EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

2 November 2023

Case Document No. 2

***Federación de Servicios a la Ciudadanía de Comisiones Obreras Región de Murcia* (FSC-CCOO) v. Spain**
Complaint No. 229/2023

OBSERVATIONS BY THE GOVERNMENT ON ADMISSIBILITY

Registered at the Secretariat on 13 October 2023

MINISTERIO
DE JUSTICIA

ABOGACÍA GENERAL DEL ESTADO

SUBDIRECCIÓN GENERAL DE ASUNTOS
CONSTITUCIONALES Y DERECHOS HUMANOS

ÁREA DE DERECHOS HUMANOS

TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

OBSERVATIONS ON ADMISSIBILITY

_____

COLLECTIVE COMPLAINT
No. 229/2023

Federación de Servicios a la
Ciudadanía de Comisiones Obreras Región de Murcia (FSC-CCOO)
v. Spain

CORREO ELECTRÓNICO:
aetedh@mjusticia.es

C/ SAN BERNARDO, 45
28015 MADRID
TEL.: 91 390.45.11

1. By letter dated 31/08/2023, the Kingdom of Spain has been notified, pursuant to Article 5 of the Additional Protocol to the Revised European Social Charter, of the Collective Complaint submitted by the *Federación de Servicios a la Ciudadanía de Comisiones Obreras Región de Murcia (FSC-CCOO)*, which has been given the reference number 229/2023. Likewise, in accordance with Article 6 of the said Additional Protocol, we have been summoned to submit written observations on admissibility by 13/10/2023

2. Within the time-limit granted, and on behalf of the Kingdom of Spain, we thereby come to submit observations on the inadmissibility of the present complaint.

Index

A. *Relevant facts*

3. The complainant trade union raises a discrepancy between Article 4.2 of the European Social Charter (Revised), adopted in Strasbourg on 3 May 1996, and Article 43 of the Collective Agreement for Road Freight Transport Companies in the Region of Murcia 2013-2015[1].

4. This Agreement, signed by the negotiating committee with the involvement of trade unions and business representative organisations, provides for:

5. In Article 39, the fixed remuneration to be received by workers to whom the Agreement applies shall be as follows:

> ***Article 39 Fixed remuneration***
>
> *39.1.- Remuneration concepts:*
>
> *The fixed remuneration of the workers shall be made up of the following concepts:*
>
> *a) Basic salary by category.*
>
> *b) Attendance bonus.*
>
> *c) Transport bonus.*
>
> *…*

6. Drivers are also entitled to receive a mileage allowance as laid down in Article 43 with the following justification:

> *"Article 43. Mileage bonus.*
>
> *In view of the difficulties for the employer in controlling the activity of the drivers, it being impossible in many cases to establish the performance of activities other than the specific activity of driving and this only in those vehicles equipped with a tachograph, in order to compensate for the presence and overtime hours which they may perform, in addition to the fixed remuneration referred to in Article 39 of this agreement, the amounts*

[1] https://www.carm.es/cef/PDF/LEGISLACION/borm14863-2013.pdf . It is also attached as Annex1

of which are shown in Annex 1, they shall receive the amounts shown in Annex 2, depending on the area of transport, monthly kilometres travelled, number of journeys made and type of vehicle driven."

7. The employers' organisation FROET [by its Spanish acronym] (Regional Federation of Transport Business Organisations) and the trade unions UGT and USO signed the Collective Agreement for Road Freight Transport in the Region of Murcia for the period 2013-2015.

8. The trade union CCOO, which was a party to the Negotiating Committee, did not sign the aforementioned Collective Agreement as it considered that there were certain situations that needed to be rectified before its publication in the BORM [the Regional Gazette], as different legal precepts were violated, which was brought to the attention of the Directorate General of Labour in a letter dated 12 August 2013, specifically with regard to the allowances for overnight stays and the disciplinary regime. As a result, on 25 September 2013, the Negotiating Committee held a meeting on 3 October 2013, attended by the employer and trade union representatives, namely UGT, USO and CCOO, and agreed -with the exception of the latter trade union - to modify certain issues, some of them at the request of the Directorate-General for Employment[2].

