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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

16 December 2024

Case Document No. 6

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

OBSERVATIONS BY THE INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE)

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COMMENTS BY THE INTERNATIONAL ORGANIZATION OF EMPLOYERS (IOE) ON THE COLLECTIVE COMPLAINT

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

Complaint No. 229/2023

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I. BACKGROUND TO THE COMPLAINT.

A) Mileage bonus provided for in the Collective Agreement for road haulage companies in the Region of Murcia 2013-2015.

1. On 19 July 2013, the employers' association “Federación Regional de Organizaciones de Empresas del Transporte” (FROET) and the trade unions UGT and USO signed the “Convenio colectivo de Transporte de Mercancías por carretera de la Región de Murcia” (Collective Agreement for road haulage companies in the Region of Murcia) for the period 2013-2015 (hereinafter "**the Agreement**").

2. The Federación de Servicios a la Ciudadanía de Comisiones Obreras Región de Murcia (hereinafter, "**FSC-CCOO**") was a party to the Negotiating Committee, although it did not sign

the Agreement as it considered that there were certain situations that needed to be rectified before its publication in the Official Gazette of the Region of Murcia (hereinafter, **"BORM**").

3. On 3 October 2013, the Negotiating Committee of the Agreement held a meeting, which was attended by both FROET and the social representation (UGT, USO and COOO), and agreed, with the exception of CCOO, to modify certain issues, including the mileage bonus.

4. The Agreement was published in the BORM on 23 October 2013.

5. According to Article 2 of the Convention now terminated, the Convention applies to

> "[...*companies which, under the corresponding Transport Operator or Transport Operator licences regulated by Law 16/1987, on the Regulation of Land Transport, carry out public road haulage activities in motor vehicles without a fixed road surface and without fixed means of energy collection and/or the so-called auxiliary and complementary activities of goods transport, including courier and logistics activities, the latter being understood as covering the planning, organisation, management, supervision and performance of freight transport activities in the supply chain; i.e. all business activities requiring the aforementioned licences, regardless of whether or not they are carried out under controlled temperature conditions. It shall also apply to public goods transport companies with mobile cranes and heavy machinery* [...]' (emphasis added).

6. Article 27 of the Agreement regulates overtime as follows:

> *"Overtime shall be defined as hours of work in excess of the ordinary daily or weekly working hours fixed in this Agreement or in company agreements in accordance with the provisions of Article 26.*
>
> *With the exception of drivers whose amount and accrual system is established in Article 42* [sic] *of this agreement, the value of the overtime for each professional category shall be the result of dividing the amount of the sum of the following concepts, in annual calculation, basic salary (SB) + extraordinary bonuses for March, July and December (GE) + attendance bonus (PA) + personal seniority supplement (CA) if applicable / by the working day (JL) in annual calculation, increasing this result by 0.50 per cent.*
>
> *For the purposes of the maximum limit of overtime hours, those that are compensated by equivalent rest periods within the four months following their completion shall not be counted; these compensatory rest periods shall be scheduled by mutual agreement between the company and the worker concerned, preferably for the company's off-peak times and ensuring that they are taken consecutively to the weekly rest period.*

Hours worked on public holidays shall, by mutual agreement between the employer and the employee, be paid as overtime or compensated by rest breaks in proportion to the amount of the overtime".

7. Article 43 of the Convention, concerning the "*mileage bonus*", provides as follows:

   "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 may be performed, 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" (underlining added).

8. The amounts set out in Annex II of the Agreement have been replaced subsequently, as a result of different agreements between the social partners.

9. Article 17 of the Agreement distinguishes between four occupational groups, including Group III, relating to the Mobile Staff. Article 20 of the Agreement, which is devoted precisely to mobile staff, differentiates - in its points 5, 6 and 7 - up to three professional categories of drivers, namely:

   - Mechanical driver: "*Is the employee who, being in possession of a "C + E" class driving licence, is contracted with the obligation to drive any company vehicle, with trailer, semi-trailer or without them, according to the needs of the company, helping, if indicated, with repairs to the same, being responsible for the vehicle and the load during the service, being obliged to fill in, where appropriate, the documentation of the vehicle and the transport carried out and to direct, if required, the loading of the goods. He shall be responsible for carrying out the tasks necessary for the correct operation, conservation and conditioning of the vehicle, as well as those necessary for the protection and handling of the goods. He shall immediately inform the person in charge of the workshop, or the person designated by the company for this purpose, of any anomaly detected in the vehicle. He shall cover the routes by the itineraries that are established or, if they are not established, by those that are most favourable for the correct performance of the service.*

     Drivers shall be automatically classified in this occupational category, even if they do not hold a class "C + E" driving licence, if they drive any of the vehicles referred to in paragraph 20.6 for one and the same undertaking for more than six months continuously or alternately.

- Driver: *"Is the employee who, although in possession of a "C + E" class driving licence, is hired only to drive vehicles that require a lower class licence, without the need for mechanical knowledge and with the obligation to direct, if so ordered, the conditioning of the load, actively participating in this and in unloading, without exceeding the ordinary working day; is responsible for the vehicle and the goods during the journey, having to fill in, where appropriate, the documentation of the vehicle and of the transport carried out; he/she is responsible for carrying out the complementary tasks necessary for the correct operation, conservation and conditioning of the vehicle, as well as those necessary for the protection and handling of the goods. He shall immediately inform the person in charge of the workshop, or the person designated by the company for this purpose, of any anomaly detected in the vehicle. He shall cover the routes that are fixed or, if not fixed, those that are most favourable for the correct performance of the service*".

- Light vehicle driver-delivery driver: "*This is the employee who, although in possession of a higher class driving licence, is contracted to drive light vehicles. He shall act with the diligence required for the safety of the vehicle and the goods, and shall be responsible for carrying out the complementary tasks necessary for the correct operation, maintenance, conservation and conditioning of the vehicle and the protection of the vehicle and the load, with the obligation to load and unload his vehicle and to collect and distribute or deliver the goods. He shall immediately inform the person in charge of the workshop, or the person designated by the company for this purpose, of any anomaly detected in the vehicle. He shall carry out his journeys along the routes that are fixed for him or, if they are not fixed, along those that are most favourable for the correct performance of the service*".

B) Legal challenge and exhaustion of internal (Spanish) remedies by FSC-CCOO.

10. The legal representation of the FSC-CCOO of the Region of Murcia brought an action for collective conflict before the Social Division of the Murcia High Court of Justice, alleging, inter alia, the illegality of Article 43 of the Agreement (and, consequently, Annex II thereto) relating to the 'mileage bonus'.

11. On 29 September 2014, the Social Division of the Murcia High Court of Justice (no. 772/2014, rec. 1/2014) handed down a judgment, rejecting in its entirety the challenge brought by the trade union, and rejecting the alleged illegality in relation to the regulation of the mileage bonus. In this regard, the Court points out:

    "[...*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 to that effect; The intention of the parties is therefore 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, The tachograph can be used to establish the time the vehicle has been stationary or in motion, and the GPS can be used to establish the location of the vehicle, but in no way the activity carried out by the driver, so the criterion agreed in the agreement cannot be described as arbitrary, but based on objective criteria [...].].

[...] *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 that 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 haulage companies in Article 36.3, fourth paragraph, when it stipulates 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 any prejudice*".

12. On 18 May 2015, the legal representation of the FSC-CCOO lodged an ordinary appeal in cassation before the Social Division of the Supreme Court against the judgment of the Murcia High Court of Justice, arguing that the lower court judgment had infringed the applicable substantive law by upholding the conformity with the law of the mileage bonus.

13. On 16 June 2026, the Social Division of the Supreme Court by judgment no. 534/2016 (no. 534/2016, rec. 240/2015) upheld the lower court's judgment, dismissing in its entirety the ordinary cassation appeal lodged by the FSC-CCOO, arguing as follows:

"...] *the above-transcribed Article 43 of the contested regional agreement, apart from the fact that it highlights the difficulty of controlling excess working hours (overtime and presence) and their determination, which does not begin, where appropriate, with 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* [...].

[...] *without, of course, that method of quantitative determination, under the conventional heading of 'mileage bonus', being able to be described as arbitrary, still less can it be said that it contravenes the general prohibition in Article 34.1 of the ET 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, art. 43 of the 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, SSTS4ª, General Chamber, of 21/2/2006, RR 2921, 2831 and 3338/04; 18/9/2007, R. 4540/04; and 26/12/2007, R. 4540/04; and 26/12/2007, RR 2921, 2831 and 3338/04). 4540/04; and 26/12/2007, R. 3697/07), provided that they equal or exceed the*

remuneration provided for ordinary working hours, in terms of their quantification, is available for collective bargaining".

C) Subsequent amendments to Article 43 of the Agreement, concerning the "Mileage Bonus".

14. Subsequent to the ruling handed down by the Social Division of the Supreme Court, both employers (FROET) and trade unions (the three trade unions with representation in the sector -UGT, CCOO and USO-) reached, within the framework of the Negotiating Committee of the Agreement, an agreement, dated 9 March 2017, published in the BORM (No. 109) on Saturday 13 May 2017.

15. The agreement agreed, inter alia, on the following issues:

    - To extend the Agreement for the years 2016, 2017 and 2018, in all its terms with the exception of the economic concepts.

    - The revision of the salary tables in 2016, 2017 and 2018 in different annual percentages (1.25%, 1.75% and 2%, respectively). It was specifically agreed that "*Per diems and mileage will experience a rise equal to that of the concepts reflected in the salary tables consisting of Base Salary, Attendance Bonus and Transport Bonus*".

      The amounts shown in Annex II were thus updated for the years 2017 and 2018.

16. On 7 February 2018, the "*Agreement to amend the Collective Agreement on Road Freight Transport in the Region of Murcia*" was published in the BORM (No. 31), registering the agreement reached within the Negotiating Committee of the Agreement on 26 December 2017 between FROET and trade unions UGT, USO and CCOO (including the latter trade union confederation), under which Annex II or 2 was reworded as follows:

    "Article 43. Mileage bonus. Remuneration for 2018.

    43.1. Long distance: Those drivers whose daily journey exceeds a radius of 100 kilometres from the work centre and who drive more than 7,000 kilometres per month:

    a) Drivers of vehicles up to 26 MT of MMA:

    I.- Up to 10.000 Km. travelled per month will receive 0,0163 €/Km.

    II.- From 10.000 Km. travelled per month they will receive 0,0314 €/Km.

    b) Drivers of vehicles over 26 MT of MMA:

I.- Up to 10.000 Km. travelled per month will receive 0,0185 €/Km.

II.- From 10.000 Km. travelled per month they will receive 0,0329 €/Km.
"Double crew: In all cases, when vehicles are driven by two drivers, they shall receive the mileage bonus corresponding to the kilometres during which they have driven each of them, according to the records on the tachograph diagram discs or driver card, the amount of which is set for 2017 at €0.0335/km and €0.0350 in 2018."

43.2 Short distance: Drivers whose daily journey does not exceed a radius of 100 kilometres from the work centre and who do not do more than 7,000 kilometres per month:

I.- Transport of construction materials and public works:

a) Concrete mixer lorry drivers. Up to 80 return journeys made per month, they will receive €1.5262 per journey made and from 80 return journeys made in a month they will receive €3.0524 per journey made. In addition, they will receive €0.1570 per km up to 1,900 km travelled in a month and €0.3141 per km after 1,900 km travelled in a month.

b) Cement tanker drivers. Up to 55 return journeys made per month, they shall receive €0.7678 per journey made and from 55 return journeys made in a month they shall receive €1.5355 per journey made. In addition, they will receive €0.0408 per km travelled up to 7,000 km travelled in a month and €0.0816 per km travelled after 7,000 km travelled in a month.

c) Drivers of tipper trucks. Up to 105 return journeys made per month, they shall receive €0.7678 per journey made and from 105 return journeys made in a month they shall receive €1.5355 per journey made. In addition, they will receive €0.0408 per km travelled up to 5,000 km travelled in a month and €0.0816 per km travelled after 5,000 km travelled in a month.

