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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**
**COMITÉ EUROPÉEN DES DROITS SOCIAUX**

13 December 2024

**Case Document No. 5**

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

# SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

**Registered at the Secretariat on 20 November 2024**

MINISTERIO
DE LA PRESIDENCIA, JUSTICIA
Y RELACIONES CON LAS CORTES

ABOGACÍA GENERAL DEL ESTADO

SUBDIRECCIÓN GENERAL
DE ASUNTOS CONSTITUCIONALES
Y DERECHOS HUMANOS

ÁREA DE DERECHOS HUMANOS

**TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS**

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# OBSERVATIONS ON THE MERITS OF THE CASE

**_____**

**COLLECTIVE COMPLAINT**
**No 229/2023**

**Federación de Servicios a la Ciudadanía**
**de Comisiones Obreras Región de Murcia (FSC-CC.OO.)**
**vs.**
**the Kingdom of Spain**

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1. By letter dated 24/09/2024, the Kingdom of Spain was notified, under Article 7 of the Additional **Protocol** to the Revised European Social Charter on the establishment of a system of collective complaints, of the decision on the admissibility of the collective complaint with reference number 229/2023, submitted by the *Federación de Servicios a la Ciudadanía de Comisiones Obreras Región de Murcia* (F.SS.C.-CC.OO.)[1] . In the same communication, the Kingdom of Spain is also invited to submit written observations on the merits by 20/11/2024 at the latest.

**2.** Accordingly, we hereby proceed, on behalf of the Kingdom of Spain, to formulate written observations on the merits, in which we will adapt the facts and some of the grounds used in our initial written submission on inadmissibility, but only insofar as they may be relevant to the merits.

## FACTUAL BACKGROUND

3. The complainant trade union raises a conflict between art. 4.2 of the European Social Charter (revised), done in Strasbourg on 3 May 1996, and article 43 of the Collective Bargaining Agreement (CBA or Collective Agreement) for road haulage sector in the Region of Murcia 2013-2015 .[2]

4. This Collective Bargaining Agreement (CBA), signed by the negotiating committee in which trade unions and representative employers' organisations took part, covered the subject matter of the complaint mainly in Articles 39 and 43.

5. Article 39 of the Collective Agreement deals with the fixed remuneration to be received by workers to whom the CBA applies. Article 43 of the Agreement also provides for a specific mileage allowance for drivers, which is justified and fixed by the said Article . [3]

[1] Hereinafter referred to as "the complainant", "the complainant trade union" or simply "FSC-CC. OO".
[2] https://www.carm.es/cef/PDF/LEGISLACION/borm14863-2013.pdf . We also attach it with our admissibility brief and now as Annex I.
[3] Both articles can be found in the section dedicated to setting out the applicable law in this brief, in the legal bases of this brief.

6. The employers' association "FROET" (*Federación Regional de Organizaciones de Empresas del Transporte*) and the trade unions U.G.T. and U.S.O. signed the CBA for road haulage sector in the Region of Murcia for the period 2013-2015.

7. The trade union CC.OO. (of which the complainant is a member), which was a party to the negotiating committee of the same CBA, did not sign the aforementioned Collective Agreement as it considered that there were certain situations that needed to be rectified prior to its publication in the Official Gazette of the Region of Murcia (B.O.R.M.), as different legal precepts were violated, which was brought to the attention of the Directorate General of Labour in a letter dated 12/08/2013, specifically with regard to the per diems for overnight stays and disciplinary regime; therefore, the Negotiating Committee of the CBA held a meeting on 03/10/2013, which was attended by the employer and trade union representatives (in this case, the trade unions U.G.T., U.S.O. and CC.OO.) and agreed, with the exception of the latter trade union, to modify certain issues, some of them at the request of the Directorate General of Labour .[4]

8. The aforementioned Collective Bargaining Agreement (CAB) was published in the B.O.R.M. on 23/10/2013 and is in force for the years 2013, 2014 and 2015.