9. The aforementioned Collective Agreement was published in the Official Gazette of the Region of Murcia on 23 October 2013 and is in force for the years 2013, 2014 and 2015.

10. (**Fact omitted by the complainant trade union**)**.** The *Federación de Servicios a la Ciudadanía de Comisiones Obreras* challenged several provisions of the aforementioned Collective Agreement, including Article 43, which is being challenged again at this point.

11. (**Fact omitted by the complainant trade union**). In these proceedings, both the organisation representing business interests, the Employers' Federation, and the trade unions UGT and USO appeared as defendants, defending the legality of the Collective

[2] As reflected, as proven fact no. 1 and 2, in the judgment of the Murcia High Court of Justice, Social Division, no. 772/2014 of 29 September, to which we will refer later.

Agreement resulting from collective bargaining; and after hearing the arguments of all the parties involved, the appeal of the trade union FCS-COOO was dismissed by judgment no. 772/2014, of 29 September 2014 issued by the Murcia High Court of Justice.

12. In particular with regard to Article 43 of the Agreement, it concluded that it is a bonus in addition to the basic salary and other items in Article 39, whose determination is based on objective criteria that are not detrimental to the worker[3]:

> *"Article 43 of the Collective Agreement for Road Freight Transport in Murcia 2013-2015 provides that "Given the difficulties for the employer to control the activity of drivers, being impossible in many cases, to determine the performance of activities other than the specific driving and this only in those vehicles equipped with tachograph, in order to compensate for the presence and overtime hours they may work, as well as the possible night-time bonus, they shall receive, in addition to the fixed remuneration referred to in Article 39 of this agreement, the amounts of which are shown in Annex 1, the amounts shown in Annex 2, depending on the area of transport, monthly kilometres travelled, number of journeys made and type of vehicle driven"; this provision highlights two fundamental issues, one, the difficulty of controlling the overtime and presence hours carried out by the driver and their determination, and the other,* ***the admission that such hours are carried out and that they must be remunerated****, for which purpose a system is established for this purpose; therefore, the intention of the parties is perfectly clear and is none other than to establish an alternative system for the payment of the aforementioned hours for the reasons set out above, with undoubted repercussions in the areas of Social Security and taxation, and that is that by means of the tachograph it is possible to establish the time in which the vehicle has been stationary or in motion; the GPS can be used to establish the location of the vehicle, but in no way the activity carried out by the driver, so that the criterion agreed in the agreement cannot be described as arbitrary, but based on an objective criterion, which is always questionable; without, on the other hand, infringing Article 10(1) of Regulation (EC) No 561/2006 of the European Parliament (EDL 2006/31237) and of the Council on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and*

---

https://www.poderjudicial.es/search/AN/openDocument/6d793a093ae15468/20141211

[3] Third Legal Ground of the judgment issued by the Murcia High Court of Justice, Social Division, no. 772/2014 of 29 September.
https://www.poderjudicial.es/search/AN/openDocument/6d793a093ae15468/20141211 . It is also attached as Annex 2.

(EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (EDL 1985/10007) of the Council, which expressly prohibits transport undertakings from remunerating employed drivers or drivers in their service, including by granting bonuses or increments, including by granting bonuses or increments to drivers in their service (EDL 1985/10007). 3820/85 (EDL 1985/10007), which expressly prohibits transport undertakings from remunerating employed drivers or drivers in their service, including by granting bonuses or salary increases, on the basis of the distances covered or the volume of goods carried, if such remuneration is such as to jeopardise road safety and/or to encourage infringements of the provisions of this Regulation; and such a situation does not arise in the present case, ***since the worker is paid by means of a fixed remuneration, as provided for in Article 39. 1 of the agreement in question,*** *which is made up of basic pay by category, attendance bonus and transport bonus, which covers most of the remuneration;*

