EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

12 January 2024

Case Document No. 1

***Unión General de Trabajadores* (UGT) v. Spain**
Complaint No. 235/2024

COMPLAINT

Registered at the Secretariat on 9 January 2024

COLLECTIVE COMPLAINT

(COMPLAINT)

Executive Secretary of the European Committee of Social Rights

Department of the European Social Charter

Directorate General of Human Rights and Rule of Law

Council of Europe

F-67075 Strasbourg Cedex

social.charter@coe.int

UNIÓN GENERAL DE TRABAJADORAS Y TRABAJADORES (UGT)

Avenida América, 25 28002 Madrid

Spain

E-mail address: flujan@cec.ugt.org; sindical@cec.ugt.org

SUBJECT MATTER

Collective complaint lodged by the UGT (Spain) due to infringement by the State of Spain of Article 4.2 of the European Social Charter (1961 and revised) in view of the fact that Spanish labour legislation does not require an increase in remuneration (and/or compensation) for overtime as a general rule, as required by the European Social Charter.

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1. Subject matter of the collective complaint

1. The General Union of Workers (UGT), represented by its Secretary General, Don José María Álvarez Suárez, and its Vice Secretary General for trade union policy, Mariano Hoya Callosa, with legal assistance overseen by Fernando Luján de Frias, lawyer, member No. 43294 of the Colegio de Abogados de Madrid (Spain) [Bar Association] and Confederal Secretary of the UGT, by means of this complaint lodged against the Kingdom of Spain, hereby requests, through the collective complaints procedure (laid down in the Additional Protocol to the European Social Charter, done at Strasbourg on 9 November 1995 and accepted by Spain on 1 July 2021), that the European Committee of Social Rights (ECSR) **issue a conclusion of non-conformity of Article 35.1 of the Spanish Workers' Statute**, on remuneration for overtime, with Article 4.2 of the European Charter (*revised - although its text is identical to that of 1961, which means that the case law laid down in the latter applies to the former*), on the **right to increased remuneration for overtime, assessed separately, insofar as it is prejudicial to all workers, and in combination with Article E ESCR, in the light of its particularly harmful impact on women.**

2. With a view to ensuring the effectiveness of compliance with this ESCR mandate for increased remuneration for overtime, the ECSR is further requested to **require Spain to ensure more effective monitoring of overtime worked in Spain**. This obligation to ensure effective compliance is currently not adequately met owing to the weakness of the legislative framework on the recording of working time, social case law that permits working time recording methods that do not ensure objectivity and reliability, as required by European law, and the shortage of staff at the Labour and Social Security Inspectorate to monitor the actual implementation of systems for recording working hours (provided for in Article 34.9 of the Law on the Workers' Statute, but seldom applied), so that overtime can be properly identified.

2. Legal framework of the State of Spain on remuneration for overtime and monitoring of its effectiveness.

2.1. Current legislation applicable to remuneration for overtime in Spain (Article 35 of the Law on the Workers' Statute - Royal Legislative Decree 2/2015, of 23 October, approving the consolidated text of the Law on the Workers' Statute - and its body of provisions or regulations).

2.1.1. Referral of remuneration for overtime to collective bargaining: The unenforceable nature of legislation stipulating an increase in the normal rate.

3. Article 35 of the Workers' Statute provides:

"Hours worked in excess of the maximum normal working time [...] shall constitute overtime." (set in accordance with Article 34 of the Law on the Workers' Statute - as agreed by collective agreement or in employment contracts, respecting the necessary rules of law - minimum daily, weekly and annual breaks).

4. Overtime work is voluntary, unless otherwise provided for in collective or individual agreements, within the established limits (maximum 80 hours of overtime per year for each person hired – in proportion to working hours), for which overtime arising due to force majeure (i.e. to prevent or respond to accidents and other extraordinary and urgent damage, without prejudice to their compensation as overtime hours) does not count (for the purposes of the maximum duration of the ordinary working day or in the calculation of the maximum number of authorised overtime hours), in accordance with Article 35.3 of the Law on the Workers' Statute. For the purposes of calculating overtime, every worker's working time:

"shall be recorded on a daily basis and the total calculated at the time set for payment of remuneration..." (Article 35 (5) of the Law on the Workers' Statute).

The record of time worked by each worker therefore includes not only normal working hours, as well as breaks, but also overtime. The worker, and the worker's representatives, are entitled to receive a "copy of the summary" of overtime on the corresponding slip.

5. Spanish law stipulates that, as a general rule, workers may work no more than nine hours in a day (Article 34.3 of the Law on the Workers' Statute). However, Spanish law does not set a daily or weekly limit for overtime, and irregular distribution of working hours (Article 34.2 of the Law on the Workers' Statute) is permitted where such an arrangement is established through collective bargaining (collective agreement or agreement with the company's labour representatives). The only actual limit in place is that overtime shall not exceed 80 hours per year.

6. The Government is legally authorised, however, to prohibit overtime or reduce the maximum number of overtime hours for a specific period of time, either generally or for certain branches of activity or within a certain geographical area, with a view to increasing job opportunities for unemployed workers (Article 35.2 in fine of the Law on

the Workers' Statute). In Spain, overtime is prohibited for night shift workers (Article 36.1, paragraph 2 of the Law on the Workers' Statute) and for workers under 18 years of age (Article 6.3).

It is also prohibited for part-time workers (Article 12. 4(c) of the Law on the Workers' Statute, except for overtime deriving from force majeure). However, it is important to inform the ECSR that "additional hours" in the case of part-time work are allowed, as will be discussed below.

This scheme (aimed at giving companies increased flexibility in the organisation of working time) aggravates the problem of overtime in Spain, as these hours have fewer limits than overtime for part-time work, and they are remunerated or compensated for as normal working hours. There is no provision indicating that they can be remunerated at a higher rate, as it is stated that they must be remunerated at the normal hourly pay rate (Article 12. 5 (i) of the Law on the Workers' Statute). However, the Spanish Supreme Court has ruled **that if the number of additional hours is exceeded these hours must be considered overtime**.

7. With regard to their remuneration, Article 35.1 of the Law on the Workers' Statute (final clause) provides:

"Through collective bargaining agreement or, in its absence, individual contract, a choice shall be made between payment for overtime in a set amount, which in no case may be less than the value of the ordinary working hour, or payment in terms of equivalent periods of paid rest.

In the absence of agreement in this respect, it shall be understood that overtime done shall be compensated through rest within the four months following its performance."

8. This regulation is based on relative mandatory law (derecho necesario relativo) (SSTS 369/2019 of 14 May 2019 and 675/2018, of 27 June). Overtime pay in Spain is an independent and autonomous form of wages the purpose of which is to remunerate time worked in excess of the ordinary working day. Therefore, it is different from workers' other earnings within the meaning of legal doctrine on social matters and of case law. In the absence of a pact or agreement, it is therefore not possible to compensate or absorb overtime with any other type of wages, such as sales commissions, which compensate workers' extra effort, speed or greater dedication in the performance of their professional duties (STSJ Asturias 21/2023, 24 January 2023). Training must also be remunerated as overtime when it is done outside normal working hours (National High Court Judgment No. 128/2017 of 18 September).