II.- Port transport and similar (radius of action 25 km from the port):
They will receive €1.2638 per month per round trip and €0.1016 per km travelled.

III.- Other types of transport: drivers of lorries over 26 MT. MMA, not included in the above, will receive a premium per kilometre travelled per month of €0.0510.

43.3.- Distribution: The total monthly mileage bonus shall be distributed as follows and shall be so reflected in the salary statement:
- 50% of the total to cover possible overtime.
- 40% of the total to cover possible presence hours.
- 10% of the total to cover possible night bonus".

17. By virtue of the same agreement dated 26 December 2017 and published in the BORM on 7 February 2018, "*the other provisions and rules contained in the text of the Collective Agreement for Freight Transport Companies 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 here*" (fourth point of the Negotiating Committee Agreement).

18. Thus, at present, Article 43 of the Collective Bargaining Agreement transcribed above relating to the "Mileage Bonus" remains in force, with the specific amounts depending on the group of drivers affected provided for in the new wording of Annex II, in force since 26 December 2017, and with the allocation of the amounts resulting from the mileage bonus between the following concepts: (i) 50% of the total to cover possible overtime; (ii) 40% of the total to cover possible presence hours; and (iii) 10% of the total to cover the possible night-time bonus.

D) FSC-CCOO collective complaint under the Protocol.

19. On 31 July 2023, a collective complaint (No. 229/2023) was lodged with the General Secretariat of the Council of Europe by FSC-CCOO Murcia for violation by the Convention, and ultimately by the Kingdom of Spain, of Article 4.2 of the Revised European Social Charter (hereinafter "**ESCr**").

20. On 13 October 2023, the Kingdom of Spain submitted observations on the inadmissibility of the present complaint, arguing that it was inadmissible.

21. On 15 December 2023, the FSC-CCOO responded to the observations made by the Government of Spain concerning the inadmissibility of collective complaint No. 229/2023, in the sense of considering its complaint of non-compliance with the CSEr by the Spanish State admissible.

22. On 29 February 2024, the Spanish Government submitted a letter, registered at the General Secretariat on 4 April 2024, referring in full the representatives of the Kingdom of Spain to the observations they had previously submitted on 13 October 2023, requesting the inadmissibility of the collective claim for a number of reasons.

E) Admissibility of the complaint and time limit for allegations.

23. On 11 September 2024, the European Committee of Social Rights (hereinafter "**ECSR**") rejected all the grounds of inadmissibility raised by the Spanish Government and, consequently, declared admissible the collective complaint no. 229/2023 brought by the

FSC-CCOO Region of Murcia requesting that the ECSR issue a decision on the merits finding that there had been a failure to comply with Article 4(2) of Article 4(2) of the Convention. 229/2023 brought by the FSC-CCOO of the Region of Murcia requesting that the ECSRC issue a substantive decision finding that the Kingdom of Spain had failed to comply with Article 4.2 of the CSER in relation to the "mileage bonus" provided for in Article 43 of the Convention.

24. In the same admissibility decision, in application of Article 7.2 of the Protocol, the ECSRC invited the international employers' organisations referred to in Article 27.2 of the ETUCE to submit comments by 20 November 2024.

25. Consequently, the International Organisation of Employers (hereinafter "**IOE**") hereby submits**, in due time and form, its observations on collective complaint No. 229/2023 submitted by the FSC-CCOO of the Region of Murcia, in accordance with the provisions of article 7.2 of the CSEr**.

II. ANALYSIS OF THE SUBJECT MATTER OF THE COMPLAINT OF THE FSC-CCOO OF THE REGION OF MURCIA AND STRUCTURE OF THE OBSERVATIONS.

26. The complaint lodged by the acting trade union is structured in six sections or headings. The first three points are devoted to the background to the complaint (Section I), the invocation of Article 4.2 of the CSEr and the doctrine developed by the CEDS (Section II) and to defending the possibility of this collective complaints procedure assessing the regulations agreed by the social partners through collective agreements (Section III).

27. The last four sections are devoted to analysing, first, the Agreement's regulation of overtime pay (Section IV), the alleged failure to comply with the specific overtime pay scheme set out in Article 43 of the Agreement under challenge (Section V) and, finally, the request for a substantive decision by the ECSRC that Article 43 of the Agreement does not comply with Article 4(2) of the ECSRC and, consequently, that the Spanish State's failure to comply with its obligations by allowing the overtime bonus to apply in the aforementioned sector of activity (Section VI).2 of the ECSRC, Article 43 of the Agreement and, consequently, the failure of the Spanish State to comply with its obligations by permitting the validity of the mileage bonus in the aforementioned sector of activity (Section VI).

28. First of all, it is uncontroversial that Spain granted the instrument of ratification of the 1996 European Social Charter on 29 April 2021, which was published in the BOE on 11 June 2021 and entered into force on 1 July 2021[1] . It is an equally peaceful fact that the Kingdom of

[1] Instrument of Ratification of the European Social Charter (revised), done at Strasbourg on 3 May 1996 (BOE No. 139, of 11 June 2021).

Spain accepted the provisional application of the Additional Protocol to the European Social Charter establishing a system of collective claims (done in Strasbourg in 1995), with the same entry into force on 1 July 2021 . [2]

29. In the first place, this party has no objection to the legal binding nature of the CSEr on the Kingdom of Spain, as an international legal obligation (i.e. Part III of the CSEr), since it is clear that Spain has ratified, without reservations, the CSEr. And in the same sense, the Spanish State has sovereignly decided to submit itself to the system of collective claims by adhering to the Additional Protocol to the CSEr. However, another totally and radically different question is the possible direct application of the SREC to the detriment of the national norm (the so-called control or judgement of conventionality).

30. In this regard, it is worth mentioning the current position of the Social Division of the Supreme Court. On the one hand, in its ruling of 28 March 2022 (no. 268/2022, rec. 471/2020), the Social Division of the Supreme Court stated that "*Given that the content of the SSC is very heterogeneous, it is not certain that all of it has the same direct applicability in the sphere of a private law relationship such as the employment contract. Rather, we believe that, even after the revised version has come into force, it is only in the light of each of the provisions it contains that a decision on this matter can be taken*". And, on the other hand, in an order dated 7 May 2019 (rec. 3085/2018) the Social Division of the Supreme Court recalls that the Decisions on the Merits of the CEDS are not rulings provided for in article 219 of Law 36/2011, of 10 October, regulating social jurisdiction, and, therefore, are not considered case law, referring for this purpose to the classic doctrine, according to which, "[....*Article 219(2) of the aforementioned law states that the doctrine of contradiction may be invoked as that established, inter alia, in the judgments handed down by the jurisdictional bodies established in the international treaties and agreements on human rights and fundamental freedoms ratified by Spain and within the scope of the Council of Europe, only the European Court of Human Rights is such a court, a rank which is not held by the European Committee of Social Rights*" (emphasis added) (all, Order of the Chamber for Social Matters of the Supreme Court of 7 February 2017, rec. 1983/2016).

31. In comparative case law, the French Civil Court of Cassation (Social Chamber) in its ruling of 11 May 2022 has rejected, for example, the direct application of Article 24 of the CSEr, insofar as we are in the presence of a legal obligation of an international nature, which does not give subjective rights to plaintiffs in an *inter partes* dispute (where the administration or the public institutional sector is not a defendant), stating that:

> *"20. Il résulte des dispositions précitées de la Charte sociale européenne que les Etats contractants ont entendu reconnaître des principes et des objectifs, poursuivis par tous*

[2] Provisional application of the Additional Protocol to the European Social Charter establishing a system of collective complaints, done at Strasbourg on 9 November 1995 (BOE No. 153 of 28 June 2021).

les moyens utiles, dont la mise en oeuvre nécessite qu'ils prennent des actes complémentaires d'application selon les modalités rappelées aux paragraphs 13 et 17 du présent arrêt et dont ils ont réservé le contrôle au seul système spécifique rappelé au paragraphe 18 (Assemblée plénière, avis de la Cour de cassation, 17 juillet 2019, n° 19-70.010 et n° 19-70.011 ; 1re Civ, 21 novembre 2019, pourvoi n° 19-15.890, publié).

21. C'est dès lors à bon droit que la cour d'appel a retenu que, les dispositions de la Charte sociale européenne n'étant pas d'effet direct en droit interne dans un litige entre particuliers, l'invocation de son article 24 ne pouvait pas conduire à écarter l'application des dispositions de l'article L. 1235-3 du code du travail et qu'il convenait d'allouer en conséquence à la salariée une indemnité fixée à une somme comprise entre les montants minimaux et maximaux déterminés par ce texte".

32. Regardless of or independently of the internal Spanish debate on the direct effect of the articles of the CSEr, this party considers that these disquisitions do not form part of the subject matter of the complaint and are absolutely irrelevant for our purposes.

33. We will therefore focus our analysis on the substance of the matter, i.e. on whether the mileage bonus regulated in Article 43 of the Agreement complies with the provisions of Article 4.2 of the CSEr.

34. However, before delving into the legal arguments that lead us to request the rejection of the claims put forward by the other party, **it is essential to note several elements that have not been taken into account or, where appropriate, have been omitted by the FSC-CCOO in its complaint**.

35. Firstly, at no point is there any mention, even briefly, of the particularities and specificities of the national, international or Community organisation of the working time of professional drivers, who, as a result of the idiosyncrasies of their sector of activity (public goods transport) have an *ad hoc* regulation of their working time.

36. Thus, it has not been explained throughout the letter governing these proceedings that drivers' working time is made up of different times: actual working time, presence or availability time, and breaks or rest periods. Nor has it been made clear that within the concept of actual working time we find, on the one hand, driving and, on the other hand, the performance of "*other work*". And this question is precisely raised by the FSC-CCOO when it states in Section V (p. 15) that "*This system only counts the kilometres driven; it does not count work that is not present in the 3 definitions of the 3 categories of drivers*" or, in the same Section on p. 16, when it states that "*Work that is not present in the 3 definitions of the 3 categories of drivers*" or, in the same Section on p. 16 when it states that "*Work that is not present in the 3 definitions of the 3 categories of drivers is not counted*". 16 when stating "*The tasks just listed in sections 20.4, 20.5 and 20.7 of the Collective Agreement, which are*

not driving tasks but are the duties of drivers, are precisely the 'other work' defined in Article 4.e) of the said Regulations". This issue will be dealt with in the following section.

37. Secondly, as has already been pointed out, the applicant trade union argues that the three professional categories of drivers provided for in the collective agreement (mechanical driver, driver and driver-delivery driver) are covered by the overtime compensation scheme provided for in Article 43 of the agreement, that is to say, the mileage bonus, when the truth is that driver-delivery drivers are governed, like the rest of the workers covered by the scope of application of that agreement, by Article 27, which provides for the payment of overtime over and above the ordinary hourly rate, establishing a calculation formula for determining the rate of overtime.

38. **Thus, the FSC-CCOO of Murcia has mistakenly and erroneously included drivers-delivery drivers among the groups affected by the mileage bonus**, when, due to the very circumstances of their activity, Article 27 on overtime of the applicable sectoral collective agreement applies to them.