9. The complainant, FSC-CC.OO., challenged in court proceedings several articles of the aforementioned Collective Agreement, including Article 43, which is at issue here. In those proceedings, both the organisation representing employers' interests (the Employers' Federation) and the workers' trade unions U.G.T. and U.S.O. were joined as defendants, arguing that the CBA was in accordance with the law as a result of collective bargaining.

10. In these legal proceedings, after hearing the arguments of all the parties involved, the High Court of Justice of Murcia (*Tribunal Superior de Justicia de la Región de Murcia*) dismissed the legal claim of the claimant's trade union (FCS-CC.OO.) by judgment no. 772/2014, dated 29 September 2014 .[5]

[4] As reflected in the section dedicated to the "proven facts", the judgement of the Murcia High Court of Justice, Social Division, no. 772/2014 of 29 September (1st and 2nd proven facts), which we provide as Annex II and to which we will refer below.
https://www.poderjudicial.es/search/AN/openDocument/6d793a093ae15468/20141211

[5] Annex II of those documents submitted with these written observations on the merits.

11. In particular with regard to Article 43 of the CBA, the judgment of the High Court of Justice of Murcia concluded that it is an allowance that is added to the basic salary and other concepts of Article 39, and that its fixing responds to perfectly objective criteria that do not harm the worker (we will see specific paragraphs of the judgment in the section dedicated to the legal grounds of these written Observations).

12. Faced with this judgment of the High Court of Justice, the complainant trade union (FSC-CC.OO.) lodged an appeal in cassation before the Supreme Court, in which it also expanded the arguments against Article 43 of the Convention, and even raised the opposite hypothesis, i.e. that the regulation could give rise to abuses by workers .[6]

13. The Social Division of the Supreme Court, in its Judgment 534/2016 of 16 June[7] , dismissed the appeal in cassation, rejecting the complainant trade union's allegations. The Supreme Court examined the remuneration system established by the CBA and expressly indicated that there was no risk that overtime would be paid below the ordinary hourly rate (in the section dedicated to the legal grounds in these written Observations, we will transcribe some of the arguments set out by the Supreme Court in its judgment).

14. The CBA challenged here was in force until the end of 2015. However, several events of interest took place subsequently, which are described in the following paragraphs.

15. The complainant trade union makes no mention in its complaint that on 09/03/2017, all parties to the Negotiating Committee of the Collective Bargaining Agreement for road haulage sector in the Region of Murcia (including the trade union FSC-CC.OO.) agreed the following (this collective agreement was published in the B.O.R.M. on 13/05/2017 ):[8]

    *To extend the Collective Bargaining Agreement for Road Haulage Sector 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.*

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[6] Ground II of the Supreme Court's judgment, which will be mentioned below.
[7] https://www.poderjudicial.es/search/AN/openDocument/82e8dac30feffcbf/20160718 . It is also attached as Annex III.
[8] https://www.carm.es/cef/PDF/LEGISLACION/borm3375-2017.pdf Also attached as Annex 4.

*Second: The salary tables will be revised by the following amounts: 2016: 1.25% increase on the 2015 salary 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 allowances 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.*

16. Nor does the complainant trade union refer in its complainant that on 26/12/2017, all the parties to the Negotiating Committee of the CBA for Road Haulage Sector in the Region of Murcia (including the FSC-CC.OO. trade union) also agreed to modify article 43, specifically (agreement published in the B.O.R.M. of 07/02/2018 ):[9]

    *To amend Annex 2 of Article 43, concerning the mileage allowance, of the Collective Barganing Agreement for Road Haulage Sector in the Region of Murcia in its current wording and instead and with effect from 1 January 2016 to adopt the following [New table of mileage allowance 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 allowance, 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 Bargaining Agreement for Road Haulage Sector in the Region of Murcia, agreement code, 30001355011981 that do not contradict the provisions herein remain in force, being incorporated into what has been agreed herein. Fifth.- Term. The present agreement will come into force from the day of its signature, independently of its publication, and the parties commit themselves to its public dissemination at the highest level.*

[9] https://www.carm.es/cef/PDF/LEGISLACION/borm759-2018.pdf Also attached as Annex 5