9. Spanish law therefore sets out two formulas to compensate for overtime worked outside the normal working hours: Firstly, a rest period within four months of the

overtime worked. Secondly, financial remuneration not to exceed the remuneration received for the normal hourly rate, but which, naturally, cannot be less than the normal hourly rate (STS 4 July 2000, Coll. 4911/1994, 4 July 1994). There have been multiple cases of collective agreements in which overtime below the rate for overtime hours was agreed. These arrangements were declared null and void by the Supreme Court (e.g. Judgment of the Supreme Court of 21 February 2007 - for the collective agreements of security companies in the years 2005/2008), given the completely unreasonable repercussions of those agreements (STS 6 May 2013, Coll. 2511/2012). Likewise, when overtime rates are set according to a certain percentage, the Supreme Court prohibits the exclusion of earnings that are normally received (Judgment of the Supreme Court, 4th, 19 October 2011).

10. The type of compensation to be applied is decided either collectively (collective agreement) or on an individual basis (employment contract), with overtime pay being specified in detail in both cases. In the absence of an agreement, Spanish social case law requires that overtime hours be compensated for by means of a rest period within four months (Judgment of the Supreme Court 22 October 2013, Coll.2977/2012). Likewise, legal doctrine has validated collective agreement clauses that give companies the choice between remunerating voluntary overtime or compensating it with equivalent rest periods.

The reason for this is that the law does not confer this power directly on the worker, but rather on the agreement, or the contract. The agreement can therefore easily confer such power on the company without prejudice to the worker, as the latter can refuse structural overtime (see, for example, National High Court Judgment 26/2017, 1 March). Article 29.3 of the Law on the Workers' Statute also provides for the payment of late payment interest for late payment of overtime (Judgment of the Supreme Court 27 January 2005, Coll. 5686/2003).

11. Social case law accepts, however, that not all overtime should be remunerated at the normal hourly rate, including all allowances, except for transport and clothing allowances, but that it **is** necessary to take into account which specific allowances have been paid for ordinary working hours and **whether or not they should be recognised for overtime**.

The most established doctrine maintains that overtime hours must have exactly the same remuneration as normal working hours, but only if they occur under the same conditions, in which case workers are entitled to receive the corresponding allowances (Judgment of the Supreme Court 369/2019, of 14 May). Consequently, it is clear that in Spain regulations and collectively agreed rules (majority), as well as the case law, place the emphasis of remuneration for overtime on normal working hours, without allowances.

12. The fact that overtime pay is not compensable does not preclude collective or individual agreements that provide for a lump-sum payment, of the same or similar

amount each month, to compensate for hours worked in excess of the normal working time. The condition of legitimacy lies in observing the limits laid down by the law relating to maximum working time limits (Article 34.2 Law on the Workers' Statute) and the requirement that the rate of remuneration for overtime match the normal hourly rate (Article 35.1 of the Law on the Workers' Statute). This special type of overtime pay, where the company pays the same or a similar amount every month, may be applied in cases where the company commits to specific excess working hours each day, with the remuneration serving as financial compensation for this excess. This system can also be used in other cases in which overtime is variable. Spanish law thus provides for special types of remuneration, although they are not usually paid at a higher rate, regardless of whether the worker exceeds the working time of normal working hours (STSJ Murcia No. 1231/2013, 19 December).

13. When collective agreements set an overtime premium as a percentage of the normal wage rate, but without specifying the basis for calculation, providing only for a maximum weekly working time, the case law holds that the appropriate way to calculate such collectively agreed overtime is by applying the premium percentage to the normal hourly rate. The normal hourly rate is determined by taking the annual salary divided by annual working time, based on weekly working time, not by dividing weekly wages (*annual wage = annual salary/52 weeks)*, since this formula would not account for holidays or public holidays in calculating overtime (Judgment of the Supreme Court 2 October 2012, Coll. 3748/20119).

2.1.2. Provision for an additional contribution for force majeure and structural overtime hours which do not contribute to the worker's social benefits for common contingencies (majority of cases).

14. It is a long-established rule in Spanish social security legislation that an additional social contribution applies for overtime. For the year 2023, Order PCM/74/2023 of 30 January requires that the remuneration earned by workers for overtime include an additional contribution, which is not taken into account for the purposes of determining the calculation basis for social benefits (it therefore does not contribute to temporary incapacity for work, invalidity pensions or retirement pensions), except for occupational contingencies (i.e. an industrial accident). Rates applicable to overtime in 2023:

- The additional contribution for overtime due to force majeure is 14% (12% payable by the employer, 2% payable by the employee);
- The additional contribution for structural overtime is 28.30%, of which 23.6% is borne by the employer and 4.7% by the employee.

In the event that the additional contribution for overtime exceeds the stipulated 80 hours (Article 35.2 of the Law on the Workers' Statute), it will be calculated by

applying the general rate established for structural hours in the General State Budgets Act (Article 149 of the General Law on Social Security General Law on Social Security). The following table gives a clear illustration of this distinction in the social contribution for overtime in Spain.

Type of Overtime	Company	Worker	TOTAL
Force majeure	12.00%	2.00%	14.00%
Ordinary	23.60%	4.70%	28.30%

15. Consequently, Spanish social security law penalises overtime with a social security contribution surcharge, which is higher for structural overtime (related to developments in the company's financial situation, such as the introduction of profit-boosting measures), and lower for overtime due to force majeure (exceptional). However, these contributions go to the public Treasury and therefore benefit the public, not workers, who do not see them reflected in the calculation basis for determining their benefits. This general rule has a distinctive feature in the case of occupational contingencies (e.g. arising from an accident at work or occupational disease), but not for common contingencies - the vast majority.

16. For overtime to be considered structural for the purposes of contributions, the company must first comply with a series of prior conditions, such as notifying the Administration, obtaining the consent of the staff committee or delegate, submitting a list of workers affected, etc. (STS, Coll. 4911/1994 of 4 July 2000). Therefore, in Spanish law, the identification of overtime continues, to a large extent, to depend on the decisions and actions of companies, which undermines effective monitoring and the actual remuneration of structural overtime.

2.1.3. Strengthening (more regulatory than practical) of the monitoring of overtime through record-keeping (Article 35.5 of the Law on the Workers' Statute as read with its Article 34.9).