39. Without prejudice to a subsequent and more detailed legal explanation of the above, it should be noted at this point that Article 43 of the Agreement states that "*it is 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 that may be performed* [...]", and two fundamental issues should be highlighted.

40. On the one hand, as is clear from Article 20.7 of the Convention, the driver-delivery driver drives light vehicles, reiterating that he is hired "*to drive light vehicles*". At present, only vehicles with a maximum authorised mass of 3.5 tonnes (hereinafter referred to as "**MMA**") are fitted with a tachograph, and so-called "*light*" vehicles, which do not reach this weight, do not have such a device or instrument.

41. On the other hand, and as a corollary of the previous statement, the specific regulation of drivers' working time, distinguishing between actual working time and presence/availability time, can only be applicable to professionals who drive vehicles with a tachograph. European Union legislation (Directive 2002/15 and EC Regulation 561/2006) limits the distinction between actual work and presence time to those workers who drive vehicles with a maximum authorised vehicle mass of 3.5 tonnes or more. **Therefore, if the employees drive light vehicles and have the professional category of "*driver-delivery driver of light vehicles*", without a tachograph and weighing less than 3.5 MMA, they cannot work presence hours and, consequently, the mileage bonus cannot be applicable to them either, insofar as it serves to compensate not only for the possible performance of overtime, but also for presence hours**.

42. Thirdly, as the mileage bonus affects exclusively mechanical drivers and drivers (and not drivers-drivers of light vehicles), the scenario described by the FSC-CCOO of Murcia changes completely.

43. First of all, because the complainant union is confusing or intermingling concepts. On the one hand, the collective complaint ignores the wage structure for mechanics and drivers. Thus, Article 36 of the Agreement establishes that "*the totality of the economic payments of the workers, in cash or in kind, for the professional provision of their labour services, whether they are paid for actual work, time spent in attendance or rest periods that can be counted as work, shall be considered as wages*".

44. Furthermore, Article 39.1 of the agreement lays down, as remuneration, various fixed remuneration items: basic salary by category, attendance bonus and transport bonus. Thus, what becomes clear in the light of the wage structure of the Agreement at issue here is that drivers' pay does not really depend on whether they cover more or fewer kilometres, in so far as a number of fixed or permanent items are fixed.

45. However, the complexity of regulating the working time of professional drivers (mechanic drivers and drivers), especially in terms of identifying the performance of activities other than the specific driving activity, explains why the social negotiators (FROET on the employer side; the UGT and USO on the social side) have opted to establish a system that allows any possible extensions to the working day to be objectified in some way. It should not be forgotten that, during the course of a driver's daily working day, there may be 'presence hours' (which do not count as actual working time, although they are paid at the ordinary hourly rate) or, on the other hand, 'other work', which does fall into the category of actual working time.

46. At the end of the day, the Mileage Bonus operates or acts as a payment on account of overtime, presence hours and night work. Given the intrinsic difficulty of identifying the working time, presence and breaks that make up the working day of a driver of a vehicle with a tachograph and taking into account the possibility of overtime, an alternative formula for calculating the price of overtime has been agreed. However, unlike the FSC-CCOO, this is not a lump sum; on the contrary, the compensation for overtime will vary according to the number of kilometres driven, on the understanding that the main activity of a driver is not the performance of other work, but precisely driving.

47. Finally, in line with the opinion expressed by the representatives of the Spanish Government on 13 October 2023 (pp. 13 and 14), the FSC-CCOO's complaint is nothing more than a hypothesis in which, in its opinion, an undesirable result may occur. A hypothesis that does not even fit in with the productive reality of the sector, because, as previously mentioned, it does not take into account the particularities of drivers' working hours and, finally, because the examples proposed to the contrary are unrealistic.

48. Suffice it to say at this very moment that no one in the sector questions the fact that drivers can carry out what are known as 'other jobs' during their working day. However, it is totally unfounded to claim that a driver, whose main and basic function is driving, i.e. moving goods from one point to another, carries out a total of 200 hours of 'other work' per month, since such a figure would mean that the worker's daily working day, depending on whether the month has 20, 21 or 22 working days, consists of between 8 and 10 hours per day just carrying out tasks other than driving. An example which, unsurprisingly, does not correspond to reality.

49. These initial arguments are developed in the following points.

- First of all, we shall proceed to contextualise the labour regulations governing the working hours of professional drivers, identifying the groups actually covered by them (**Section III**).

- Secondly, we will address the identification of working, presence and rest times in the road haulage sector, in order to highlight the existence of a third time, presence time, which has not even been mentioned by the complainant (**Section IV**).

- Thirdly, and as a direct consequence of the previous point, the difficulties arising from the control of drivers' working hours as a result of the peculiar characteristics of the activity and the operation of the tachograph will be explained (**Section V**).

- Fourthly, reference will be made to the regulation of overtime in Spain and to article 4.2 of the CSEr and the doctrine developed by its enforcement body, the ECSRC. (**Section VI**).

- Fifthly, it will be explained why Article 43 of the Convention concerning the Mileage Bonus is in conformity and in line with the provisions of both Article 4.2 of the CSEr and its authentic interpretation by the ECSRC (**Section VII**).

- Seventh, these observations will end with a series of conclusions (**Section VIII**).

III. CONTEXTUALISATION OF THE SECTOR: THE COMPLEXITY OF WORKING TIME FOR PROFESSIONAL DRIVERS.

A) International labour law: ILO Convention No. 153.

50. Within the framework of international labour law and more specifically under the auspices of the International Labour Organisation (hereinafter referred to as "**ILO**"), ILO Convention

No. 153 concerning Hours of Work and Rest Periods in Road Transport was adopted by the ILO General Conference in Geneva on 27 June 1979.

51. In accordance with Article 13 of ILO Convention No. 153, this international treaty revises Convention No. 67 concerning Hours of Work and Rest in Road Transport, 1939.

52. ILO Convention No. 153 entered into force on 10 February 1983, in accordance with Article 15.2, which stated that it "*shall come into force twelve months after the date on which the ratifications of two Members have been registered by the Director-General*". It was ratified first by Switzerland on 4 May 1981 and secondly by Mexico on 10 February 1982.

53. Spain ratified the aforementioned ILO Convention No. 153 on 7 February 1985, which was published in the BOE on 28 June 1985[3] . In application of Article 15.3 of the Convention, the Convention came into force in Spain on 7 February 1986.

54. According to Article 1 of ILO Convention No. 153, it applies to "*employed drivers of motor vehicles engaged professionally in the inland or international carriage of goods or passengers by road, whether such drivers are employed by transport undertakings for hire or reward or by undertakings engaged in the carriage of goods or passengers for their own account*".

55. In accordance with the provisions of Article 4.1 of the above Convention, the term 'working time' means the time spent by employed drivers: (a) on driving and other work during the time the vehicle is in use; (b) on ancillary work in connection with the vehicle, its passengers or its load.

56. But furthermore, Article 4.2 of the Convention provides for a third time, which it calls "**periods of simple presence, standby or availability**", "*spent in the vehicle or at the workplace and during which drivers do not freely dispose of their time, may be considered part of the working time in a proportion to be determined in each country by the competent authority or body, by means of collective agreements or by any other means in accordance with national practice*".

57. Or, in other words, periods of simple presence, standby or availability are not included in the category 'working time', depending on the regulations made by each Contracting State. Moreover, the Member States have the possibility or option, in accordance with the aforementioned provision, to consider part of the working time in a proportion to be determined internally.

[3] Instrument of Ratification of Convention No. 153 of the International Labour Organization concerning Hours of Work and Rest Periods in Road Transport, adopted at Geneva on 27 June 1979 (BOE No. 154 of 28 June 1985).

58. In short, **periods of simple presence, waiting or availability, spent in the vehicle or at the place of work and during which drivers do not freely dispose of their time, are not considered as effective working time**.

B) European Union law.

59. On 8 August 1985, Organic Law 10/1985, of 2 August 1985, on Authorisation for Spain's accession to the European Communities, was published in the Official State Gazette (BOE)[4] , in compliance with Article 93 of the Spanish Constitution.

60. On 15 November 1985 the Decision of the Council of the European Communities of 11 June 1985 on the accession of the Kingdom of Spain and the Portuguese Republic to the European Coal and Steel Community was published in the Official Journal of the European Communities (OJEC). On 1 January 1986 the Kingdom of Spain and the Portuguese Republic joined the European Coal and Steel Community and became part of the former European Economic Community . [5]

61. Since the establishment of the European Communities, there has been a succession of legislative provisions dealing with the particularities of working time in the road transport sector:

    - Council Regulation (EEC) No 543/69 of 25 March 1969 on the harmonisation of certain social legislation relating to road transport.

    - Council Regulation (EEC) No 2829/77 of 12 December 1977 concerning the implementation of the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR).

    - Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport.

62. Council Directive 93/104 of 23 November 1993 concerning certain aspects of the organisation of working time[6] introduced elements of working time regulation at Community level. However, Article 1(3) of the Directive excluded from its scope "*transport by road, air, rail, sea, inland waterway, sea fishing, other maritime activities and the activities of doctors in training*".

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[4] Ley Orgánica 10/1985, de 2 de agosto, de Autorización para la adhesión de España a las Comunidades Europeas (BOE Núm. 189, de 8 de agosto de 1985).
[5] Instrument of Ratification of the Treaty done at Lisbon and Madrid on 12 June 1985, concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and the European Atomic Energy Community (BOE No. 1 of 1 January 1986).
[6] OJEC No. 307 of 13 December 1993.

63. On the basis of this exclusion, Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities[7] was adopted.

64. Directive 2002/15/EC remained in force after the entry into force of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[8] , insofar as its Article 14 provided that "*The provisions of this Directive shall not apply to the extent that other Community instruments contain more specific requirements concerning the organisation of working time in respect of certain occupations or occupational activities*". In other words, Directive 2002/15/EC applies as a specific rule for the road haulage sector, as opposed to Directive 2003/88/EC, which is intended to be general and can be applied in most sectors in any of the Member States, without prejudice to the exceptions it provides for certain productive activities.

65. Subsequently, Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport was published in the Official Journal of the European Union (OJEU) on 11 April 2006[9] . This Regulation, of a more administrative nature although related to social aspects in road transport, came to replace and repeal the aforementioned Regulation 3820/1985, but, above all, to complement Directive 2002/15/EC, a genuine labour law.

66. Regulation 561/2006 is still in force today, although it has undergone various amendments and technical improvements, which is evidence of the great regulatory complexity of this sector and which are listed below for illustrative purposes only:

- Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009.

- Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014.

- Regulation (EU) 2020/1054 of the European Parliament and of the Council of 15 July 2020.

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[7] Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJEC No. 80 of 23 March 2002).

[8] OJEU No. 299 of 18 November 2003.

[9] Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJEU No 102 of 11 April 2006).

- Regulation (EU) 2024/1258 of the European Parliament and of the Council of 24 April 2024.

67. In summary, the specific or sectoral EU-wide labour standards for drivers are to be found in two distinct instruments:

    - On the one hand, Directive 2002/15/EC aims to establish minimum requirements concerning the organisation of working time in order to improve the safety and health protection of persons performing mobile road transport activities, to improve road safety and to align conditions of competition (Art. 1).

    - On the other hand, Regulation (EC) 561/2006 (as amended above) aims to lay down rules on driving time, breaks and rest periods for drivers engaged in the carriage of goods and passengers by road in order to harmonise the conditions of competition between modes of inland transport, especially as regards the road sector, and to improve working conditions and road safety (Art. 1).