17. There is no record that either party has exercised the right to denounce the Collective Agreement in accordance with the provisions of art. 86 of Royal Legislative Decree 2/2015, of 23 October, approving the revised text of the Workers' Statute Law (*Estatuto de los trabajadores*).[10]

**LEGAL GROUNDS ON THE MERITS FOR DISMISSAL OF THE COLLECTIVE CLAIM**

18. First, as we have indicated, the Committee rejected the grounds of inadmissibility raised by the Kingdom of Spain in a previous written submission. However, in the present written Observations, we will take up some of the issues that were outlined in our previous brief, insofar as they may also affect substantive issues.

**Relevant international legislation: Revised European Social Charter**

19. *Article 4 - The right to a fair remuneration*

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

***1** (...)*

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

*(...)*

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

20. *Article 6 - The right to bargain collectively*

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

***1** to promote joint consultation between workers and employers;*

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

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

***3*** *to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*
*and recognise:*
***4*** *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.*

**Relevant domestic regulations:**

**21. -Spanish Constitution:**

*Article 35*

*1. All Spaniards have the duty to work and the right to work, to free choice of profession or trade, to promotion through work and to sufficient remuneration to satisfy their needs and those of their families, without discrimination on grounds of sex in any case.*
*2. A statute for workers shall be established by law.*

*Article 37*

1. *The law shall guarantee the right to collective bargaining between workers' and employers' representatives, as well as the binding force of such agreements.*

**-Workers' Statute (*Estatuto de los trabajadores*, Royal Legislative Decree 2/2015)**

*Article 34*

*1. The length of the working day shall be that agreed in collective agreements or employment contracts.*
*The maximum length of the ordinary working day shall be forty hours per week of effective work on an annual average.*
*2. The irregular distribution of working hours throughout the year may be established by collective agreement or, alternatively, by agreement between the company and the workers' representatives. In the absence of an agreement, the employer may distribute ten per cent of the working day irregularly throughout the year.*
*Such distribution shall in all cases respect the minimum daily and weekly rest periods provided for by law, and the worker shall be informed at least five days in advance of the day and time of the resulting work.*

*The compensation of the differences, due to excess or shortfall, between the working day and the maximum length of the ordinary legal or agreed working day shall be enforceable as agreed in the collective agreement or, in the absence of any provision in this respect, by agreement between the employer and the workers' representatives. In the absence of an agreement, the differences arising from the irregular distribution of working hours must be compensated within twelve months of their occurrence.*
*(...)*

*Article 35*
*1. Overtime shall be considered to be those hours of work that are performed in excess of the maximum length of the ordinary working day, set in accordance with the previous article. By collective agreement or, failing this, by individual contract, a choice shall be made between paying overtime at an amount to be fixed, which may in no case be less than the value of the ordinary hour, or compensating them by equivalent paid rest periods. In the absence of an agreement to this effect, it shall be understood that overtime worked shall be compensated by rest within four months of its completion.*
*2. The number of overtime hours may not exceed 80 per year, except as provided for in paragraph 3. For workers who, due to the type or duration of their contract, work an annual working day that is less than the general working day in the company, the maximum annual number of overtime hours shall be reduced in the same proportion that exists between those working days.*
*For the purposes of the provisions of the preceding paragraph, overtime that has been compensated by rest within four months of being worked shall not be computed.*
*The Government may abolish or reduce the maximum number of overtime hours per specified period, either generally or for certain sectors of activity or territorial areas, in order to increase employment opportunities for unemployed workers.*
*3. Excess hours worked to prevent or repair accidents and other extraordinary and urgent damage shall not be taken into account for the purposes of the maximum length of the ordinary working day, nor for the calculation of the maximum number of authorised overtime hours, without prejudice to their compensation as overtime.*
*4. Overtime work shall be voluntary, unless it has been agreed in a collective agreement or individual employment contract, within the limits of paragraph 2.*

*5. For the purposes of calculating overtime, the working day of each worker shall be registered day by day and shall be totalled in the period established for the payment of remuneration, and a copy of the summary shall be given to the worker in the corresponding receipt.*