17. Since before 2019, Article 35.5 of the Law on the Workers' Statute has required that overtime hours be monitored by means of specific records. However, since Article 35.5 does not provide for a similar obligation to record normal working hours, this system has proven very inadequate. The Spanish Supreme Court has not issued a ruling

requiring that records be kept of normal working hours (Judgment of the Supreme Court of 23 March 2017, Coll. 81/2016 and of 20 April 2017, Coll. 116/2016). Spain's National High Court therefore referred a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling on whether such a register was compulsory. According to the National High Court, only a specific record of normal working hours could objectively and reliably identify what an ordinary working day is and thereby prove precisely and objectively the overtime worked, so as to determine the compensation owed (financial or in the form of rest periods).

18. The judgment of the Court of Justice of the European Union (Grand Chamber) of 14 May 2019 (Case C-55/18) ordered Spain to implement an effective system for the monitoring of working time (ordinary, rest periods, overtime).

The CJEU recognises the right of all workers to know their daily working time to ensure compliance with the maximum weekly working time (Article 6 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) and minimum daily and weekly rest periods (under Articles 3 and 5 of Directive 2003/88). The CJEU considers it necessary, inter alia for the protection of health and safety in the workplace, a basic social right protected by the EU Working Time Directive, to have a mechanism that makes it possible to determine objectively and reliably the number of daily and weekly working hours, considering that other means of proof are not adequate, especially in view of workers' position of weakness.

19. The CJEU has also maintained that it is necessary to set up a recording system that is both adequate and effective, a position intricately linked to the need for working time monitoring systems to be objective. To this end, the CJEU noted that the Labour and Social Security Inspectorate played an extremely limited role in the exercise of its powers of investigation and supervision of labour legislation. In the absence of an objective means of providing evidence, these powers are limited, as there is no way to access objective and reliable data. Given that we are dealing with an instrument intended to ensure the protection of a basic social right, health and safety at work, the CJEU considers that this objective of effective monitoring cannot be subordinated to any purely financial consideration.

20. In compliance with the mandate of the CJEU, Spain amended Article 34 of the Law on the Workers' Statute and provided as follows in paragraph 9 (promulgated by Article 10 of the Royal Decree-Law 8/2019, of 8 March - Ref. BOE-A-2019-3481).

"9. The company shall ensure that a daily record of the working day is kept, which shall include the specific start and end times of each worker's working day, without prejudice to the flexible working hours provided for in this article.

By collective bargaining or company agreement or, failing this, by decision of the employer after consultation with the legal representatives of the employees in the company, this record of working hours shall be organised and documented.

The company shall keep the records referred to in this provision for four years and they shall remain at the disposal of the workers, their legal representatives and the Labour and Social Security Inspectorate."

21. Spanish labour law therefore obliges all companies to keep a mandatory time register that records the daily working hours of each employee (entry, exit, breaks and overtime). The register is therefore intended to prevent overtime from being worked above the stipulated upper limit and/or without adequate compensation.

According to the rule in Spain, this information can be logged in a single document or in two documents: one containing the entry, exit and breaks of the daily working day, and the other containing overtime hours, which must be calculated each day that they occur and totalled when remuneration is paid (Article 35.5 Law on the Workers' Statute).

22. However, although the obligation to record daily working hours, which is key to determining overtime, is guaranteed by law and derives from the primacy of EU law, Spanish social legislation does not in itself guarantee compliance with it in all cases by means of a sufficiently objective, reliable and accessible mechanism, as required by the CJEU. The reason for this is that the specific arrangements, wording and documentation of the register must be determined by a collective agreement (collective bargaining agreement or company agreement) or, failing this, by a unilateral decision by the companies, after consultation with the workers' representatives (if there are any, of course, since in a good number of Spanish companies there are none due to their small size).

23. Consequently, in some companies and sectors of activity registers are compliant with EU requirements, while in others they are not, which has given rise to considerable legal disputes. Generally speaking, the Spanish Supreme Court is, again, lax or generous when it comes to assessing the suitability of companies' time recording systems and accepts the validity of some of the more traditional ones. Such is the case, for example, of registers based solely on the unilateral declaration of the worker him/herself, downloaded via an application (Judgment of the Supreme Court, 4th, 41/2023, 18 January, Coll. 78/2021). Given the worker's weaker position in the contractual relationship, it would seem difficult to describe a system for recording working hours based on the worker's own declaration of the hours worked, the nature of the activity and, consequently, the type of time spent, as objective and reliable. The CJEU has therefore held that the resulting evidence is not admissible. Moreover, although there are differences, the complainant union argues that there are also notable similarities

between a testimony and a self-declaration, despite the latter being produced by means of a computer application (the National High Court Judgment of 15 February 2022 ruled that a signature on a sheet of paper was not a valid system for the purposes of complying with Article 34.9 of the Law on the Workers' Statute). The CJEU has not been called upon again to rule on this departure in respect of implementation.

The ECSR has stated that the Social Charter is complied with where, although legislation is not formally compliant, the supreme courts of the Member States have well-established corresponding case law *(Association for the Protection of All Children (APPROACH) Ltd v. Italy*, Complaint No. 94/2013, decision on the merits of 5 December 2014, §46). However, as has been argued, this is not the case for Spain.

24. On the other hand, the last three paragraphs of Article 12.4.c of the Law on the Workers' Statute on part-time work provide:

*"In this context, the working time of part-time workers **shall be recorded on a daily basis and shall be totalled on a monthly basis,** with a copy being given to the worker, together with the wage slip, of the summary of all hours worked in each month, including the ordinary and the additional hours referred to in paragraph 5.*

The employer shall keep monthly summaries of the working time records for a minimum period of four years.

In the event of failure to comply with these obligations to keep records, the contract shall be presumed to have been concluded on a full-time basis, unless evidence to the contrary is provided to prove the part-time nature of the services."

25. In any case, failure to comply with rules on overtime and to keep working time records are both serious offences of a lower level (see Article 7.5 of the amended text of the Act on Offences and Penalties in the field of Employment) of labour legislation and are punishable by fines. The fine does not seem adequate, and certainly not dissuasive, as it amounts to a mere **EUR751** at the minimum level **and EUR7 500 at the maximum level**.

26. As a collective guarantee, legislation provides that workers' representatives are entitled to be informed on a monthly basis of overtime hours worked by workers, irrespective of how these hours are remunerated, and that they shall receive a copy of the summary referred to in Article 35.5 of the Workers' Statute.

2.2. Recognition of specific and increased overtime pay in earlier Spanish regulation prior to the Law on the Workers' Statute and in its initial version: a guarantee against the abuse of overtime and an incentive to hire.

27. The statutory scheme governing overtime in Spain has undergone very significant change since its original formulation in the Law on the Workers' Statute, given that the original version did provide for a specific increase in remuneration, in line with the provisions on night work *(Article 34 Six of the original Law on the Workers' Statute provided for specific remuneration of at least a 75 per cent increase on the normal rate for working hours*). However, this guarantee of remuneration was subsequently downgraded in the interests of greater management flexibility for companies; it was established basically as a matter of private, collective or individual autonomy. Of course, the original rule did not disregard the role of private autonomy, but it did set minimum limits that raised overtime pay well above the normal hourly rate. Article 36.1 of the Law on the Workers' Statute in its original version provided:

"One. Hours worked in excess of the maximum working time of the ordinary working week, set in accordance with the preceding article, ***shall be remunerated with the increase established by collective agreement or individual contract***. In no case shall ***the increase be less than 75 per cent*** *of the ordinary wage*."