68. The relationship between the two European provisions is clarified in Article 2(4) of Directive 2002/15/EC, which states that "*This Directive supplements the provisions of Regulation (EEC) No 3820/85 and, where necessary, the AETR Agreement, which shall prevail over the provisions of this Directive*". Insofar as Regulation 3820/1985 has been replaced in its entirety by Regulation 561/2006, it must be understood that it is precisely the latter which takes precedence over the directive.

69. Like its ILO counterpart (Convention No. 153), Directive 2002/15/EC distinguishes between working time and standby time in the working time of drivers.

70. Despite the classic and reiterated case-law of the Court of Justice of the European Union (hereinafter "**CJEU**")[10] according to which actual working time and rest are two mutually exclusive concepts or, in the words of the CJEU, "*the concept of 'rest period' is defined negatively as any period which is not working time*", so that "*as those concepts are mutually exclusive, a worker's on-call time must be classified either as 'working time' or as a 'rest period' for the purposes of the application of Directive 2003/88, since the latter does not provide for an intermediate category*" (emphasis added). However, in the road transport sector, by virtue of the application of both ILO Convention No. 153 and Directive 2002/15 and Regulation 561/2006, there are intermediate periods of time, known as presence or availability, which do not count for the purposes of working time.

71. By reference of the Directive (art. 2.1), this unique working time regulation applies to activities falling within the scope of Regulation 561/2006, and article 2.1.a) of that Regulation is clear in stating that, as of today, it will apply to road transport "*of goods, where*

[10] E.g., CJEU (Fifth Chamber) of 11 November 2021 (Case C-214/20) [ECLI:EU:C:2021:909].

the maximum authorised mass of the vehicles, including any trailer or semi-trailer, exceeds 3.5 tonnes".

72. Consequently, according to Article 2(2) of Directive 2002/15, the provisions of Directive 2003/88 (the successor to Directive 93/104/EC) shall apply to mobile workers excluded from the scope of Regulation 561/2006. In other words, it **is not the specific labour legislation (Directive 2002/15/EC and Regulation 561/2006) but Directive 2003/88/EC that applies to the drivers of light-duty vehicles covered by the Convention, with the particularities laid down for mobile workers in Article 20 thereof**.

C) Spanish law.

73. In Spanish law, although the 1971 Labour Labour Ordinance for Road Transport Companies[11] made reference to waiting times, it was with the advent of democracy that the first Workers' Statute of 1980 was approved and expressly established the possibility that the Government, at the proposal of the Ministry of Labour and after consulting the most representative trade union organisations and employers' associations, could establish extensions or limitations to the working day (art. 34.6 of the 1980 Statute)[12] .

74. Specifically, Final Provision 4 of the 1980 Statute provided for the continued application of "*the specific regulations on working hours, breaks and geographical mobility in the transport sector, respecting in all cases the maximum annual working time, until the Government, after consulting the most representative trade union organisations and employers' associations, issues the regulations adapting the present Law to this sector in such matters*".

75. Royal Decree 2001/1983 of 28 July 1983 on the regulation of working hours, special working days and rest breaks[13] , for the first time in Spain, for road, rail and air transport and for work at sea, made a distinction between actual work and presence time in determining the calculation of the working day, the latter not being counted as part of the actual working day or for the purposes of the overtime limit (art. 9).

76. Royal Decree 2001/1983 was practically repealed and replaced in its entirety by Royal Decree 1561/1995 of 21 September 1995 on special working days[14] . Like its predecessor, Article 8.1 of Royal Decree 1561/1995 (which has remained unchanged since 1995) states that "*for the calculation of the working day in the different transport sectors and in work at sea, a*

[11] Order of 9 July 1974 approving amendments to various articles of the Labour Labour Ordinance for Road Transport Companies, approved by Order of 20 March 1971 (BOE No. 173 of 20 July 1974).
[12] Law 8/1980, of 10 March 1980, on the Workers' Statute (BOE No. 64, of 14 March 1980).
[13] BOE No. 180, 29 July 1983.
[14] According to the Sole Repealing Provision of Royal Decree 1561/1995, "*Royal Decree 2001/1983, of 28 July, on the regulation of the working day, special working days and rest periods, except for the provisions of Articles 45, 46 and 47 on working holidays, and any other regulations of equal or lower rank that oppose the provisions of this Royal Decree*" (BOE No. 230, of 26 September 1995), *is repealed*.

distinction shall be made between actual working time and time spent in attendance", with Article 8.3 of the same regulation stating that "*hours spent in attendance shall not count towards the maximum duration of the ordinary working day, nor towards the maximum limit for overtime*".

77. Following the adoption of Directive 2002/15/EC, Spanish law had to be adapted to its content, and the regulation of Royal Decree 1561/1995 was amended by Royal Decree 902/2007 of 6 July 2007[15] . Article 10 of Royal Decree 1561/1995, devoted exclusively to working time in road transport, was reworded, an Article 10a was added to introduce limits on working time for mobile workers, and the wording of Article 11 was amended to adapt it to the entry into force of Regulation 561/2006.

78. Later, the regulation of working hours in road transport underwent further changes with the approval of Royal Decree 1635/2011, of 14 November[16] , which gave even more importance, if possible, to collective bargaining at national level for the determination of the legal regime of hours of presence, giving a new wording to this end to Article 10.5 of Royal Decree 1561/1995.

79. With regard to the working hours of mobile workers, the II General Agreement for road haulage companies published in the Official State Gazette on 29 March 2012 (hereinafter, "**II General Agreement**")[17] , plays a leading role since, in its article 28 relating to the working hours of drivers, it partially develops certain points of Royal Decree 1561/1995 and, in particular, some of the cases that may be considered as presence time in accordance with article 10.4 of the aforementioned regulation.

80. The aforementioned Article 28 of the 2nd General Agreement expressly provides in paragraph 2 that: *"In the event that specific agreements on the working hours of mobile workers are adopted in sectoral collective agreements of a lower territorial scope or in company collective agreements or arrangements, the provisions of these shall prevail over the provisions of this Article. The aforementioned agreements and arrangements may establish specific wage compensations, fixed according to objective criteria, as remuneration for possible extensions of the ordinary working day and/or for the performance of on-call time"* (emphasis added). As can be seen, the state collective agreement for road freight transport itself covers the possibility that the social partners in the sector may agree to establish specific wage compensatory payments, set according to objective criteria - such as

[15] Royal Decree 902/2007, of 6 July 2007, amending Royal Decree 1561/1995, of 21 September, on special working days, with regard to the working time of workers who carry out mobile road transport activities (BOE No. 171, of 18 July 2007).
[16] Royal Decree 1635/2011, of 14 November, amending Royal Decree 1561/1995, of 21 September, on special working days, in terms of presence time in road transport (BOE No. 303, of 17 December 2011).

[17] Resolution of 13 March 2012, of the Directorate General for Employment, registering and publishing the II General Agreement for road freight transport companies (BOE No. 76, of 29 March 2012).

the mileage bonus agreed in Article 43 of the Agreement - which serve to remunerate the performance of overtime and/or presence hours.

81. It should be noted that Spanish legislation (Royal Decree 1561/1995 and II General Agreement) provides a definition of effective working time, which includes the controversial "other work", as well as an identification of attendance time.

IV. WORKING TIME OF A DRIVER'S WORKING DAY: ACTUAL WORK, ATTENDANCE AND BREAKS/BREAKS.

82. According to Article 3(a)(1) of Directive 2002/15/EC, effective working time in the case of mobile workers means any period between the beginning and the end of work, during which the mobile worker is at his place of work, at the employer's disposal and carrying out his duties and activities, that is to say, between the beginning and the end of the period during which the mobile worker is at his place of work, at the employer's disposal and carrying out his duties and activities:

- time spent on all road transport activities. These activities include, in particular
    - driving,
    - loading and unloading,
    - assisting passengers boarding and alighting from the vehicle,
    - cleaning and technical maintenance,
    - all other tasks whose purpose is to ensure the safety of the vehicle, cargo and passengers or to fulfil legal or regulatory obligations directly linked to a specific transport operation being carried out, including the control of loading and unloading, administrative formalities with police, customs, immigration officials etc.;

- periods during which the mobile worker is not free to dispose of his time and has to remain at his place of work, ready to carry out his normal work, performing certain service-related tasks, in particular periods of waiting for loading and unloading, where the foreseeable duration is not known in advance, i.e. either before departure or before the actual start of the period concerned, or under the general conditions negotiated between the social partners or defined by the legislation of the Member States.

83. For its part, it is defined as availability time (Art. 3.b of Directive 2002/15/EC):

- Periods other than break or rest periods during which the mobile worker is not obliged to remain at his place of work but has to be available to respond to possible instructions to start or resume driving or to carry out other work. In particular, periods during which the mobile worker accompanies a vehicle transported by ferry or train and periods spent

waiting at borders or caused by driving bans are considered as periods of availability, without prejudice to the fact that, if drivers have a bed or bunk, these periods are considered as rest in application of Article 9(1) of Regulation 561/2006.

- For mobile workers driving in a team, the time spent during the movement of the vehicle sitting next to the driver or lying down in a bunk.

84. **Articles 8 and 10 of Royal Decree 1561/1995 are responsible for outlining and delimiting, from an internal or Spanish labour law point of view, the different times that make up the working day of professional drivers**.

- On the one hand, the second paragraph of Article 8.1 of Royal Decree 1561/1995 gives a definition of what is considered, in general terms, to be effective working time, understood as that in which the worker is at the disposal of the employer and in the exercise of his activity, carrying out the functions of driving the vehicle or means of transport or other work during the time the vehicle or means of transport is in circulation, or auxiliary work that is carried out in relation to the vehicle or means of transport, its passengers or its load.

- Article 10.3 of Royal Decree 1561/1995 states, for its part, that without prejudice to the foregoing, periods during which the mobile worker cannot freely dispose of his time and has to remain at the workplace ready to perform his normal work, carrying out tasks related to the service, including, in particular, periods of waiting for loading and unloading when their foreseeable duration is not known in advance, are understood to be included in the effective working time.

- On the other hand, periods other than breaks and rest periods, during which the mobile worker does not carry out any driving or other work and is not obliged to remain at his place of work, but must be available to respond to any instructions to start or resume driving or other work, are included in the period of presence.

- And, in particular, provided that they do not constitute a break or rest, the following periods shall be considered as attendance time (art. 10.4 of Royal Decree 1561/1995 in relation to the development made by article 28.2 of the II General Agreement):

    - Except in the case of breaks or rest periods, periods during which the worker accompanies a vehicle transported by ferry or train shall be regarded as presence time, provided that the existence and foreseeable duration of the journey is known in advance. In accordance with the provisions of Article 9 of Regulation (EC) 561/2006, and without prejudice to the accrual of the corresponding daily bonus, the driver shall have access to a bed or bunk during his daily rest period, which may be interrupted a maximum of two times to carry

out other activities not exceeding a total of one hour (Article 28.2.e of the 2nd General Agreement).

- Except in the case of breaks or rest periods, waiting periods at frontiers or periods caused by driving bans during which the driver has to be available to respond to any instructions to start or resume driving or to carry out other work shall be regarded as time spent in attendance, if the worker is aware in advance of the existence of these periods and their foreseeable duration, being understood to be aware of them when they concern borders which he has crossed on some occasion as a result of carrying out a professional transport service, or when driving bans have been pre-established by the competent authority and the worker is aware of them. Time during these periods during which the worker carries out any work or resumes driving, when so ordered, shall be considered as actual work (Art. 28.2.f of the 2nd General Agreement).