**22. -Act on offences and penalties in the social order (Royal Legislative Decree 5/2000 of 4 August).**

*Article 7. Serious infringements.*

*These are serious infringements:*

*(...)*

*5. The transgression of the rules and legal or agreed limits on working hours, night work, overtime, additional hours, rest periods, holidays, breaks, leave, working hours registration and, in general, the working time referred to in Articles 12, 23 and 34 to 38 of the Workers' Statute.*

**23. -Collective Bargaining Agreement for Road Haulage Sector in the Region of Murcia 2013-2015:**

*Article 39 Fixed remuneration*

*39.1.- Remuneration concepts:*

*The fixed remuneration of employees shall consist of the following items:*

*(a) Basic salary by category.*

*b) Attendance allowance.*

*(c) Transport allowance.*

*(...)*

*Article 43. Mileage allowance.*

*In view of the difficulties for the employer in controlling the activity of the drivers, it being impossible in many cases to determine 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 that they may perform, In addition to the fixed remuneration referred to in Article 39 of this agreement, the amounts 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.*

**Application to the present case:**

**-The present collective complaint pursues an illegitimate aim.**

24. In this case, we must remember that the complainant trade union is facing a specific section of a Collective Bargaining Agreement (CBA) that has been freely agreed between the employers' and workers' representatives and which is endowed with a normative character in accordance with the constitutionally recognised rights in art. 37 of the Spanish Constitution.

25. On closer examination, this collective complaint is aimed at overturning what has been freely agreed in collective bargaining by the social partners, and furthermore, this claim by the complainant union is made outside the jurisdictionally established mechanisms for this purpose. However, we must remember here that in this case, the domestic courts have already examined this case twice (once before the High Court of Justice and once on appeal to the Supreme Court), and the courts have confirmed the legality of the CBA both in general and in particular (with regard to the point challenged by the complainant trade union).

26. Thus, the present complaint is contrary to the effectiveness of collective bargaining, so that to uphold it on the merits would contravene both Article 6 of the European Social Charter (revised), which recognises and guarantees the effectiveness of collective bargaining, and Article 37 of the Spanish Constitution (transcribed above), which does the same in the Spanish domestic sphere.

27. This collective claim therefore serves an illegitimate purpose, as it is contrary to the applicable law (Article 6 of the revised European Social Charter and Article 37 of the Constitution).

**-The contested CBA is fully in accordance with the law.**

28. The legal regulation on the matter is limited to the provisions of Article 35 of the revised text of the Workers' Statute Act (*Estatuto de los trabajadores*), approved by Royal Legislative Decree 2/2015, of 23 October, which, in its first section, defines the concept of overtime in the following terms:

    *Overtime shall be considered to be overtime if it exceeds the maximum length of the ordinary working day, fixed in accordance with the previous article.*

29. The same article refers to the collective bargaining agreement for regulation, setting a limit:

    *By collective bargaining agreement or, failing this, by individual contract, a choice shall be made between paying overtime at a fixed rate, which may in no case be less than the value of the*

*ordinary hour, or compensating it by equivalent paid rest periods. In the absence of an agreement to this effect, it shall be understood that the overtime worked shall be compensated by rest within four months of its completion.*

30. Collective bargaining in the Spanish system has binding force and *erga omnes* effectiveness, as can also be seen in the Spanish Constitution, in Article 37 transcribed above. The legislator also leaves it up to the CBA to set the value of the overtime hour, provided that it is guaranteed that it cannot be lower than that set for the ordinary working hour.

31. In addition, Spanish law imposes sanctions on those who do not respect, among others, the overtime regime established by law or agreed in a CBA, as we have seen in Article 7 of the Act on offences and sanctions in the social order (Royal Legislative Decree 5/2000, of 4 August), which we have transcribed above.

32. The CBA has been in force for more than ten years, and since 2017 with the express agreement of all the negotiating unions, including the claimant, which also agreed on several increases in the amount of the mileage allowance.