28. The regulations implementing this statutory scheme provided:

"1. *Hours worked in excess of the maximum working time of the ordinary working week established by law or by collective agreement* ***shall be remunerated with the increase set by collective agreement or individual contract.*** *The increase* ***shall be*** *not* ***less than 75 per cent*** *of the normal hourly wage, except as provided for in the regulation on work at sea.*

2. (…). Hours worked in excess of the annual working time, or of shorter cycles, in the aforementioned weekly distribution of working hours, as well as nine-hour working days, shall always be remunerated as overtime.

3. Overtime may be compensated for with rest periods by virtue of a collective agreement" (Article 40 of Royal Decree 2001/1983 of 28 July on the regulation of working hours, special working days and rest periods).

29. Hours worked in excess of the normal daily working time were thus traditionally remunerated with additional financial compensation. The rule stipulating a premium on the normal hourly rate served a dual purpose. Firstly, it aimed to guarantee effectiveness by seeking to prevent possible abuses in the organisation of working time, reinforced by an additional social security contribution. Secondly, it also acted as a disincentive to overtime, encouraging instead the use of new hires, especially in light of Spain's high unemployment rate.

30. The original regulation also provided for remuneration in the form of compensatory time off, although this was less prevalent. The choice between financial compensation

and rest periods was left to the collective agreement. This rule for the financial compensation of overtime was preferred for understandable reasons, given that the hours worked were actually worked in excess of the working day, intrinsically involving extra effort, compared to those compensated for with alternative rest periods, pointing towards a model (which would later be implemented) based on internal flexibility and an irregular distribution of the working day.

It is worth noting, although this will be set out in greater detail in Section 4 of this collective complaint (on the international social regulatory framework in this area, which is also formally in force in Spain, although it is not legally respected), that Spanish legislation has traditionally stipulated a minimum increase of 25 per cent above the normal hourly rate in calculating overtime pay. Such was the case in the social legislation of the Second Republic (Decree on working hours of June 1931 - Gaceta of 2 July 1931 -), in application of the relevant ILO Conventions on working hours (1919 and 1930), in force in Spain.

31. However, for the sake of consistency with the new statutory regulation laid down in Article 35.1 of the Law on the Workers' Statute now in force, this regulation was repealed (Single repealing provision of Royal Decree 1561/1995, of 21 September, on special working days), without prejudice to the continuity of Article 47 of Royal Decree 2001/83 on work on public holidays, prescribing, due to its exceptional nature and the concurrence of technical or organisational factors that prevent the corresponding public holiday from being taken, higher pay (Judgment of the Supreme Court, 4th, 1132/2020, 18 December).

2.3. A glance at the (in)effectiveness of the existing regulation on overtime in Spain: more overtime, including unpaid overtime, resulting in indirect discrimination to the detriment of women workers.

32. The European Committee of Social Rights (ECSR) analyses not only the legislation but also its practical application (principle of the primacy of facts), in order to ensure the effectiveness of the social rights recognised in the European Social Charter (1961 and revised). This has been stated by the ECSR, along similar lines to the European Court of Human Rights (ECtHR), since its first decision on the merits, in which it clearly held that the Social Charter does not protect rights in a merely theoretical manner, but in practice *(International Commission of Jurists (ICJ) v. Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32).

33. From this realistic perspective, it is important to emphasise that the reform of the original model for regulating overtime, eliminating the general obligation to pay a specific premium for overtime, despite the strong social reasons warranting it, and reducing the statutory limit required in agreements to the normal hourly rate, has had significant practical consequences. In Spain, most overtime is structural, i.e. set by companies to increase production activity and profitability of work. Companies opt for this system not out of necessity but out of a desire to attain more profitable organisation of work.

34. Moreover, there are two sources of evidence relating to overtime in Spain. First, Spain is one of the EU countries with the highest number of overtime hours, despite having twice the EU average unemployment rate. ***Some 13 million hours of overtime are worked each month.***

35. Secondly, virtually half of overtime hours are unpaid (49%). This is based on information drawn from the labour force survey.[1] This is a widespread situation of labour fraud affecting more than half a million workers throughout Spain, **disproportionately affecting women more than men** (another source of gender gaps in the labour market). The Spanish government has on several occasions committed to more effective monitoring systems, such as management with an algorithm called **MAX** (More algorithms for less overtime); the stark reality highlights the great inadequacy of the current labour and social security inspection methods to tackle this recurrent phenomenon.

The labour force survey (as an official survey) does not provide any data to check whether this algorithm is working or not. It is therefore impossible to assess whether, in the future, there will be reliable reasons to expect improvement in such a deficient situation, which very clearly violates the guarantees of the effectiveness of the right not only to a reasonable working day, with justified overtime, but also to be paid in accordance with the requirements of the European Social Charter.

36. Consequently, since the pandemic, and still today, we have been witnessing an increase in overtime and unpaid overtime in Spain, which only increases the perception of informality in this aspect of labour relations in Spain. Although in Spain there are problems of (low) productivity, despite the long periods of actual working time in excess of the legal limits (extending the working day decreases productivity, in accordance with the established law of diminishing returns), companies operating in Spain will prefer to extend the working day, albeit informally, rather than to hire unemployed people. As

[1] An illustrative table of the trend in paid and unpaid overtime in Spain from 2008 to 2022 can be found at: https://www.epe.es/es/activos/20220809/horas-extra-pagan-espana-14248498

has been pointed out, the unemployment rate in Spain, according to Eurostat data, was 11.7% in 2023, while the average for the Eurozone, to which Spain belongs, was 6.4%.

Spain remains the Eurozone country with the highest unemployment rate. Consequently, the complainant trade union has been advocating, among other employment policy measures, that overtime be reduced, that all overtime be remunerated and that specific and additional remuneration be set to discourage this manner of organising working time, which clearly leads to precariousness and high unemployment rates. Studies show that the use of overtime in Spain amounts to a missed opportunity to create the equivalent of 180 000 jobs.[2] Therefore, **increasing its cost would be an important disincentive to overtime in favour of greater job creation** which, in turn, taking into account that practically half of overtime hours are unpaid, would also serve to stimulate domestic demand, and in turn boost the economy and ultimately job creation.

37. The precariousness of employment, it would seem, encourages part of the wage-earning population to work excessively long hours in the belief that this will increase their low wages. However, in many cases, this very situation of precariousness, and the lack of control over the fulfilment of obligations regarding the recording of working hours and the organisation of working time, also results in companies not even paying the minimum established by collective agreement, a clearly fraudulent practice.