- The first two hours of each loading or unloading waiting period. The third hour and subsequent hours shall be regarded as actual working time, unless their foreseeable duration is known in advance. In any case, it shall be understood that the worker knows in advance the foreseeable duration of the waiting periods for loading and unloading when the transport service he/she is performing is for a shipper and/or consignee for whom he/she has performed another service in the same facilities (art. 28.2.d of the 2nd General Agreement).

- Periods of time during which a mobile worker driving in a team remains seated or lying down in a bunk while driving in the vehicle (art. 10.4.d of Royal Decree 1561/1995 and art. 28.2g of the 2nd General Agreement).

85. Furthermore, the FSC-CCOO's complaint omits the fact that, following the entry into force on 2 September 2022 of Royal Decree-Law 3/2022[18] , Law 16/1987 of 30 July 1987 on Land Transport Organisation (hereinafter "**LOTT**") has been amended by adding a thirteenth final provision, by virtue of which it is generally **prohibited for drivers of goods vehicles with a gross vehicle weight of over 7.5 tonnes to take part in the loading or unloading of goods or their supports, packaging, containers or crates, with the exception of a series of specific cases**. This provision shall apply to all loading and unloading operations carried out on Spanish territory.

[18] Royal Decree-Law 3/2022, of 1 March, on measures to improve the sustainability of road freight transport and the functioning of the logistics chain, and transposing Directive (EU) 2020/1057, of 15 July 2020, laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for the posting of drivers in the road transport sector, and exceptional measures regarding price revisions in public works contracts (BOE No. 52, 2 February 2022). 52 of 2 February 2022).

V. DIFFICULTY IN MONITORING WORKING TIME: THE OPERATION OF THE TACHOGRAPH.

86. Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport[19] made it compulsory for goods vehicles with a maximum permissible weight, including that of trailers or semi-trailers, exceeding 3.5 tonnes MMA to be fitted with so-called tachographs.

87. Subsequently, Article 9.b of Directive 2002/15/EC made it compulsory to record the working time of persons performing mobile road transport activities. To this end, Royal Decree 902/2007 incorporated into Article 10a.5 of Royal Decree 1561/1995 the responsibility of employers to keep a record of the working time of mobile workers.

88. Subsequently, Article 26 of Regulation 561/2006 amends Regulation 3821/1985 in order to adapt Community legislation to the digital tachograph.

89. Finally, Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport repeals Regulation 3821/1985 and amends, again, Regulation 561/2006.

90. Pursuant to Article 34(5)(b) of Regulation 165/2014, drivers are responsible for operating tachographs or, in the terms of the Community regulation itself, "*switching devices which enable the following time periods to be recorded separately and in a differentiated manner*:

    a) *With the sign*  *the driving time*

    b) *With the sign*  *the other working times, also known as "other work", which have been explained in the previous section.*

    c) *With the sign*  *the availability time, also known as "presence time", which has already been explained in the previous section.*

    d) *With the sign*  *break, rest, annual leave or sick leave.*

    (e) *with the sign for "ferry/train": in addition to the sign*  *: the period of rest taken on board a ferry or train, in compliance with Article 9(1) Regulation 561/2006*".

91. According to the same Regulation, driving times are recorded automatically as soon as the vehicle starts moving. On the other hand, it is the driver who must operate the activity selector (tachograph) for the different symbols in relation to the different activities in which the worker may be engaged, namely: other work, availability, break or break with shuttle/train.

[19] OJEU No. 370 of 31 December 1985

92. Before Spain introduced the obligation to keep a working time register for all employees by Royal Decree-Law 8/2019, companies in the road haulage sector were already obliged to register the working time of mobile workers, as a result of Article 9.2 of the aforementioned Directive 2002/15 and its internal transposition into Spanish law, through Royal Decree 902/2007 and the addition of Article 10.bis paragraph 5 to Royal Decree 1561/1991, which regulates the working time of mobile workers.2 of the aforementioned Directive 2002/15 and its internal transposition into Spanish law, through Royal Decree 902/2007 and the addition of article 10.bis section 5 to Royal Decree 1561/1995, which regulates special working days.

93. Thus, different Spanish courts have declared that "*in this case the business activity is road transport, the worker's profession being that of driver, and in that field there were specific regulatory provisions in relation to the control of driving time before the aforementioned RD 8/2019. The recording of the working day was compulsory for road haulage professionals from 2007, by virtue of Royal Decree 1561/1995, which included the regulations related to special working days and whose art. 10 bis establishes that "the employer shall be responsible for keeping a record of the working time of mobile workers"* (STSJ, Sala de lo Social, de Cataluña, núm. 6578/2023, de 20 de noviembre).

94. In identical terms, the judgement of 24 April 2024 of the Social Division of the High Court of Justice of Castilla-León (Valladolid) (rec. 655/2023) has stated that "*We must bear in mind that the tachograph only records the worker's activity during the periods of driving the vehicle, but it cannot be deduced from it what the worker's activity is during the stops of the vehicle, which it only records on the basis of the tachograph position entered by the worker himself and questioned by the company (...) - STSJ de Castilla Y León, Valladolid, de 1 del 28 de marzo de 2022 -Recurso: 2183/2021-. "(...) the time control must be taken from the tachograph discs already in the employee's possession and it is the employee himself who must correctly mark the different activities he carries out as effective working time or presence time in accordance with Article 8 of RD 1561/1995, also taking into account the provisions of European Regulation EEC/3821/85 which establishes that the tachograph discs record driving times, while the other activities, such as other work, availability, breaks or rest, must be selected by the driver himself*" (underlining is ours).

95. Hence, Article 43 of the Agreement, concerning the Mileage Bonus, states that "*given the difficulties for the employer in controlling the activity of drivers, it is 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*", precisely because of the difficulty of determining which periods correspond to other work and which periods are included in the third time as presence or availability.

96. For its part, the judgment of the Social Division of the High Court of Justice of Galicia of 24 November 2023 (no. 5140/2023) recalls that "*It has been pointed out, with regard to the importance of tachographs for the recording of the working day in terms of lorry drivers'*

driving times. [...] We consider that, for the purposes of what is claimed by the party, it is a fundamental piece of evidence and the best means of accrediting the time actually worked in the claimant's activity, as it is carried out outside a specific work centre, making it the most reliable record of the working day that can be relied on" (underlining added).

97. Thus, as judicial doctrine has stated (for example, STSJ, Sala de lo Social de Cataluña of 24 October 2022, no. 5542/2022), "*if the driver does not mark these different times correctly, the company is not in a position to be able to provide any evidence in this respect*" (emphasis added).

VI. REGIME AND REGULATION OF OVERTIME: SPANISH REGULATIONS AND ARTICLE 4.2 CSER IN THE LIGHT OF THE INTERPRETATION OF THE CEDS.

A) Overtime in Spanish Law: Article 35 of the Workers' Statute and the role of collective bargaining.

(i) Substantive law.

98. Since the labour reform brought about by Law 11/1994[20] , Article 35.1 of the Workers' Statute has remained untouched by the successive legislative modifications that the statutory rule has undergone. Currently, article 35 of the current revised text of the Workers' Statute Law approved by Royal Legislative Decree 2/2015, of 23 October[21] (hereinafter, "**ET**"), stipulates the following:

1. Overtime shall be considered to be overtime if it is worked in excess of the maximum duration of the ordinary working day, fixed in accordance with the preceding 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 the 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, because of 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

[20] Law 11/1994, of 19 May 1994, amending certain articles of the Workers' Statute, and of the text of the Labour Procedure Law and the Law on Offences and Penalties in the Social Order (BOE No. 122, of 23 May 1994).
[21] BOE No. 255, of 24 October 2015.

annual number of overtime hours shall be reduced in the same proportion that exists between those working days.

For the purposes of the preceding paragraph, overtime which has been compensated by rest within four months of its completion shall not be taken into account.

The Government may abolish or reduce the maximum number of overtime hours per specified period, either generally or for certain branches of activity or territorial areas, in order to increase job 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 duration of the ordinary working day, nor for the purposes of calculating 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 recorded day by day and totalled in the period fixed for the payment of remuneration, and a copy of the summary shall be given to the worker in the corresponding receipt (emphasis added).

99. As can be seen from the wording of the above-transcribed article, there is a direct reference to collective bargaining to determine the price of overtime. We are in the presence of a legal provision that grants the leading role in the regulation of working conditions to collective bargaining.

100. In this sense, article 37 of the Spanish Constitution guarantees "*the right to collective bargaining between workers' and employers' representatives, as well as the binding force of agreements*". This right to collective bargaining is inseparably linked to the right to freedom of association proclaimed in Article 28.1 of the Constitution with regard to trade union organisations, and to Article 22 of the same constitutional provision with regard to employers' associations, which enjoy the fundamental right of association.

101. The right to collective bargaining includes, as its essential content, freedom of contract. This right includes freedom of stipulation, understood as the power of the parties to determine the matters and content to be negotiated. Thus, the collective agreement is the result of the exercise of the right to collective bargaining, the binding force of which must be guaranteed by law, as proclaimed in the last paragraph of article 37.1 of the Spanish Constitution. [22]

[22] RUÍZ-NAVARRO PINAR, J. L., SIEIRA, S. and RASTROLLO RIPOLLÉS, A., Synopsis article 37 (accessed here).

102. From the legal point of view, Title III of the TE develops the legal regime of collective bargaining, regulating both the material and formal requirements for reaching agreements -collective agreements- with normative and *erga omnes* or general legal effectiveness.

103. Pursuant to Article 82.1 of the ET, "*collective agreements, as a result of bargaining carried out by the representatives of the workers and employers, are the expression of the agreement freely adopted by them by virtue of their collective autonomy*". The third paragraph of Article 82 of the statutory provision states that "*the collective agreements regulated by this law are binding on all employers and workers included within their scope of application and for the entire duration of their validity*".

104. While respecting the law, in accordance with Article 85.1 of the TE, collective agreements may regulate matters of an economic, labour and trade union nature and, in general, any other matters affecting employment conditions and the sphere of relations between workers and their representative organisations and the employer.

105. Thus, from a material perspective, Spanish law expressly provides for the regulation of overtime, but makes a strong call for collective bargaining (by collective agreement) to determine the price of overtime in each sector or company. Precisely for this reason, in accordance with Article 84.2.a) of the ET, company collective agreements have priority over sectoral collective agreements in negotiating *"the payment or compensation of overtime*".

106. Indeed, Article 35.1 of the ET establishes a minimum that may not be exceeded: "*in no case may it be less than the value of an ordinary hour*". And it provides that, in the absence of an agreement, whether collective or individual, "*it shall be understood that overtime worked must be compensated by rest within four months of its completion*".

107. Nor should it be forgotten that, according to data prepared by the Ministry of Labour itself on the basis of actual information held by the Ministry of Social Security, the collective bargaining coverage rate in Spain is 91.2% in 2021, 91.5% in 2022 and 91.8% in 2023[23] . And as can be seen from the data of most of the existing agreements in Spain, practically all of them set an overtime hourly rate above the ordinary hourly rate.

108. It is within this regulatory framework that the Agreement operates, in particular Articles 27 and 43, which establish a price for overtime hours that is higher than the value of the ordinary hour.

109. **And to conclude this sub-section, it should be noted that at no point in its complaint does the trade union in question mention that, according to article 35.2 of the ET, the**

[23] Collective Bargaining Agreements Statistics published by the Ministry of Labour and Social Economy on its website (access here).

maximum limit for overtime, unless it is compensated by equivalent rest time within four months of its completion, is eighty hours per year. The FSC-CCOO makes no mention of this.

(ii) Adjective or procedural law: the claim for overtime.