33. Specifically, in the aspect challenged by the complainant union (the mileage allowance), the CBA operates as a mechanism to improve on the legal provisions set out in Article 35 of the Workers' Statute, which allows collective bargaining to increase overtime pay while respecting the mandatory minimum floor of never being paid below the ordinary hour.

34. Moreover, as we have seen in the section on the facts, the complainant union has already challenged the mileage allowance before the national courts, which was examined by the High Court of Justice of Murcia and the Supreme Court, which (both of them) rejected the claim of the complainant trade union and established that the CBA did not breach the duty to ensure a minimum remuneration not lower than the remuneration of the ordinary working hour.

35. Specifically, the High Court of Justice of Murcia handed down a ruling on 29/09/2014, in which it concluded that the allowance set out in Article 43 of the CBA is in addition to the basic salary and

other items in Article 39, and that its setting responds to perfectly objective criteria that do not represent a detriment to the worker :[11]

*Article 43 of the Collective Bargaining Agreement for the Road Haulage Sector in the Region of 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 allowance, 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 stated, 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, violating 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, amending Council Regulations (EEC) No. 3821/85 and (EC) No. 2135/98 and repealing Council Regulation (EEC) No. 3820/85 (EDL 2006/31237) and (EC) No. 2135/98 and repealing Council Regulation (EEC) No. 3820/85 (EDL 2006/31237). 3820/85 (EDL 1985/10007), which expressly prohibits transport undertakings from remunerating employed drivers or drivers in their service, including by granting allowances 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***

[11] Third Legal Basis of the judgment of 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 II.

***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;*

*what happens 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 collective bargaining agreement establishes the way in which these hours are to be paid, which is authorised by the General Collective Bargaining Agreement for Road Haulage Sector 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 allowance 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**.*

36. For its part, the Supreme Court also ruled on the CBA and handed down a judgment on 16/06/2016[12] , in which it rejected the allegations of the claimant trade union, confirming the previous judgment (that of the High Court of Justice) and expressly stating that there was no risk that overtime would be 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, insofar as it coincides with the grounds of the original claim and its ratification at the trial, it must also be dismissed because, as the judgment of the court of first instance rightly held, 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 reality only establishes an alternative system for the payment of or compensation for such excesses, of course, as the contested decision states, "with undoubted repercussions in the areas of overtime and presence, which, as the Court of First Instance rightly held, is undoubtedly of great importance in the case of overtime and presence, which, in any case, does not prevent the rigorous application of the provisions of Art. 35.5 ET, in reality, only establishes an alternative system for the payment or compensation for such excesses, of course, as the contested decision states, "with undoubted repercussions in the areas of social security and taxation" (hence the possible uselessness of the*

[12] https://www.poderjudicial.es/search/AN/openDocument/82e8dac30feffcbf/20160718 . It is also attached as Annex III.

*novel subsidiary request), but which in no way violates EC Regulation 561/2006, not even art. 10.1, which the appellant Trade Union fails to mention expressly or give any reasoning in this regard, since the fixed remuneration indicated for this purpose in art. 39.1 of the contested Collective Bargaining Agreement itself, as permitted by paragraph 4 of art. 36.3 of the II General Agreement for undertakings in the European Union.3 of the II General Collective Bargaining Agreement for Road Haulage Sector (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, this method of quantitative determination, under the conventional heading of "mileage allowance", can be described as arbitrary or, even less, as contravening the general prohibition of art. 35.1 of the ET [Estatuto de los trabajadores] for this 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, art. 43* ***of the Collective Bargaining Agreement merely establishes a module, a parameter or a scale of remuneration for excess working hours, whether they are called "overtime" or "presence hours", which, according to 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***.

37. The regulation established by the CBA is not contrary to law, moreover, because, by linking the payment of the allowance to the kilometres covered, an absolutely objective criterion is adopted for its establishment (regardless of whether the driver is a mechanic, simple driver or delivery driver), taking into account that the activity of driving (which is what is being rewarded with the allowance) requires extra attention.