38. This massive and inappropriate use of overtime in Spain, which reflects the low level of monitoring of working time regulations, notably on the recording of daily working hours, also has a gender bias aspect. It is more harmful to women, as was already evident during the pandemic (owing to a higher rate of more feminised activities), and this continues to be the case today. According to Spain's official labour force survey, women are only paid 45% of overtime worked, **10 percentage points lower than men**, who are paid 55.6% of overtime worked. The situation has worsened, albeit slightly: in 2021 **women were unpaid for 52.89% of overtime worked compared to 55.67%** the previous year.

There is therefore clear proof that the regulatory and practical situation of overtime in Spain has a major detrimental impact on women workers. For trends in this regard, see the official statistics at:

Total number of overtime hours worked during the week by all wage earners by sex and occupation (4366) (ine.es)

39. With regard to this significant gender bias in overtime regulation and, above all, practices in Spain, it should be borne in mind that part-time work continues to have a much greater impact on women, with this non-standard form of employment being an

[2] https://www.ugt.es/sites/default/files/informe_horas_extras.pdf

area in which increases in unpaid overtime have a major impact. Although overtime is prohibited by law (except in cases of force majeure), there is provision for *additional hours* (which are paid as ordinary working hours and give companies a high degree of flexibility). Hence, the inadequate regulation of overtime in Spain, together with the ineffectiveness in practice (intensive use of overtime and standardisation of unpaid overtime, due to the lack of effective monitoring of compliance by the Labour and Social Security Inspectorate, even following the introduction of the obligation to record working hours under Article 9 of the Law on the Workers' Statute), also contributes to the gender pay gap in the workplace, in violation of the principle of equal pay for work of equal value **(Article 4.3 of the European Social Charter + Article E;** Article 14 in relation to Article 35 of the Spanish Constitution).

2.4. Doubts in Spanish legal doctrine and case law as to the use of working time records (ordinary and overtime) as an instrument for proving overtime hours actually worked.

40. Unlike the provision on part-time work (Article 12.4 of the Law on the Workers' Statute), which uses the obligation to record part-time working hours as an instrument for proving overtime hours actually worked, where working hours are presumed to be full time if this obligation is not complied with, ***there are no provisions stipulating that this mechanism be implemented to prove excess working hours, whether normal or overtime***. Such a mechanism would undoubtedly significantly help reduce the Spanish labour sector's unhealthy wide-scale reliance on unpaid overtime.

The absence of precise rules on the obligation to implement systems for recording ordinary and overtime working hours results in considerable litigation in Spain.

41. There is no unified case law on the matter, at least currently. There are consequently quite different, even opposing, interpretative currents in the various courts of appeal. This situation leads to uncertainty and a multiplicity of solutions depending on the jurisdiction in which the worker is located. Furthermore, the case law prior to the legislative change rejected the presumption of overtime, ***requiring the worker to prove the nature of any overtime, hour-by-hour*** (Judgment of the Supreme Court, 4th, 23 March 2017 in Plenary, Coll. 81/2016). This constituted a very significant procedural obstacle to effective judicial protection against excesses and abuses relating to overtime in Spain. An important body of legal doctrines continues to reflect this strict interpretation (e.g.: STSJ Valencia of 12 April 2022, Coll. 4005/2021):

"This obligation to keep a record of the ordinary working hours was imposed by the Royal Decree-Law of March 2019, and neither this decision, European case law nor Article 35.5 of the Law on the Workers' Statute sanctions non-compliance with the obligation to monitor working time with the application of a rebuttable presumption system for overtime claimed, within the meaning of Article 12.4 c) of the Law on the Workers' Statute in the event of non-compliance with the obligation to record hours worked under part-time contracts. It is well known that rules of a punitive or rights-limiting nature are subject to a restrictive interpretation."

42. Most High Courts (e.g. STSJ Galicia of 23 June 2022, Coll. 5087/2021), understand that, since the entry into force of Article 34.9 of the Law on the Workers' Statute, if the company does not comply with its obligation to keep records of working hours, there is a presumption of overtime, but proof is required that it is overtime. Once this element has been established, it is for the company to prove reliably that all or part of the overtime hours claimed were not worked or that they were duly compensated for with rest periods (STSJ Castilla-La Mancha, 25 February 2022, Coll. 397/2021, STSJ Andalusia 11 May 2022, Coll. 2304/2021): "*For the burden of proof to be reversed, there must be at least some indication that the worker could have worked the hours he or she claims to have worked.*"

Judgment STSJ Valencia 12 July 2022 (Coll. 634/2022) concludes: "*It is not a question of requiring the worker to submit proof of overtime, hour by hour, day by day, but there must be proof of having repeatedly worked in excess of the normal working day*" (similarly, see STSJ Catalonia 14 April 2022, Coll. 6963/2021).

43. However, this Spanish legal doctrine would appear to conflict with the position held by the CJEU. According to the aforementioned CJEU ruling of 14 May 2019, the requirement to set up a system enabling the duration and distribution of daily working time to be measured, and therefore any overtime, objectively and reliably, is a condition for allowing the worker to prove that overtime has actually been worked. Otherwise, the CJEU states, "it appears to be excessively difficult, if not impossible in practice" for workers to ensure that their rights relating to the limitation of working hours and relevant rest periods are observed.

More precisely, the CJEU states:

"... it must be emphasised that, taking into account the worker's position of weakness in the employment relationship, witness evidence cannot be regarded, in itself, as an effective source of evidence capable of guaranteeing actual compliance with the rights at issue, since workers are liable to prove reluctant to give evidence against their employer owing to a fear of measures being taken by the latter which might affect the employment relationship to their detriment."

*By contrast, a **system enabling the time worked by workers each day to be measured offers those workers a particularly effective means of easily accessing objective and reliable data** as regards the duration of time actually worked by them and is thus capable of facilitating both the proof by those workers of a breach of the rights conferred on them by Articles 3 and 5 and 6(b) of Directive 2003/88, which give specific form to the fundamental right enshrined in Article 31(2) of the Charter, and also the verification by the competent authorities and national courts of the actual observance of those rights*."

44. Hence, as argued by another current of judicial interpretation (the third), which is more modern and proactive, overcoming the restrictive case law on the evidential use of the register, or the absence thereof, STSJ País Vasco of 12 July 2022 (Coll. 402/2022) states emphatically:

"*It is the employer who must keep records of the employee's working hours so that the latter cannot be held responsible for an alleged lack of accuracy of the working hours in the claim*."

45. However, the case law and most legal doctrine continue to be restrictive in the use or non-use of overtime records as evidence, which undoubtedly hinders the protection of workers and, consequently, discourages applications or effective judicial protection against abuse and fraud in relation to overtime, while continuing to encourage its widespread use and the high rate of non-payment by many companies.

3. The recognition in the European Social Charter, as a general rule, of the right of workers to an increased rate of remuneration for overtime work compared to normal working hours (Article 4.2), separately and in combination with the principle of non-discrimination (Article E) and the case law of the ECSR interpreting them.