The fact is that, in view of the difficulties indicated in the control of the drivers' activity and in order to ***compensate for the presence and overtime hours which may be worked****, the agreement establishes the way in which these hours are to be paid, which is authorised by the State Agreement for road freight transport companies in Article 36.3, fourth paragraph, when it provides that the amount of overtime shall be that which is fixed in the collective agreement, without this method of determining the amount of such hours being arbitrary or compromising road safety, since it is the worker himself who must control his rest hours and his ordinary working hours; and,* ***furthermore, the mileage bonus is being paid from the first kilometre, so that eliminating it would be detrimental to the worker, and the wording of the provision does not cause detriment****."*

13. **(Fact omitted by the complainant trade union).** The trade union FSC-CCOO lodged an appeal to the Supreme Court against the aforementioned judgement, in which it also expanded its arguments against Article 43 of the Agreement, even raising the contrary hypothesis that it could lead to abuses by workers (as stated by the Supreme Court "*The appellant submits, ... the agreement establishes abusive conditions of employment and that the employer's laziness and negligence in verifying the driving and rest times of its employees, in addition to establishing a certain degree of employer irresponsibility, seeks to shift that responsibility onto them which, according to the appellant, 'is null and void, not only because it is incompatible with the employment relationship, but also because it constitutes unjust enrichment for the employer, which would be offset against the cost of the penalty by the crude mechanism of automatic deduction from the pay slips of the employee concerned'; thirdly (c), that this alleged shift of responsibility also*

constitutes an abuse of law which, at the same time, encourages drivers, in order to increase their remuneration, to neglect their health, their own safety and that of other road users.")

14. The Social Division of the Supreme Court, in its judgment no. 534/2016 of 16 June, dismissed the appeal, rejecting the complainant trade union's allegations and expressly stating that, having examined the pay system established by the Collective Agreement as a whole, there is no risk of overtime being paid at a rate lower than the ordinary hourly rate:

> *"2. As regards what we consider to be the first plea in law in the appeal, in so far as it coincides with the grounds of the initial claim and its ratification at the trial, it must also be dismissed because, as the judgment of the court of first instance correctly states, the above-mentioned Article 43 of the contested regional agreement, apart from highlighting the difficulty of controlling excess working hours (overtime and presence) and their determination, which does not prejudice, where appropriate, the rigorous application of the provisions of Article 35.5 ET, in fact only establishes an alternative system for the payment of or compensation for such excesses, which, as the contested decision states, 'with undoubted repercussions in the areas of social security and taxation" (hence the possible uselessness of the novel subsidiary request), but which in no way violates EC Regulation 561/2006, not even Article 10.1, which the appellant trade union omits to mention expressly or to give any reasoning in this regard, since the fixed remuneration indicated for this purpose in Article 39.1 of the contested Agreement itself, as permitted by Article 36.4. 3 of the II General Agreement for road freight transport companies (also transcribed above: BOE 29/3/2012), is made up of the basic salary of the category, the attendance bonus and the transport bonus,* ***without, of course, that method of quantitative determination, under the conventional heading of 'mileage bonus', being able to be described as arbitrary or, even less, as contravening the general prohibition in Article 35.1 of the WS for that monetary compensation to be less than the value of the ordinary hour****. In other words, in our view, and in line with what is ultimately decided in the contested judgment, Article 43* ***of the Agreement merely establishes a module, a parameter or a scale of remuneration for "overtime" or "attendance hours", which, in accordance with our settled case-law*** *(for example, SSTS 4ª, General Chamber [3], of 21/2/2006 , RR 2921 , 2831 and 3338/04 ; 18/9/2007 , R. 4540/04 ; and 26/12/2007 , R. 3697/07),* ***provided that they equal or exceed the remuneration provided for ordinary working hours, as regards their quantification, is available for collective bargaining****."*

15. The Agreement at issue here was to expire **in 2015**. However, the following events took place thereafter:

16. **(Fact omitted by the complainant trade union).** On 9 March 2017 all the parties to the Negotiating Committee of the Collective Agreement for Road Freight Transport Companies in the Region of Murcia (including the trade union FSC-CCOO) agreed as follows:

