally residing in Spain,** since, as it is regulated in article 3 of Act 16/2003, of 28 May, on Cohesion and Quality of the National Health System, as it has been drafted by Royal Decree-Law 16/2012, these citizens have the same rules of access as the Spanish

citizens residing in Spain, and they therefore enjoy the health care as insured on grounds of accrediting a link to the Social Security system (workers, pensioners, people in receipt of periodical benefits or beneficiaries of the previously mentioned), or on grounds of not having an income over 100,000 euros per year.
Precisely for these people who, being legally in Spain, don't have the condition of insured because they have not a link with the Social Security system and have important incomes, a mechanism of voluntary insurance by paying a premium has been designed. This mechanism is the special agreement regulated by Royal Decree 576/2013 of 26 June, which makes it possible that those who have resources also can accede to the public health system by means of the necessary financial consideration, but that in no case replaces the assistance given to the persons who have no means.

- **It is also not true either that people in irregular situation have not right to drugs, since, as we have previously seen, for special cases even the percentage of applicable co-payment is established** (cfr. page 6)
- **And even less true is that the new regulation of the right to health care had costed life to several immigrants.** Beyond the dissemination of some reports where the eventual existence of anonymous people damaged by the new health care regulation is raised, the only judicial action known is that of a Senegalese citizen who died in the Balearic Islands. The public prosecutor of the Court of First Instance nr 2 of Palma de Mallorca understood that by no way whatsoever was any responsibility for the death of the Senegalese citizen, Mr Alpha Pam, who was assisted in the public health services of de Balearic Islands, regardless of his irregular situation. This citizen on the other hand was never included in the implementation field of the European Social Charter, an aspect that should not be forgotten.
- The trade unions allege that the **requirement of a certificate of the last State of residence to accredit the lack of income over 100,000 euros is in practice an obstacle that prevents foreigners legally residing in Spain from acceding to health care.** In this point, it is again convenient to literally transcribe the so oft quoted article 6.2.d) of Royal Decree 1192/2012:

d)In the case of persons who are not contributors of the Income Tax, a responsible statement of not exceeding the income limit foreseen in article 2.1.b), accompanied for those persons who do not have the Spanish nationality, of a certificate issued by the fiscal administration of the State where they had the last residence accrediting that they did not exceed the mentioned income limit according to the income tax return submitted in the said State for a tax equivalent to the Income Tax. However, the stateless will not be obliged to submit this last certificate.
This last precept means in practice that the Spanish citizens who apply for health care for not having yearly incomes over 100,000 have to accredit this through their last income tax return, and, if they are not obliged to submit it, they have to sign a responsible statement of not exceeding the said income limit, both aspects that are strictly proven and verified by the Spanish tax administrations (c. article 5 of Royal Decree 1192/2012, which indicates that the acknowledgement of the right will be carried out *"after proving the fulfilment of the established requirements").*
Therefore, it cannot be understood that the reporting trade unions defend that there is a lower level of control on the lack of income for foreign citizens than there is for Spanish nationals. Moreover, and adjusting ourselves to the implementation field of the European Social Charter, it is to be expected that all citizens who come from the countries that have

ratified the said Charter avail without problems of the certificate required by the Spanish authorities, and that, it should not be forgotten, it is the one that allows to prevent that people with significant resources use this way as a fraudulent vehicle to accede to the right to public health care when they have more than sufficient means to pay for it or to subscribe a health insurance, public or private.

- Finally, it can also be indicated **that the appreciation on the eventual breach of article 19.2 of the European Social Charter, alleged by the reporting trade unions, as they understand that the extinction of the condition of insured or beneficiary for staying** longer than 90 days along each natural year **outside Spain** breaches the said precept **is inaccurate.**

To this respect, the mentioned article 19.2 provides that Spain must “”take, within the limits of its jurisdiction, appropriate measures to facilitate the exit, the journey and the receipt of these workers (it refers to emigrants) and their families, and to provide them during the journey, within the limits of its jurisdiction, with the necessary health and medical services, as well as with good hygienic conditions.”

It is obvious that the protection measures guaranteed by the transcribed precept are within the limits of jurisdiction of each signing party, i.e., within the national territory, what is perfectly guaranteed in the case of Spain, and not even the trade unions doubt it.

That Spain keeps paying health care when the persons have no link with the Spanish Social Security (in this case the coverage is always maintained) or reside in our country is a different question. In these cases, the coverage system of the European Social Charter itself implies that it will be the country of stay and receipt the one which provides the said assistance, as Spain does with the people coming from the signatory countries of the Charter when these are in our country, as has been set out in this report.

It must therefore be concluded that, as it is accredited, Spain avails of one of the legal frameworks with the highest protection for people without right to health care coverage, as has been reflected in the meeting of Ministers for Health held in Athens in the first half year of 2014, where the commissioner for Health Tonio Borg confirmed that our legislation adapts to the European standards and highlighted the generosity in the treatment given to persons without right to health care.