3.1. The right to an increased rate of remuneration for overtime as a means of guaranteeing the effectiveness of the right to fair remuneration.

46. To guarantee its effective exercise, Article 2 of the European Social Charter**, on the right to just conditions of work**, requires States that are party to the international social instrument, the Social Constitution of Europe, inter alia:

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

47. Article 4 of the European Social Charter recognises **the right to a fair remuneration**. With a view to "**ensuring the effective exercise**" of this right, this rule of the Social Constitution of Europe requires the Parties, inter alia:

" (...)

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

48. According to the case law of the European Committee of Social Rights (ECSR), Article 4§2 is intrinsically linked to Article 2§1.

According to the settled case law of the ECSR, the concept of overtime presupposes the existence of ordinary working hours: overtime hours are those worked in excess of ordinary hours (Conclusions I-1969, Statement of Interpretation on Article 4.2). The Committee accepts the legitimacy of flexible working hours and the irregular distribution of working hours, which make it more difficult to determine overtime, but points out that the requirements of the European Social Charter must always be observed, both as regards reasonable working hours and as regards an increase in overtime pay.

3.2. Principles enshrined in Article 4.2 ESC in accordance with the ECSR case law.[3]

49. According to the principle enshrined in Article 4§2 of the Charter, work performed in addition to normal working hours requires an increased effort on the part of the worker, who must therefore be remunerated at a higher rate than the normal rate of pay (Conclusions XIV-2 (1998), Statement of interpretation on Article 4§2). There is therefore an objective reason justifying specific and higher remuneration, i.e. the intrinsic increase in effort when the working day is extended compared to the ordinary working day, which may already be considerable in itself, as is the case in Spain.

50. The principle of remuneration at a higher rate for overtime in relation to the normal hourly rate should be established in domestic law on a general basis, i.e. standardised or applied globally in the domestic rules of the Member States or Parties. This is without prejudice to the fact that, as provided for by the European social standard itself, it may be excluded in certain specific cases, subject to adequate justification to that end (*European Council of Police Trade Unions (CESP) v. France*, Complaint No. 68/2011, decision on the merits of 5 November 2012, §§ 76, 77, 86 to 88).

[3]See DIGEST OF THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, June 2022. https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd, p. 74 *et seq*.

51. The ECSR allows for the possibility of lump-sum compensation. In such cases neither the amount of the lump-sum compensation nor its effects on the purchasing power of the persons concerned are assessed. It would be important to effectively verify whether the resulting overtime compensation actually is an increase compared to the normal rates of the worker's wages (Conclusions XIV-2, 1998, Belgium).

52. Recognising an alternative mode of compensation for overtime, such as equivalent days of rest, instead of increased remuneration, is consistent with Article 4§2, provided that the compensatory rest period is longer than the duration of the overtime worked.

Therefore, according to long-established ECHS case law, it is not sufficient to provide workers with leave equivalent to the number of overtime hours worked. A form of overtime compensation whereby overtime hours are compensated at the normal rate, but with such compensation being supplemented with additional compensatory leave, would not be contrary to Article 4§2 (Conclusions XIV-2, 1998, Belgium; *European Council of Police Trade Unions (CESP)* v. France, Complaint No. 57/2009, decision on the merits of 1 December 2010, § 21; Conclusions XX-3, 2014, Slovenia; *European Council of Police Trade Unions (CESP) v.* France, Complaint No. 57/2009, decision on the merits of 1 December 2010, § 21; Conclusions XX-3, 2014, Slovenia; *European Council of Police Trade Unions (CESP) v. Portugal,* Complaint No. 60/2010, decision on the merits of 17 October 2011, §21).[4]

53. Article 4§2 can be implemented through various procedures, in line with the set (system) of social rights recognised and guaranteed through the European Social Charter. These can be recognised and guaranteed by collective agreement, by regulation or in any other manner appropriate to domestic conditions applicable to the entire workforce. Although it is a common source, collective bargaining is not the only path to realising the right to increased remuneration for overtime in relation to the normal hourly rate in domestic law and practice.

54. Provision for a necessary minimum consistent with Article 4§2 ESC is in no way incompatible with a flexible interpretation to tailor the organisation of working time to the specific needs of companies and sectors of activity, while taking into account the institutional and regulatory diversity of each State Party. If working time is calculated on the basis of an average weekly working time over a period of several months (this is the case in Spain, although it also takes annual working time into account), during this

[4] https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdcidentifier%22: [%22cc-60-2010-dmerits-en%22]}

reference period, the actual weekly working time may vary between a maximum and a minimum, without giving rise to overtime.

In short, the ESC system is consistent with diverse regulations and management styles specific to sectors and companies, provided that the limits of relative mandatory law, provided for in the aforementioned Article 2.1, are observed (Conclusions XIV-2, 1998, Statement of Interpretation on Article 4§2). It is thus possible, in systems of flexible working time arrangements, for hours in excess of normal working hours to not be counted as overtime, although when they are, they must be compensated for with additional or supplementary remuneration (Conclusions XX-3, 2014, Portugal).

55. European social law and ECSR doctrine provide that the individual right of workers to higher remuneration (premium or allowance) for overtime may be subject to exceptions in certain specific cases, but this must be specifically justified. These include, for both the private and public sectors, groups such as senior management (Conclusions IX-2, 1986, Ireland; Conclusions X-2, 1990, Ireland) or civil services through civil servants (e.g. police, notaries). Exceptions to higher overtime pay apply to an entire category of elite or "senior" officials, e.g. police officers in intelligence and management bodies, irrespective of their rank and responsibilities *(European Council of Police Trade Unions (CESP) v. France,* Complaint No. 38/2006, decision on the merits of 3 December 2007, *§22),* or administrative court judges *(Union syndicale des magistrats administratifs (USMA) v. France*, Complaint No. 84/2012, decision on the merits of 2 December 2013, §§ 67 and 69).

56. Restrictions on increases in pay for overtime can only exist if they are prescribed by law, for a legitimate aim and are proportionate to that intended aim (see *Confédération Française de l'Encadrement (CFE-CGC) v. France,* Complaint No. 9/2000, decision on the merits of 16 November 2001, §45*; Confédération Générale du Travail (CGT) v. France,* Complaint No. 55/2009, decision on the merits of 23 June 2010, §§ 87-8).

3.3. Principles enshrined in Article E ESCR.

57. Non-discrimination: Article E of the Charter (the prohibition of discrimination on grounds of sex or gender). The ECSR has long upheld the legal principle according to which Article E should be interpreted in conjunction with other articles of the ESC, in line with the provisions of Article 14 of the Convention on Human Rights. **Hence the need to argue that it was violated in combination with one of the substantive provisions of the ESC** (*Syndicat*

des Agrégés de l'Enseignement Supérieur (SAGES) v. France, Complaint No. 26/2004, decision on the merits of 15 June 2005, §34), in this case Article 4.2 thereof.