> *"To extend the Collective Agreement for Road Freight Transport Companies in the Region of Murcia 2013-2015, for the years 2016, 2017 and 2018, in all its terms, with the exception of the economic concepts.*
>
> *Second: The wage tables will be revised by the following amounts: 2016: 1.25% increase on the 2015 wage tables. 2017: On the tables resulting from 2016, an increase of 1.75%. 2018: On the resulting salary tables of 2017, an increase of 2%. Per diems and mileage will experience an increase equal to that of the concepts reflected in the salary tables made up of Base Salary, Attendance Bonus and Transport Bonus.*
>
> *...*
>
> *Fourth: The parties undertake to begin negotiations to draw up a new agreement in the second half of January 2018. Fifth: In the hypothetical case that no agreement has been reached in the negotiation of a new agreement, the present agreement will be automatically extended for a period of one year and so on until an agreement is reached."*

17. Such collective Agreement was published in the Murcia Oficial Gazette of 13 May 2017[4].

18. **(Fact omitted by the complainant trade union).** Likewise, on 26 December 2017 (published in the BORM of 7 February 2018[5]) all the parties to the Negotiating Committee of the Collective Agreement for Road Freight Transport Companies in the Region of Murcia (including the trade union FSC-CCOO) agreed, among other issues, on the following:

---

[4] https://www.carm.es/cef/PDF/LEGISLACION/borm3375-2017.pdf . It is also attached as Annex 4.
[5] https://www.carm.es/cef/PDF/LEGISLACION/borm759-2018.pdf . It is also attached as Annex 5

"To amend Annex 2 of Article 43, concerning the mileage bonus, of the Collective Agreement for Road Freight Transport Companies in Murcia in its current wording and instead and with effect from 1 January 2016 to adopt the following [New table of mileage bonus replacing the original one provided for in Annex II]

Third: The amounts established in the previous paragraphs, both for the per diem and for mileage, shall be understood to be compensated with those that the driver would have received derived from the application of Articles 43 and 47 of the agreement before being modified by this agreement, without this being able to generate any arrears or wage or extra wage differences. Fourth: The other provisions and rules contained in the text of the Collective Agreement for Freight Transport Companies in Murcia, agreement code, 30001355011981 that do not contradict the provisions herein remain in force, being incorporated into what has been agreed herein. Fifth.- Validity. This agreement will come into force from the day of its signature, regardless of its publication, with the parties committing themselves to its public dissemination at the highest level."

19. There is no record that any of the parties has exercised the right to terminate the Agreement in accordance with the provisions of Article 86 of Royal Legislative Decree 2/2015, of 23 October, which approves the revised text of the Workers' Statute[6].

B. *Reasons for declaring the collective complaint inadmissible*

20. The abovementioned facts determine the existence of the following grounds for dismissal of the collective complaint.

1. Manifest lack of substantiation and lack of the real collective nature of the complaint

a) Committee's relevant legislation and doctrine.

21. The Additional Protocol to the European Social Charter providing for a system of collective complaints, signed at Strasbourg on 9 November 1995, sets out the following relevant rules:

[6] https://www.boe.es/eli/es/rdlg/2015/10/23/2/con

"Article 1

The Contracting Parties to this Protocol recognise the right of the following organisations to submit complaints ***alleging unsatisfactory application of the Charter***

...

Article 4

The complaint shall be lodged in writing, relate to a provision of the Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision."

22. The Committee has required -and has rejected collective complaints on this ground- that the complaint comply with the duty to detail a failure of the State concerned to comply with the provisions of the Charter. In this regard, for example, the decision on admissibility of 18 March 2019 regarding the *Sindacato Autonomo Europeo Scuola ed Ecologia (SAESE) v. Italy*, Complaint No. 166/2018:

"In addition, turning to the grounds for the complaint, the Committee notes that that these primarily refer to the 2012 reform of the pension legislation and its implications for the health of teaching staff. However, the complaint lacks detail and substantiation and it does not specify adequately how this reform of the public pension system relates to the Charter provision invoked, namely Article 11 of the Charter. The complainant organisation states that Italy failed to carry out a scientific assessment before adopting the reform in question, but this assertion does not suffice to indicate in what respect Italy has not ensured the satisfactory application of the relevant provision of the Charter, as required by Article 4 of the Protocol.