110. According to the reiterated doctrine of the Social Division of the Spanish Supreme Court, in application of Article 217.2 of Law 1/2000, of 7 January, on Civil Proceedings (hereinafter, "**LEC**")[24] , "*it is up to the plaintiff to prove the elements constituting the claim and in matters of overtime, the interpretation of case law has been to require strict and detailed proof of the number of hours worked, without the mere manifestation of having worked them being sufficient* (FJ 4.º)"[25] .

111. The proof that falls on the worker is interpreted strictly, so that no probative value is given to work reports or notes that the worker himself has drawn up (STSJ, Sala de lo Social, de Galicia, de 19 de diciembre de 2003, rec. 2335/2001).

112. In the road haulage sector, the state of judicial doctrine can be summarised as follows[26] :

"But, in addition, in matters of transport "it should be noted that there is a consolidated doctrine developed by different High Courts of Justice, which in cases identical to the present one, of a worker whose activity is that of a driver, distinguishes between actual work and time spent on duty or on call; affirming the difficulty of assessing the actual occupational task, subject to interruptions, which prevents overtime from being recognised as overtime, given that it is a type of work which, like other types of work that are carried out interruptedly, on detachment or travelling, can only be quantified when the occupational task is accredited in detail, as established in Article 8 of Royal Decree 1561/1.995, of 21 September, on the regulation of the working day, special working days and rest periods, for the calculation of the working day in the different transport sectors, distinguishing between actual working time and presence time, indicating that the maximum duration of the ordinary working day established in article 34 of the ET and the limits established for overtime in article 35 of the ET shall apply to actual working time, while the hours of presence will not be calculated for these purposes, understanding as such those in which the worker is at the employer's disposal without actually working, for reasons of waiting, expectations, on-call services, journeys without service, breakdowns, meals in route or other similar reasons" (STSJG 01/07/10 R. 5623/06). Therefore, it would be the plaintiff's burden - in accordance with article 217

[24] BOE No. 7, 8 January 2000.
[25] STS, Sala de lo Social, of 11 June 1993 (rec. 660/1992). Doctrine reiterated in the SSTS of 9 December 2022 (rec. 5325/1999) and 7 November 1994 (rec. 365/1993).
[26] For example, the STSJ, Sala de lo Social, de Galicia of 6 February 2024 (rec. 7310/2022).

LEC - to demonstrate the different effective working times, waiting times, loading and unloading, etc.; elements that have not been stated in the historical account and prevent it from being asserted now; and for this purpose it is not sufficient to state that all the time was working time, as - apart from being an apodictic statement - it contradicts article 8 RD 1561/95 and the distinction between times that it makes".

113. As has been made clear, not all the time during which the worker is travelling for professional transport can be considered working time, so that, in some cases, we will be in the presence of real effective working time, in its double aspect, either driving (via tachographs) or other work, while in other cases we will be faced with the so-called presence or availability times, which do not count as effective working time.

114. **In short, the complainant union omits the difficulty of assessing the actual occupational task, subject to interruptions, which prevents the recognition of overtime as overtime, since it is a type of work that, like other work that is performed interruptedly, on detachment or on the move, can only be quantified when the occupational task is accredited in detail.**

B) Article 4.2 of the CSEr and CEDS doctrine on overtime pay.

115. Article 4.2 of the CSEr recognises the "*right of workers to an increase in remuneration for overtime, except in certain special cases*".

116. The above precept is inevitably connected with Article 2.1 of the CSEr, insofar as the Contracting States (in this case, Spain), in order to guarantee the effective exercise of the right to fair working conditions, the Parties undertake "*to fix reasonable daily and weekly working hours, progressively reducing weekly working hours to the extent permitted by productivity increases and other relevant factors*".

117. Article 6.2 of the ETUCE states that in order to ensure the effective exercise of the right to collective bargaining, the Parties undertake to "*promote, where necessary and appropriate, the establishment of procedures for voluntary negotiation between employers or employers' organisations, on the one hand, and workers' organisations, on the other hand, with a view to regulating terms and conditions of employment by means of collective agreements*".

118. The SREC is equipped with a system for monitoring compliance with the obligations assumed by the Acceding States. These monitoring functions are exercised by the SSCS through two channels: on the one hand, through a system of reports (Part IV Article C of the SREC); and, on the other hand, through a collective complaints mechanism established by the Additional Protocol of 1995 (Part IV Article D of the SREC), the latter recently ratified by Spain.

119. In Complaint no. 154/2017 Confédération générale du travail (CGT) v. France, the ECSRC summarises its doctrine concerning Article 4.2 of the CSEr in the following terms:

> *"47. Le Comité rappelle qu'au titre de l'article 4§2 de la Charte, les États parties s'engagent " à reconnaître le droit des travailleurs à un taux de rémunération majoré pour les heures de travail supplémentaires, exception faite de certains cas particuliers ". Le principe consacré dans ce paragraphe trouve son origine dans la considération que les heures supplémentaires nécessitent, de la part du travailleur, un effort accrue (Conclusions I, Observation interprétative de l'article 4§2). Le Comité a noté que l'on entendre généralement par " heures supplémentaires " " le travail exécuté [...] en dehors des heures normales de travail, ou en plus de celles-ci " (Conclusions I, Observation interprétative de l'article 4§2).*
>
> *48. Le Comité souligne que l'article 4§2 de la Charte est intrinsèquement lié à l'article 2§1 qui garantit le droit à une durée raisonnable du travail journalier et hebdomadiaire. Les salariés accomplissant des heures supplémentaires doivent être rémunérés à un taux majoré par rapport au taux horaire normal (Conclusions XIV-2, Observation interprétative de l'article 4§2).*
>
> *49. Le Comité a noté que des États parties ont adopté des régimes de flexibilité de la durée du travail dans lesquels le temps de travail est calculé sur la base de la durée moyenne de travail hebdomadaire sur des périodes de référence données. Ces régimes ont pour conséquence que les heures travaillées au-delà de la moyenne sont en pratique compensées par une réduction des heures pendant d'autres semaines au cours de la période de référence (Conclusions XIV-2, Observation interprétative de l'article 2§1 et de l'article 4§2). Le Comité considère que les arrangements de ce type ne sont pas, en tant que tels, contraires à l'article 4§2 de la Charte, pourvu que les conditions énoncées à l'article 2§1 de la Charte soient respectées (Conclusions XIV-2, Observation interprétative de l'article 4§2 et Conclusions XX-3 (2014), Portugal).*".

120. According to the ECSRC's doctrine, not only must the worker be remunerated for his overtime, but the price of this remuneration must be increased in relation to the value of the normal wage. In the opinion of this supervisory body, the aim of article 4.2 of the CSEr is that the additional effort made by the worker who works overtime should be compensated. According to the wording of the provision, the compensation should take the form of a bonus or an increase in remuneration. However, the Committee accepts compensation in the form of rest, provided that the objective of Article 4.2 of the CSEr is respected (Decision Conseil européen des Syndicats de Police (CESP) v. France, complaint no. 68/2011).

121. In its Decision of 17 October 2011 (European Council of Police Trade Unions CESP v. Portugal) the ECSRC "*also acknowledges that there may be mixed systems for compensating overtime, for example where an employee is paid the normal rate for the overtime worked but also receive time in lieu, or where the extra time worked is "banked*".

122. Complementing its doctrine, in its 2022 Conclusions on the French Republic's compliance with Article 4.2 of the CSEr, the ECSRC accepted the possibility of fixing certain amounts in compensation for overtime, provided that this amount guarantees "*an increased rate of remuneration*". The ECSRC stated the following:

> "*In its previous conclusion, the Committee considered that the situation in France was not in conformity with Article 4§2 of the Charter on the grounds that the flat rate for overtime work performed by the ordinary members of the supervision and enforcement corps of the police did not guarantee an increased rate of remuneration and that the increase in the command bonus for senior managers could only compensate a very small number of overtime hours and compensatory time off provided to senior police officers working overtime when performing certain duties was equivalent in length to overtime worked (Conclusions 2014). The assessment of the Committee will therefore concern the information provided in the report in response to the conclusion of non-conformity, and to the targeted question.*
>
> *Previously, the Committee found that the situation in France was not in conformity with Article 4§2 of the Charter because the flat rate for overtime work performed by the ordinary members of the supervision and enforcement corps of the police did not guarantee an increased rate of remuneration and that the increase in the command bonus for senior managers could only compensate a very small number of overtime hours and compensatory time off provided to senior police officers working overtime when performing certain duties was equivalent in length to overtime worked (Conclusions 2014).*
>
> *The report provides no information with regard to the previous conclusion of non-conformity. In these circumstances, the Committee reiterates that the situation in France is not in conformity with Article 4§2 of the Charter on the grounds that the flat rate for overtime work performed by the ordinary members of the supervision and enforcement corps of the police does not guarantee an increased rate of remuneration (European Council of Police Trade Unions (CESP) v. France, Complaint No. 57/2009, decision on the merits of 1 December 2010) and that the increase in the command bonus for senior managers does not compensate more than a very small number of senior managers. 57/2009, decision on the merits of 1 December 2010) and that the increase in the command bonus for senior managers does not compensate more than a very small number of overtime hours and compensatory time off provided to senior police officers working overtime when performing certain duties is equivalent in length to overtime*

worked (European Council of Police Trade Unions (CESP) v. France, Complaint No. 68/2011, decision on the merits of 23 October 2012)".

123. In the decision Union syndicale des magistrats administratifs (USMA) v. France (complaint no. 84/2012), the ECSRC takes into account "*the particularities of the organisation of the working time of administrative magistrates in terms of autonomy and the absence of control of actual working time, which has not been contested by the complainant organisation*". Moreover, the ECSRC goes on to point out that "*overtime is time worked outside normal working hours and corresponds to work actually carried out*" *(Conseil européen des Syndicats de Police (CESP) c. Portugal, réclamation n°37/2006, décision sur le bien-fondé du 3 décembre 2007 §§30 et 31)*". In this regard, the Committee stresses that "*in the case of administrative magistrates, in the absence of a calculation of actual working hours, it is not possible to establish, for each magistrate, that the eight days granted to him or her in his or her time-saving account necessarily correspond to overtime*".

124. Therefore, in the light of the ECSRC doctrine, it is possible to establish mixed formulas for compensating overtime, as well as to fix certain lump sums for the purpose of paying any overtime in cases where there are particularities in the organisation of working time. That said, these amounts must be sufficient to compensate for any overtime worked, otherwise the system would not be in accordance with Article 4.2 of the CSEr.

VII. COMPATIBILITY OF THE MILEAGE BONUS WITH ARTICLE 4.2 OF THE CSER AND WITH NATIONAL AND INTERNATIONAL LABOUR LAW.

125. This section will compile all the arguments that justify the conformity of the mileage bonus, not only with Article 4.2 of the CSEr, but also with the rest of Spanish, EU (EU law) and international (ILO Convention No. 153) labour law.

A) Lack of contextualisation of the sector: omission of the particularities of the sector's working day.

126. There is no mention, not even briefly, of the existence of presence or availability time, which does not count as effective working time in accordance with Community legislation (Directive 2002/15/EC and EC Regulation 561/2006), which is covered by Royal Decree 1561/1995 of 21 September 1995 on special working days, the internal rule in charge of regulating working time in the road transport sector.