58. The Committee reiterates this point, stating that there can be no place for the application of Article E of the Charter unless the facts in question [such as those alleged and substantiated here in respect of the overtime regulatory regime and enforcement practices] fall within the scope of one or more of its other clauses (in this complaint, Article 4.2 ESC).

However, the Committee also adds that even a measure that complies with the substantive provision in question may nevertheless violate Article E *(Confédération française démocratique du travail (CFDT) v. France,* Complaint No. 50/2008, decision on the merits of 9 September 2009, §§ 37-39 and 42), as could occur in certain cases of indirect discrimination, as in this case, on grounds of gender. In any case, the Committee insists that they should be read in conjunction with the provision in question when it is established that it may have a discriminatory effect, even indirectly, as in this case, on grounds of gender.

59. **Definition of discrimination.** The Committee refers to the Court's judgment in the 2000 case of Thlimmenos v. Greece, in which it held that *discrimination within the meaning of Article 14 of the Convention occurred when the State party failed to treat differently persons whose situations were different (discrimination by failure to take account of differences)*. Failure to take appropriate measures to take account of existing differences may therefore amount to discrimination. Likewise, in line with this case law, the Committee *(International Association Autism-Europe v. France,* Complaint No. 13/2002, decision on the merits of 4 November 2003, §52*)* considers that Article E prohibits not only direct discrimination, but also all forms of indirect discrimination *(Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Complaint No. 41/2007, decision on the merits of 3 June 2008, §§ 50-51).

Such indirect discrimination [including gender-related] can arise due to failure to implement adequate safeguards, of a proactive nature, to prevent and/or correct relevant differences or by not taking adequate measures to ensure that the social rights of all persons, in this case workers, enabling real equality of outcomes, such as the right to effective increased pay for overtime, are exercised equally (in terms of outcomes, not just formally) by and for all (in this case, including women working overtime).

60. The ECSR also considers that the notion of indirect discrimination (on grounds of sex or gender, as raised in this complaint) concerns all cases in which one person or group is treated less favourably than another, without objective or reasonable justification (*Confédération française démocratique du travail (CFDT) v.* France). *France,* Complaint

No. 50/2008, decision on the merits of 9 September 2009, §§ 39 and 41, referring to the *1984 Abdulaziz, Cabales and Balkandali case, European Court of Human Rights*. Referring to the precedents set by the judgments of the European Court of Human Rights (in the Belgian Linguistic Case of 1968, the Marckx Case of 1978 and the Rasmussen Case of 1984), the Committee considers that a difference in treatment is discriminatory if it is not objectively and reasonably justified, if it does not pursue a "legitimate purpose" or if there is no "reasonable relation of proportionality between the means employed and the aim pursued."

It is true that States Parties enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law. It is no less true, however, that it is ultimately up to the Committee to decide whether this margin applies to the dispute.

4. The international regulatory framework (ILO Conventions) on overtime pay: the minimum standard increase of 25 per cent.

61. The European Social Charter provides (and the ECSR follows this interpretative approach) that the recognition and guarantee of social rights in the ESC system cannot mean lowering the thresholds of protection established in the international social standards applicable in the States Parties. Hence, it is a recurring criterion in ECSR case law to interpret the provisions of the ESC in the light of other international instruments on social and economic human rights, whether of the European Union or of the United Nations, covered by the ILO Conventions. The Committee also looks at the interpretation derived from the criteria repeatedly laid down by the bodies responsible for ensuring compliance with such international standards.[5]

62. Likewise, according to settled case law of the ECSR, the social rights of the Charter must be protected in the form of specific and effective rights with useful substance on a practical level, not merely theoretically (e.g. *International Commission of Jurists (ICJ) v. Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32, *European Federation of National Organisations working with the Homeless (FEANTSA) v. Slovenia*, Complaint No. 53/2008, decision on the merits of 8 September 2009, §28, *International Association Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, §53). It sets out objectively measurable and quantifiable minimum protection thresholds.

[5] See DIGEST OF THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, June 2022. https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd, p. 33 *et seq*.

63. Moreover, as regards the Social Constitution of Europe, the Committee considers the European Social Charter to be a living document that is constantly evolving and developing, in terms of its implementation and the development of legal culture. As stated in the Digest (p. 34):

"The Committee interprets the rights and freedoms set out in the Charter in the light of current conditions and in the light of relevant international instruments, as well as in light of new emerging issues and situations, in other words, the Charter is a living instrument," *Transgender-Europe and ILGA-Europe v. Czech Republic*, Complaint No. 117/2015, decision on the merits of 15 May 2018, §75).

64. With regard to the integration of the Charter's social rights with the relevant international instruments, it should be noted that **establishing a minimum overtime premium has been a constant feature in international labour law**.[6] This premium or increase is set at a **minimum of 25 per cent over the normal hourly pay rate**. This is clearly expressed in Article 6.2 of ILO Hours of Work (Industry) Convention (No. 1) of 1919 ratified by Spain in 1929 and currently in force,[7] which stipulates that the regulations (regulatory – after consultation with trade union and employer organisations – or fixed by collective agreement) in this area:

"*shall fix the maximum of additional hours in each instance*, **and the rate of pay for overtime shall not be less than one and one-quarter times the ordinary rate**."

This provision is repeated in Article 7.4 of ILO Convention No. 30 on Hours of Work (Commerce and Offices), 1930, ratified in 1932 and in force for Spain, according to which:

"*4. The rate of pay for the additional hours of work permitted under paragraph 2 (b), (c) and (d) of this Article* ***shall not be less than one-and-a-quarter times the ordinary rate***."

65. In full confirmation of this objective minimum regulation, the writings of the Committee of Experts on the Application of Conventions and Recommendations have shown that in a significant number of countries which have ratified such ILO Conventions on working hours, **overtime rates of pay are 25 to 50 per cent above the ordinary wage**. Only in some countries do overtime pay rates exceed 75 per cent (in line with the original statutory legislation in Spain and its implementing regulations) or even up to 100 per cent of normal hourly rates[8] (CEAR Report, Report III, Part B, 2018, page 58). Some countries have a scale in which wage rates increase according to the number of hours worked, as was also the case in Spain's earlier legislation, as well as in other European

[6] https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/working-time/lang--en/index.htm

[7] https://www.ilo.org/dyn/normlex/en/f?p=1000: 11200: 0:: NO: 11200: P11200_COUNTRY_ID: 102847

[8] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_618490.pdf

countries, such as France. In addition, while the legislation provides for a minimum supplement of 10 per cent, the provisions on the scope of collective bargaining specify that a company agreement or, failing that, a sector-wide agreement, may establish the wage supplement for overtime pay. In the absence of any applicable agreement, the supplement is set at **25 per cent for the first 8 hours of overtime**, **and 50 per cent for subsequent overtime hours**.