The Committee therefore holds that the complaint, as submitted, does not meet the requirements of Article 1 (c) and Article 4 of the Protocol."

23. In addition, the subject matter of the collective complaint must be collective in nature. As the Explanatory Report on the Additional Protocol makes clear, commenting on Article 4 of the Protocol because of their "collective" nature, complaints may only raise

questions concerning non-compliance of a State's law or practice with one of the provisions of the Charter, without individual situations being able to be submitted[7]:

> *"because of their "collective" nature, complaints may only raise questions concerning non-compliance of a state's law or practice with one of the provisions of the Charter.* ***Individual situations may not be submitted****."*

24. For these reasons, by means of the decision on admissibility of 14 June 2005 regarding *SAIGI - Syndicat des Hauts Fonctionnaires v. France*, Complaint No. 29/2005, the Committee declared the complaint inadmissible because it did not pertain to the rules applicable in a country but rather to the manner in which those rules were being applied to a particular case by way of procedures that were brought over a period of years.

b) Application to the present case

25. First of all, it should be noted that the complainant trade union is challenging a specific section of a collective agreement which:

- Has been freely agreed between the representatives of employers and workers and which is endowed with a normative character in accordance with the rights constitutionally enshrined by Article 37 of the Spanish Constitution[8].

- In the aspect questioned by the complainant trade union, the mileage bonus, the Collective Agreement operates as a mechanism to improve the legal provisions, specifically Article 35 of the Workers' Statute, which allows collective bargaining to increase the remuneration of overtime while respecting the mandatory minimum floor so that it is never paid below the ordinary hour[9].

---

[7] https://rm.coe.int/16800cb5ec

[8] Article 37.1 of the Spanish Constitution https://www.boe.es/eli/es/c/1978/12/27/(1)/con :
"1. The law shall guarantee the right to collective labour bargaining between worker and employer representatives, as well as the binding force of the agreements."

[9] Royal Legislative Decree 2/2015, of 23 October, approving the consolidated text of the Workers' Statute Act.
https://www.boe.es/eli/es/rdlg/2015/10/23/2/con
Article 35. Overtime.

- It is also an agreement that has been in force for more than ten years, and since 2017 with the express agreement of all the negotiating trade unions, including the complainant, which also agreed on several increases in the amount of the mileage bonus.

- Furthermore, the complainant trade union had, and exercised, the opportunity to challenge this mileage bonus before domestic courts, and the Supreme Court concluded that the duty to ensure a minimum remuneration not lower than the remuneration of the ordinary working hour was not breached.

26. Strictly speaking, if we look at the collective claim, the following is stated:

- The complainant does not claim that *per se* the regulation, freely agreed in collective bargaining between representatives of workers and employers, established in Article 43 of the Collective Agreement, breaches the duty of minimum overtime pay established in Article 35 of the Workers' Statute or Article 4 of the European Social Charter (Revised), signed at Strasbourg on 3 May 1996.

- Nor does it point out that State practice (that of the courts in particular) in the application of the aforementioned Agreement is systematic or structural, failing to comply with the obligations of the Charter and confirming salaries below what is acceptable, which on the other hand would be a breach of national legislation (namely, the aforementioned Article 35 of the Workers' Statute), the content of which overrides what may be established by collective bargaining or the clauses of the employment contract.

27. The complaint does nothing of the sort, but rather proposes a hypothetical scenario in which, in its view, an undesirable result may occur, in the following terms:

---

1. Those hours of work done over the maximum duration of the ordinary working day, determined as set forth in the preceding article, shall be considered overtime. Through collective bargaining agreement or, in its absence, individual contract, a choice shall be made between payment for overtime in a set amount, which in no case may be inferior to the value of the ordinary working hour, or payment in terms of equivalent periods of paid rest. In the absence of agreement

"A worker who has driven 9,000 kilometres in a month but has only spent a total of 40 hours on "other work" could be better paid than a worker who has driven 8,100 kilometres and spent a total of 200 hours on "other work".

This is because the system offered by the collective agreement does not foresee counting the hours actually worked, but only the kilometres driven. This is an incomplete estimate, which may give values that are higher or lower than the hours actually worked."