127. There is also a failure to explain the difficulty of understanding or identifying when we are dealing with "*other work*" or, on the other hand, with "*hours of presence or availability*". Nor is the fact that not all the time when drivers are away from home is considered to be

effective working time. For example, it is clear that a driver engaged in the international transport of goods who transports tomatoes from Murcia to Berlin (return trip) will spend at least a few days away from home, but this does not mean that all the time spent on this journey automatically constitutes effective working time *per se.*

128. Drivers do not provide their services *on site*, at the workplace, and therefore cannot be directly controlled or monitored by their employers for the purpose of determining the specific legal status of the different times a driver is on assignment.

129. Logically, first by Regulation 3821/1985 and then by Regulations 561/2006 and 165/2014, all vehicles that comply with certain technical characteristics, i.e., at present, a weight of 3.5 tonnes MMA for the transport of goods by road, must be fitted with a recording equipment, known as a tachograph.

130. The tachograph automatically reflects on its discs, without the need for any positive action on the part of the worker, the times during which drivers are driving. This is crucial in a sector where driving times and the mandatory breaks or rest periods are a real risk factor, which can lead to traffic accidents. This stored information can be controlled and verified both by employers and by the governmental authorities of each country (traffic inspection or labour inspection), which makes it possible to safeguard drivers' rest periods.

131. However, as we have tried to explain *above*, the working time of professional drivers is not limited solely and exclusively to driving, although this is logically their main task. There is also other work, also counted as effective working time, which may include administrative tasks (document management) or direct participation in the processes of loading or unloading, loading or unloading, as well as maintenance and cleaning of the vehicle, or simply refuelling the lorry.

132. Furthermore, the facts put forward by the complainant trade union do not state that, in 2022, by means of Royal Decree-Law 3/2022, a ban was introduced on drivers of goods vehicles with a gross vehicle weight exceeding 7.5 tonnes being able to take part in the loading and unloading of goods and their supports and packaging. Although there are exceptions (*i.e.* those provided for in the Thirteenth Additional Provision of the LOTT), it cannot be overlooked that this provision will have an effect on the identification or conceptualisation of the times which make up the drivers' working day. One of the activities considered as "other work" can no longer be carried out by drivers.

133. One of the greatest specialities of drivers' working hours lies in the existence of a third period, which is not considered either as actual working time (because it does not count as such) or as rest time (on the understanding that the sum of actual working time and presence cannot reduce the legally or conventionally established rest periods), and which is paid, at least, at the rate of the ordinary hour or with equivalent rest time, as stated in Article 28.2 of the 2nd General Agreement.

134. According to Article 10.4 of Royal Decree 1561/1995, presence time includes periods other than breaks and rest periods, during which the mobile worker does not carry out any driving or other work and is not obliged to remain at his place of work, but must be available to respond to possible instructions to start or resume driving or to carry out other work. Furthermore, Article 10.4 of Royal Decree 1561/1995 (transposing Directive 2002/15/EC and implementing ILO Convention No. 153) lists, by way of example, certain special times in the working day for drivers. For example, the first two hours of each loading or unloading waiting period, or the periods of time during which a mobile worker driving in a team remains seated or lying down in a bunk while driving in a vehicle are to be considered as presence time, unless they can be considered as rest periods.

135. That said, there are certainly grey areas in the sector, where doubts can arise as to when we are dealing with breaks/breaks, when we are dealing with effective working time or when we are dealing with presence time. If, for example, a driver arrives at the destination to unload the goods, and the customer tells him that he cannot be served right now and that he will call him in three hours - the driver can then freely dispose of his time and does not have to be available - the debate will arise as to the qualification of this waiting time, which, in the light of the criteria established by the aforementioned rules, may be considered as a break or rest, without prejudice to the driver being away from his usual place of residence.

136. The problem is accentuated when the determination of these times falls to the worker, as it is the worker who must select which activity he/she is doing at any given moment, except, obviously, that of driving. If the worker uses the activity selector (the tachograph) incorrectly, he may indicate in a case of presence time that he is doing other work, or in a case of effective working time, that he is resting.

137. The FSC-CCOO's complaint should be dismissed solely and exclusively on the basis of the above, as its complaint is incomplete because it does not provide sufficient evidence to enable the CEDS to make a decision on the reality and virtuality of the sector, and on why a mileage bonus has been agreed in the Agreement.

B) Incorrect determination of the groups affected by the Mileage Bonus: not affecting drivers-drivers of light vehicles.

138. In close connection with the above, another aspect that shows the lack of clarity and basis of the collective complaint is that not all the drivers identified in it receive the mileage bonus and are excluded from the ordinary system of overtime compensation provided for in Article 27 of the sectoral collective agreement now under analysis.

139. Article 43 of the sectoral collective agreement is clear in its wording: "*given the difficulties for the employer in controlling the activity of drivers, which in many cases is impossible, 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, as well as the possible night-time bonus* [...]". The precept itself is referring to two elements that cannot be applicable to driver-drivers of light vehicles, i.e. those which, as is obvious, weigh less than 3.5 tonnes of MMA. We are referring to the tachograph, on the one hand, and the hours of presence, on the other.

140. Delivery drivers drive light vehicles, such as vans, which are not fitted with control devices such as tachographs, and whose function is not only to transport but also to deliver parcels or goods. Furthermore, the distances covered by light vehicles are not comparable to those covered by trucks or vehicles with a gross vehicle weight of more than 3.5 tonnes.

141. *A fortiori*, however, the main argument for the exclusion of delivery drivers is of a genuinely legal nature, in the sense that European Union legislation does not include drivers of light vehicles in its scope and therefore Directive 2002/15/EC does not apply to them as regards the existence of presence time. They are governed by the general Directive 2003/88/EC and by the derogations provided for in Article 20 thereof for mobile workers not covered by Directive 2002/15/EC.

142. This has been affirmed, for example, by the Sala de lo Social del Tribunal Superior de Justicia de Madrid in its judgment of 10 January 2024 (no. 3/2024, rec. 803/2023):

> *"In this sense,* ***even a sector that can clearly be considered as unequivocally integrated within transport for the purposes of applying national or European inland transport legislation may be excluded from the scope of Directive 2002/15/EC if it does not meet the criteria of the Directive (by reference to Regulation 561/2006) and therefore falls fully within the scope of Directive 2003/88/EC without the possibility of a national derogation, so that the concept of presence or availability time does not apply to it*".

143. As light-duty vehicles are excluded from the scope of Regulation 561/2006 due to their maximum authorised mass, Directive 2002/15/EC does not apply to them either, and therefore the concept of presence or availability time does not apply to them.

144. And the mileage bonus agreed in Article 43 of the Agreement serves to compensate not only overtime (50% of the amount resulting from the application of the mileage), but also attendance hours (40%). It is clear that if the delivery drivers are not allowed to work hours in attendance, this bonus is not applicable to them either, and they are therefore governed by the general system of overtime pay provided for in Article 27 of the sectoral collective agreement now being challenged.

145. **In short, the mileage bonus, as defined in Article 43, only affects the professional categories of mechanical driver and driver provided for in the applicable collective agreement**.

C) In accordance with article 4.2 of the CSEr as the mileage bonus exceeds the price of the ordinary hourly rate.

146. In line with the opinion expressed by the representatives of the Spanish Government on 13 October 2023, the collective claim put forward by the FSC-CCOO is based purely and simply on an abstract hypothesis, totally out of context, without explaining the peculiar characteristics of drivers' working time arrangements.

147. The Mileage Bonus is blamed for establishing an estimate of how much time may have been worked in terms of both driving time and the performance of other work. On the other hand, the complainants forget that the drivers concerned have a fixed remuneration consisting of basic salary, attendance bonus and transport bonus, and that the mileage bonus acts or serves to compensate for possible excess working hours.

148. There is a difference between the maximum time a driver can drive per week and the maximum effective working time according to the Convention.

149. According to Article 26.1 of the Agreement, "*the maximum ordinary working week shall be 40 hours of actual work per week and 1,826 hours and 27 minutes per year, distributed on an irregular basis*". It goes on to specify that "*the ordinary working day may not exceed ten hours of actual work per day; by agreement between the company and the workers' representatives, depending on the characteristics of the company, a higher or lower limit may be set for the ordinary working day* [...]".

150. In the section on distribution, drivers are exempted, in that "*the distribution of working hours indicated shall be adapted to the needs of the service*".

151. Whereas under Regulation (EC) 561/2006, drivers may not drive more than nine hours a day, extendable to ten hours no more than twice a week. But, in addition, drivers may not drive more than 56 hours per week or 90 hours over two consecutive weeks.

152. In view of these regulations, it is clear that, by its nature or because of the particular conditions of time and place, the distribution of drivers' working hours is flexible, on the understanding that it is adapted to the needs of the service that may be required.

153. For this reason, both Article 29 of the 2nd General Agreement and Article 28 of the Collective Sectoral Agreement for the Region of Murcia state that "*given the nature of the activity that the companies affected by this Agreement carry out, workers are obliged,*

notwithstanding the above paragraph, to work the overtime necessary to complete the work of driving, delivery or distribution and collection, loading, unloading, removal, preparation of vehicles and their documentation that are started before the end of the ordinary working day, up to the maximum legally established limit".

154. Having established that the main function of drivers is precisely driving, and in view of the particular circumstances in the sector, where there are other jobs (which count as effective working time) and hours of presence or availability (which do not count as such), the social negotiators, under the protection of the legitimacy they have in accordance with Articles 37 of the Constitution and 87.3 and 4 of the Workers' Statute, as well as on the basis of the provisions of Article 6.2 of the CSEr, have reached an agreement, by virtue of which, given that the only objective activity is driving (the tachograph is automatically activated), a lump sum shall be paid for each kilometre driven and depending on the vehicle used. This bonus shall be paid monthly and shall be distributed as follows, and shall be reflected in the salary slips:

- 50% of the total to cover possible overtime.
- 40% of the total to cover possible presence hours.
- 10% of the total to cover any night bonus.

155. It is not a fixed and invariable amount, unable to compensate for drivers' overtime, but takes into account the greater or lesser workload of professional drivers, in compliance with the ECSDS (e.g. Conclusions of 2022 on France's compliance with Art. 4.2).

156. It is also a system for calculating compensation for possible attendance and overtime hours that is objective and takes into account the reality of the sector, which has been adopted with express attention and appreciation of the data handled by the Ministry of Transport and Sustainable Mobility itself.

157. Indeed, according to the Observatorio de costes del transporte de mercancías por carretera (July 2024)[27] , which is the result of the work carried out under the auspices of the Ministry of Transport and Sustainable Mobility by a working group made up of different entities (National Road Transport Committee, Association of Manufacturers and Distributors, Spanish Shippers' Association and Spanish Association of Loading Companies), the average kilometres driven by each type of vehicle, depending on its technical characteristics, are predicted.

158. In order to demonstrate that the system deployed by the Convention complies with the provisions of Article 4.2 of the CSEr, the main vehicles used in road transport will be taken as examples: articulated general cargo vehicle (for national transport) and articulated general cargo vehicle in international transport.

[27] Consult the Observatory of road freight transport costs (July 2024) at the following link.

159. According to data as of 31 July 2024, an average of 120,000 kilometres are driven annually by a national articulated vehicle (p. 12 of the Cost Observatory).

The calculations would be as follows:

- Lorry with a maximum authorised mass of 40 tonnes.
- Up to 10,000 km travelled per month you will receive 0.0185.
- Annual mileage: 120,000
- Monthly mileage: 10,000
- Mileage calculation: 10,000x0.0185 = 185.
- Monthly overtime calculation: 50% of 185 = 92.50.
- Total amount of annual overtime (92,50x11 months) = 1.017,50 €.
- 11 months are taken because every worker has 30 calendar days of holiday.