**-In particular, neither is the CBA contrary to the European Social Charter (revised).**

38. The complainant does not claim that *per se* the regulation, freely agreed in collective bargaining between workers' representatives and employers, embodied in art. 43 of the Collective Bargaining Agreement, is in breach of the duty to pay minimum overtime established in art. 35 of the Workers' Statute or art. 4 of the European Social Charter (revised), done in Strasbourg on 3 May 1996. Nor does it point out that State practice (specifically that of the Courts) in the application of the said CBA is systematically or structurally in breach of the obligations of the Charter and confirming below-acceptable rates of pay.

39. What the complaint actually raises is a mere hypothesis, based on the fact that, in the complainant's view, a possible undesired result could occur, in the following terms explained by the complainant in his submission:

*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".*

*Because the system offered by the collective agreement does not include the hours actually worked, but only the kilometres travelled. This is an incomplete estimate, which may give higher or lower values than the hours actually worked.*

40. The presentation of a hypothesis (not even based on actual practice) cannot lead to a Collective Bargaining Agreement (negotiated between the social forces) being declared contrary to the obligations derived from the revised Social Charter, especially when the hypothesis offered by the complainant has not materialised in reality, which implies that its risk is covered by the mechanisms for applying the CBA (remember that Article 35 of the Workers' Statute imposes as an obligation that agreed overtime cannot be paid at less than the ordinary rate). The Collective Bargaining Agreement, as we said, has been in force for ten years, and if there really was a problem of underpayment of overtime in application of this CBA, the complainant could have provided some real examples of this situation contrary to the Charter.

41. Whether or not a national rule complies with the European Social Charter cannot be judged on the basis of a mere hypothesis as to its application, especially when (1) the rule is a collective bargaining agreement, i.e., the result of the negotiating work of employers and workers and (2) when the hypothesis put forward does not take account of the limits on the application of the rule set by the legal system in general. Moreover, when (3) the national courts (and, in particular, the highest domestic court, the Supreme Court) have already examined the issue in judicial proceedings and, after hearing all the negotiating parties, concluded that the duty not to underpay overtime was not infringed.

**-On good faith and abuse of rights.**

42. We have already set out in our written Observations on inadmissibility why good faith and the prohibition of abuse of rights were principles to be understood as implicit in the Charter itself and in the Protocol.

43. In fact, the complainant has concealed from the Committee in its statement of claim that the CBA, and that the regulation of the mileage allowance was already challenged by the complainant trade union itself before the High Court of Justice of Murcia and before the Supreme Court and that both courts rejected its claim, because they understood that the Collective Bargaining Agreement guarantees that the payment of hours does not breach the duty of sufficient payment of overtime.

44. In order to assess the existence or not of good faith, it is also relevant that after the Supreme Court ruling, the complainant trade union itself agreed, together with the other members of the negotiating table, to extend the term of the Collective Bargaining Agreement beyond the initially planned term (2015), and that the amounts of the mileage allowance have been revised upwards in successive years (the last in 2018) always with the consent of all the negotiating parties, including the trade union signing this complaint.

In the light of the foregoing, **the Committee I FURTHER REQUEST** that, for the reasons set out above, the present collective complaint be dismissed on the merits.

Madrid for Strasbourg, 20 November 2024.

THE AGENT OF THE KINGDOM OF SPAIN

Alfonso Brezmes Martínez de Villarreal

**ANNEXES**

**Annex I**.- Resolution of 8 October 2013, of the Directorate General of Labour, providing for the registration and publication of the Collective Bargaining Agreement on the Agreement and Wage Table 2013, for road haulage sector.

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

**Annex III**.- Judgment of the Supreme Court (Labour Chamber), no. 534/2016 of 16 June 2016

**Annex IV**. Resolution of the Directorate General for Labour Relations and Social Economy, which provides for the registration and publication of the Collective Agreement to extend the ultra-activity and wage table for 2016, 2017 and 2018 of the Collective Bargaining Agreement for Road Haulage Sector.

**Annex V.-** Resolution of the Directorate General for Labour Relations and Social Economy, which provides for the registration and publication of the Collective Agreement to amend the CBA entitled, for Road Haulage Sector, year 2018