28. However, such a scenario cannot be tantamount to pointing out, with a minimum of foundation, a collective practice or regulation that fails to comply with the obligations of the Revised Social Charter. It should also be borne in mind that the Collective Agreement, as we said, has been in force for ten years, and if there really were a problem of under-retribution of overtime in application of the Collective Agreement (which, we would insist, would also require the courts to stop applying the unavailable right of Article 35 of the Workers' Statute), it would not be difficult to provide an example of such a collective situation contrary to the Charter. The complainant trade union does not manage to provide a single example despite ten years of application, but only presents a single hypothesis.

29. Moreover, we must insist that this issue has already been debated before the Supreme Court which, after hearing all the negotiating parties, concluded that the duty not to underpay overtime was not breached, which is not only undisputed by the complainant but it has been concealed from the Committee.

30. In view of the lack of a minimum explanation or proof that overtime is actually being underpaid, in application of Article 43 of the aforementioned Collective Agreement, this is a claim that should be rejected for being manifestly ill-founded.

---

in this respect, it shall be understood that overtime done shall be compensated through rest within the four months following its execution. …

2. Abuse of rights or, alternatively, lack of grounds given the concealment of relevant data from the Committee.

a) <u>Regarding the European Social Charter and the Committee's doctrine on this matter.</u>

31. Whereas neither the European Social Charter (Revised), signed at Strasbourg on 3 May 1996, nor the Additional Protocol to the European Social Charter providing for a system of collective complaints, signed at Strasbourg on 9 November 1995, contains an express mention of the prohibition of abuse of rights:

- Firstly, it must be understood as implicit in both international instruments.

- In any event, it is imposed by the general obligation of interpretation and application in good faith of international treaties, established by Article 26 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

- In any event, by considering it as a general principle applicable between States and which is included in other relevant instruments such as Article 35.3 (a) and Article 17 of the European Convention on Human Rights ("*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*.") or Article 54 of the Charter of Fundamental Rights of the European Union.

32. The prohibition of abuse of rights has been interpreted by the European Court of Human Rights both in the sense of rejecting, as abusive, claims which:

- Conceals factual elements relevant to the European Court's decision (*Kerechashvili v. Georgia* (dec.), 2006; *Martins Alves v. Portugal* (dec.), 2014, §§ 12-15; *Gross v. Switzerland* [GC], 2014, §§ 35-36); or

- It is manifestly contrary to the purpose of the European Convention right of individual application and hinders the proper functioning of the European Court or the proper conduct of the proceedings before it constitutes an abuse of the right of individual application (*Zhdanov and Others v. Russia*, §§ 79-81 and references cited therein; *Miroļubovs and others v. Latvia*, 2009, §§ 62 and 65; *S.A.S. v. France* [GC]].

33. In any event, such obligations are included in the Protocol:

- Within the obligation of any collective complaint that, ex Article 4 of the Protocol "shall indicate in what respect the latter has not ensured the satisfactory application of this provision", an obligation that is not fulfilled if relevant data are concealed to expose such lack of satisfactory implementation.

- The assumption that the purpose of the collective complaint can only be to denounce "unsatisfactory application of the Charter", ex Article 1 of the Protocol.

b) <u>Application to the present case</u>

34. In the first place, the complainant trade union has abusively failed in its duty to fully reflect the state of affairs before the Committee, since the following has been concealed:

- The Agreement, and the regulation of the mileage bonus, was already challenged by the trade union itself and the Supreme Court duly ruled that it guarantees that the remuneration of the hours does not breach the duty of sufficient remuneration for overtime.

- Following that judgment, the trade union itself, together with the other members of the negotiating bureau, has agreed to extend the validity of the Agreement beyond the initially planned period of validity (2015).

- The amounts of the mileage bonus have been raised in successive years, the last in 2018, again with the consent of all the negotiating parties, including the complainant trade union.

35. Secondly, as regards the non-legitimate purpose of the claim, it should not be forgotten that:

- Alongside the right to fair remuneration in Article 4 of the Revised European Social Charter.