	ARTICULATED GENERAL CARGO. 120,000 KM/YEAR
Basic Salary	955,52
Plus Assistance	173,01
Transport Plus	97,77
Grat.extra March	79,63
Art.43:Kilometr:Nocturni	18,50
Art.43:Kilometr:Hours pr	74,00
Art.43:Kilometr:Hours ex	92,50
Pro-rata bonus payments	159,26

- Ordinary hourly rate = 9,6659 €.
    - Sum of all monthly bonus (including pro-rata payments) and divided by 1,826 hours and 27 minutes.
- General overtime (art. 27) = 9.7142 € (0.5 is added to the ordinary hourly rate).
- Limit of 80 hours of economic hours payable ex art. 35.3 ET.
- Overtime rate according to annual maximum = $\frac{1.017,50}{80}$= 12,72 €

- <u>In conclusion:</u> while the price of an ordinary hour would be €9.6659, the price of an extra hour would be €12.72.

160. According to data as of 31 July 2024, an international articulated vehicle travels an average of 120,000 kilometres per year (p. 14 of the Cost Observatory).

The calculations would be as follows:

- Lorry with a maximum authorised mass of 40 tonnes.
- Up to 10,000 km travelled per month you will receive 0.0185 €/km.
- From 10,000 km travelled per month you will receive 0.0329 €/km.
- Annual mileage: 150,000 (p. 14).
- Monthly mileage: 12,500
- Mileage calculation:
    - 10.000x0,0185= 185
    - 2.500x0,0329= 82,25
    - Total=267,25€.
- Monthly overtime calculation: 50% of 267.26 = €133.63.
- Total amount of annual overtime (133,63x11 months) = 1.469,87 €.
- 11 months are taken because every worker has 30 calendar days of holiday.

	ARTICULATED TTE. INTERNATIONAL 150.000 KM/YEAR
Basic Salary	955,52
Plus Assistance	173,01
Transport Plus	97,77
Grat.extra March	79,63
Art.43:Kilometr:Nocturni	26,73
Art.43:Kilometr:Hours pr	106,90
Art.43:Kilometr:Hours ex	133,63
Pro-rata bonus payments	159,26

- Ordinary hourly rate = 9,6659 €.
- Amount of overtime (general scheme Art. 27 of the Agreement) = 9,7142 €.
- Overtime according to annual maximum = $\frac{1.469,87}{80}$= 18,37 €

- In conclusion: while the ordinary hour would be €9.7142, the overtime hour would be €18.37.

161. It is not, therefore, an "*imaginary, hypothetical estimate, with no guarantee of approximating the hours actually worked*", as the FSC-CCOO contends to the contrary, but precisely the opposite, given that the calculations on which the mileage bonus is based are based on real statistics officially published by the Ministry of Transport itself. Data, moreover, updated as of July 2024.

162. The collective complaint lodged by the FSC-CCOO is based solely and exclusively on a mere hypothesis, completely unrealistic, in which the so-called "other work" is inflated. It is

enough to read page 16 of the complaint of the trade union in question to see that the hypothesis does not correspond at all with reality. It postulates 200 hours of "other work".

163. Taking into account that, in general, a month has four weeks and that according to the collective agreement the maximum working time is 40 hours per week, there could be an average of 160 hours of actual working time per month. The complainant union's example is totally impossible: a driver, in addition to driving 8,000 km, would have worked 200 hours per month on other jobs alone.

164. It should not be overlooked that other work is "ancillary". This is expressly stated in the second paragraph of Article 8.1 of Royal Decree 1561/1995, which states that "In *any case, effective working time is considered to be that in which the worker is at the disposal of the employer and in the exercise of his activity, carrying out the functions of driving the vehicle or means of transport or other work during the time the vehicle or means of transport is in motion, or auxiliary work carried out in relation to the vehicle or means of transport, its passengers or its load*".

165. In view of the above, **we consider that Article 43 of the Collective** Bargaining **Agreement and, in general, the Mileage Bonus as it is configured, more than complies with the provisions of Article 4.2 of the CSEr, by guaranteeing for the professional categories of mechanical drivers and drivers an overtime hourly rate higher than the value of the ordinary hourly rate.**

D) Conformity of the mileage bonus with article 4.2 of the CSEr as it falls within a sector with specific characteristics and can be subsumed under the exceptions provided for in the CSEr itself.

166. The idiosyncrasy of the activity inexorably leads to constant legal uncertainty about drivers' working times, which justifies the search for objective estimation methods for the purpose of compensating for possible overtime, based on the only thing that can be determined with certainty and security: the number of driving hours.

167. The complexity of the regulation of the working time of professional drivers has been demonstrated, especially due to the existence of a third period, which cannot be considered as work, but, of course, cannot be considered as a break or rest either.

168. ILO Convention No. 153, Directive 2002/15/EC and Regulation (EC) No. 561/2006, as well as Royal Decree 1561/1995 stipulate that, for the purpose of calculating working time, a distinction is to be made between actual working time and time spent in attendance.

169. With the exception of driving time (which is computed automatically by the tachograph), all other times depend on the activation of the activity selector (of the tachograph) by

drivers. It is clear that there are discrepancies or even misuse of the activity selector by professional drivers.

170. Given the peculiarities of the activity, with a flexible working day that is difficult to identify, it is essential to try to make it as objective as possible, for which a system of compensation for possible extensions to the working day has been designed based on objective parameters, beneficial for both employers and workers.

171. For this reason, not only the Murcia High Court of Justice, but also the Supreme Court, have endorsed the lawfulness of the mileage bonus. But, apart from these two rulings already transcribed in the background of these Observations, Spanish judicial doctrine has also endorsed this system, due to the legal certainty it grants to all parties involved.

- The judgement of the Social Division of the Murcia High Court of Justice of 8 March 2017 (no. 266/2017, rec. 319/2016) has affirmed the following

  "...] *the purpose of the aforementioned article 43 is to establish an alternative system for the payment of possible hours due to the difficulty for the company to control the activity of the drivers, and in the case in question here, in accordance with article 27.2 of the agreement, overtime is not applicable to the drivers, but rather the provisions of article 42 are applied, as mentioned above*".

- The judgment of the Social Division of the Murcia High Court of Justice of 13 June 2018 (no. 567/2018, rec. 864/2017) has stated the following:

  "...] *and the legality of art. 43 of the collective agreement for road freight transport in the RM is applicable, as this Chamber and the SC said in the judgments referred to above, since the negotiators of the agreement understood that given how difficult it is to control the activity of the drivers, especially when it comes to activities other than driving, the hours of presence and overtime, as well as the night-time bonus, will no longer be paid independently, but in addition to the fixed remuneration of art. 39 of the agreement, drivers will receive the amounts set out in Annex II of the agreement* [...]".

- The judgement of the Social Division of the High Court of Justice of Andalusia (Granada) of 26 September 2019 (no. 2124/2019, rec. 3278/2018) has stated the following (in a case where the Murcia Agreement was applicable):

  "[...] *The legality of this art. 43 was declared by Ruling no. 772/2014,m of 29/09/2014, of the Social Chamber of the Murcia High Court of Justice, being the same ratified by the Ruling of 16/06/2016 of the Social Chamber of the Supreme Court since the negotiators of the agreement understood that given how difficult it is to control the activity of the drivers, especially when it comes to activities other than driving, drivers will no longer be paid separately for attendance and overtime hours, as well as the night-time bonus, but*

in addition to the fixed remuneration of art. 39 of the agreement, the drivers will receive the amounts established in annex II of the agreement, which is what the company has done, paying all the concepts claimed as mileage".

- More recently, the judgement of the Social Division of the Murcia High Court of Justice of 5 October 2021 (no. 819/2021, rec. 449/2020) has stated the following:

  "[.....] *in contrast to the assessments made by the appellant, it must be borne in mind that it is for the plaintiff to prove the overtime hours claimed and to specify them, in accordance with the provisions of Article 217 of the LEC, which means that, in the present case and in the absence of any specification of the hours in excess of the ordinary working hours established in the collective agreement, it has not been established as such, by the evidence adduced in the proceedings and its evidential assessment, the said excess, and without any error of assessment having been evidenced, <u>when the rules complained of by the appellant require the specification and proof of the said excess working hours, which is undoubtedly an added difficulty, which is why the negotiators of the Collective Agreement for the Transport of Goods by Road in the Region of Murcia introduced Article 43</u>* [...]" (the underlining is ours).]" (emphasis added).

172. In addition to the intrinsic difficulty of accrediting overtime, in the transport sector there is the added complexity of specifying each of the times, in such a way that Article 43 of the Collective Agreement on Road Freight Transport contributes precisely to tackling this problem, and to establishing an alternative system of compensation for overtime, based on an objective parameter, driving, and adjustable according to the greater or lesser number of working hours of the drivers.

173. The doctrine of the ECSRC admits the existence of certain workers or certain professions which, due to the characteristics of the organisation of work, may allow exceptions in the way overtime is compensated (Decision Union syndicale des magistrats administratifs - USMA- v. France, complaint no. 84/2012).

174. Notwithstanding the fact that this party understands that the Mileage Bonus compensates the overtime over and above the ordinary hour (*i.e.* The above calculations based on actual data published by the Ministry of Transport), the special nature of the organisation of the working day and the additional complexity of the existence of a third time (presence or availability), as well as the abundance of grey areas in the identification of working time during drivers' journeys, make it advisable to establish a transparent system, based on totally and absolutely objective data (driving hours extracted from the tachograph) and where, given the possibility of overtime and presence, companies pay a monthly bonus for this very concept, guaranteeing the worker not only their fixed remuneration, but also a payment on account for presence and overtime.

175. And contrary to what the FSC-CCOO argued in its collective complaint, the mileage bonus is not disconnected from the number of hours actually worked, since that is the main function of drivers, driving, the other jobs being linked to or ancillary to driving. Apart from the fact that many drivers can no longer carry out loading or unloading work in Spanish territory, more driving will involve more administrative tasks (delivery or completion of more documentation), more stowage or unstowage of goods, and more vehicle maintenance or refuelling work.

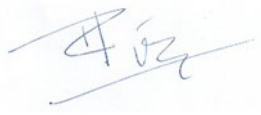
176. **In view of the above, we consider that road haulage, like other sectors such as maritime transport, cannot be treated as if it were an office or factory, and consequently, we believe that, without prejudice to the fact that the system complies with Article 4.2 of the CSEr with regard to the payment of overtime over and above the normal hourly rate, this sector of activity can be included in the exceptions mentioned in Article 4.2 of the CSEr.2 of the CSEr with regard to the payment of overtime over and above the ordinary hour, this sector of activity can be included in the exceptions mentioned in article 4.2 of the CSEr, and the establishment of an objective system of compensation for overtime based on the number of kilometres covered by the driver is in line with both this international treaty and the doctrine developed by the CEDS**.

VIII. APPLICATION.

177. For all of the above reasons, the OIE requests the CEDS:

- The dismissal of the collective claim brought by the FSC-CCOO and the declaration of conformity with art. 4.2 of the CSEr by complying with the mileage bonus provided for in article 43 of the collective agreement for road freight transport in the Region of Murcia with the provision of paying overtime above the value of the ordinary hour.

- The dismissal of the collective claim brought by the FSC-CCOO and the declaration of conformity of the mileage bonus provided for in Article 43 of the collective agreement for road haulage in the Region of Murcia, as this sector of activity can be subsumed, due to the peculiarities of the regulation of its working hours, under the exceptions that Article 4.2 of the CESr and which has been outlined by the ECSR in its doctrine (*i.e.* Decision Union syndicale des magistrats administratifs -USMA- v. France, complaint no. 84/2012).



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