- Article 6 of the Charter (as well as Article 37 of the Spanish Constitution) recognises collective bargaining and the effectiveness of collective agreements.

36. In fact, with the present complaint, the complainant trade union seeks, contrary to Article 6 of the Charter, to render ineffective what has been freely agreed in collective bargaining, and outside the legal mechanisms established (and already applied) mechanisms to confirm the effectiveness of such collective bargaining for exceeding the standard of legality required of it.

37. It is unacceptable, as a legitimate aim of a collective complaint, that it should be used as an instrument to dissociate itself from what has been agreed in collective bargaining, also covered by Article 6 of the European Convention, and in which the complainant trade union has expressly accepted the extension of the validity of that agreement and the increase in its tariffs, which it now seeks to invalidate.

38. In view of the above reasons, either for abuse of rights, or for non-compliance with Articles 1 and 4 of the Collective Complaints Protocol, the present collective complaint must be rejected as inadmissible.

3. Lack of competence *ratione temporis*.

39. As stated by the Committee in its **decision on admissibility of 10 October 2005 regarding *Maragopoulos Foundation for Human Rights MFHR v. Greece*. complaint no. 30/2005:**

> *"15. As regards the Government's objection in connection with the Committee's competence ratione temporis, in accordance with the principle of non-retroactivity of treaties as codified in Article 28 of the 1969 Vienna Convention on the Law of Treaties, the starting point for application is the date on which a treaty came into force in a country and not the date of its signature as the Government points out. However there are exceptions to this rule when events occurring before the entry into force of a treaty continue to occur after this date, thus potentially constituting a continuing violation (see, for example, European Court of Human Rights, Papamichalopoulos and others v. Greece, judgment of 24 June 1993, Series A. 260B, §40)."*

40. It should be noted that the complaint defines the state of affairs which it considers to be a violation of the European Social Charter, which is Article 43 of the Agreement and the rates in Annex II reflected in the section "THE EXCEPTION FOR DRIVERS WITHIN THE COLLECTIVE AGREEMENT".

41. This state of affairs **is no longer in force**. As mentioned above, by agreement of the members of the negotiating bureau, it was agreed not only to extend the term of the Agreement beyond 2015, but also to establish new, higher mileage bonus rates for 2018 and subsequent years (see again the 2018 agreement by which the Amended Agreement for Road Freight Transport of December 2017 was published in the corresponding Official Gazette[10].)

42. In short, the Committee is being asked to decide on a situation which in fact ceased to exist before the entry into force of the Collective Complaints Protocol for Spain, replaced by a new regulation and tariffs (again, before the entry into force of the Agreement) agreed by all the negotiating trade unions, including the complainant.

43. Given that the situation described in the complaint ceased to have effect before the entry into force of the Collective Complaints Protocol for Spain, and that the complaint does not identify the new state of affairs currently in force (and to which it has also given its consent) the complaint must be dismissed for lack of competence *ratione temporis*.

[10] https://www.carm.es/cef/PDF/LEGISLACION/borm759-2018.pdf

From the foregoing, the Spanish Government REQUESTS from the Committee:

- To declare the present collective complaint inadmissible for the grounds set out above.

Madrid for Strasbourg, 13 October 2023.

The Agent of Spain

Alfonso Brezmes Martínez de Villarreal

The Co-Agent of Spain

Luis E. Vacas Chalfoun

ANNEXES

Annex 1.- Resolution of 8 October 2013, of the Directorate General of Labour, providing for the registration and publication of the Agreement and Wage Table 2013, for road freight transport.

Annex 2.- Judgment of the Murcia High Court of Justice, Social Division, no. 772/2014 of 29 September 2014.

Annex 3.- Judgment of the Social Division of the Supreme Court, no. 534/2016 of 16 June 2016.

Annex 4.- Resolution of the Directorate General for Labour Relations and Social Economy, which provides for the registration and publication of the agreement to extend the ultra-activity and wage table for 2016, 2017 and 2018 of the Road Freight Transport Sector Agreement.

Annex 5.- Resolution of the Directorate General for Labour Relations and Social Economy, which provides for the registration and publication of the agreement to amend the 2018 Road Freight Transport Agreement.