66. In this context, the Committee of Experts on the Application of Conventions and Recommendations reiterates, in an authentic interpretation of ILO standards on working hours and overtime pay, the need to provide, in all circumstances:

"**the payment of overtime hours in all circumstances at no less than 125 per cent of the ordinary wage rate**, irrespective of any compensatory rest granted to the workers concerned. The Committee emphasises the importance of additional hours being in all cases remunerated and paid at a higher rate than normal hours, even in the cases where compensatory time off is granted." (General Survey concerning working-time instruments, Report of the Committee of Experts on the Application of Conventions and Recommendations - Report III, Part B, adopted at the International Labour Conference, 107th Session, 2018; Ensuring decent working time for the future, para. 158, p. 61).[9]

67. In strict application of this international social standard, traditional Spanish industrial legislation, as was the case in the Labour Law of the Second Republic (Gaceta de Madrid No. 183, 2 July 1931),[10] **provided for a minimum increase in overtime, also set at the aforementioned 25 per cent over the ordinary working day**. However, Spanish legislation differentiated the amount of the premium or increase according to the criterion of the special effort that the ordinary working day represented (e.g. night work, work done on a public holiday or where the overtime hour raised the total working day above a minimum threshold) or depending on the sex of the worker (the premium was increased for women). In particular, Article 6 of that regulation states:

"*Article 6.... Each hour of overtime shall be remunerated by means of a premium* ***of at least 25 per cent over the normal hourly rate****. (...)*

Where overtime is worked at night or on Sundays or in excess of the first ten hours per day, the premium shall not be less than 40 per cent.

Overtime for female staff shall in any case be paid by means of a premium of at least 50 per cent, and the total working day may not exceed ten hours."

[9] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_618485.pdf
[10] https://www.boe.es/gazeta/dias/1931/07/02/pdfs/GMD-1931-183.pdf (p. 35)

68. As anticipated and now reaffirmed, Spain has ratified and maintains in force both International Conventions. In compliance with these texts, the Workers' Statute adhered to this increase and even went so far as to change it to 75 per cent above ordinary working hours in the regulations. However, subsequent reforms eliminated this minimum increase, which is binding for collective bargaining.

5. On the full satisfaction by the collective complaint of requirements for a decision on admissibility.

5.1. Spain accepted the collective complaint procedure on 1 July 2021.

69. The collective complaint is directed against the Kingdom of Spain. Spain has ratified the European Social Charter, both the 1961 version and the revised version, the latter having effect from 1 July 2021. This was stated in the **Instrument of Ratification of the European Social Charter (revised)**, done at Strasbourg on 3 May 1996, and published in Official State Gazette (BOE) No. 139 of 11 June 2021.[11] The ESCR entered into force for Spain **on 1 July 2021**, in accordance with the provisions of its Part VI, Article K(2) and (3). Likewise, the collective complaints procedure also came into force for Spain on 1 July 2021, when the respective declaration to that effect provided for in Article D of the revised ESC was issued. This declaration is set out in the ratification instrument filed on 17 May 2021 and published in the above-mentioned BOE. It is therefore fully in force as of the time of filing this collective complaint.

5.2. The complaint is thus admissible *ratione temporis* and *ratione materiae*.

70. The State of Spain's regulatory framework relating to the right to an increased rate of remuneration for overtime is clearly inconsistent with Article 4.2 ESC (described in paragraph 2, above, and examined in substance in the light of the aforementioned Article 4.2 in paragraph 5, below), having been adopted prior to 1 July 2021 (the date of effect of the ESCR and the collective complaint procedure for Spain). It therefore precedes the ratification of the ESCR and also the acceptance of the collective complaint procedure. This legislation is still in force at the time of lodging of this complaint. It therefore establishes a normative framework that endorses a legal and factual situation that continuously and persistently violates Article 4.2. ESC (e.g.: *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, §193; *Centre on Housing Rights and Evictions (COHRE) v. Croatia*, Complaint No. 52/2008, decision on admissibility of 30 March 2009, §18, and

[11] https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-9719

International Federation of Human Rights (FIDH) v. Greece, Complaint No. 72/2011, decision on the merits of 23 January 2013).

In short, the Committee has jurisdiction *ratione temporis* to hear this complaint.

71. In that context, the complaint concerns the breach of Article 4.2 ESC, a provision which was accepted by Spain. Spain has been bound by this provision since 1 July 2021, the date of entry into force of the treaty, although the same provision already existed in the initial version of the European Social Charter, done at Turin on 18 October 1961. The complaint must therefore also be deemed admissible *ratione materiae*.

5.3. Trade union presenting the collective complaint: Union General de Trabajadores (y trabajadoras) (UGT)

72. The Unión General de Trabajadoras y Trabajadores (UGT) is one of the most representative trade unions in Spain. As a labour union, it has had a long history of support for workers. It was founded in 1888. It is a constitutionally significant social body, according to Articles 7 and 28 of the Spanish Constitution, in line with constitutional doctrine established for that purpose, which recognises not only its nature as a contracting party but also its social and institutional nature (STC 18/1984). Since its legalisation in 1977 following the Franco dictatorship, the UGT has been structured internally as a trade union confederation composed of State federations which bring together working people from the various economic sectors. These structures are co-ordinated in the regional administrative areas by Autonomous Community unions. The Confederal Committee is the senior decision-making body between congresses and meets ordinarily once per year. After the UGT's 43rd Confederal Congress (May 2021), approval was granted for it to change its name to "Union General de Trabajadoras y Trabajadores de España", thus retaining its acronym, UGT. It is a member of the European Trade Union Confederation and is also affiliated to the International Trade Union Confederation.

For further information on the UGT, see (website address): UGT | Sindicato Unión General de Trabajadoras y Trabajadores de España (Spanish General Union of Workers)

5.4. Standing of the UGT to lodge collective complaints before the ECSR as the most representative trade union at State level

73. The UGT has the standing to lodge collective complaints under Article 1(c) of the Protocol. According to that rule, it is one of the organisations competent to submit complaints that challenge the unsatisfactory application of the revised ESC, as in this case in relation to Article 4.2. The UGT is one of the:

"*c) representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.*"

74. The UGT is competent and particularly qualified to report violations of labour rights recognised in the European Social Charter (first in its original 1961 version and then in its 1988 Protocol, and now in its 1996 revised version), as it has shown not only through its experience in the domestic arena but also over many years in which it has submitted observations to the Committee as part of the reporting system (the only one binding on Spain until the recent acceptance of the collective complaints procedure with effect from 1 July 2021). The UGT brings collective complaints through the organ that has that power under its statutes. The position of Secretary General of the UGT is currently held by Mr José María Álvarez Suárez.

75. In accordance with its Article 4, this complaint is submitted in writing and refers to a specific provision of the Charter, Article 4.2 ESC, which was accepted by the defendant Member State, Spain. The following section will specify to what extent that Party has not ensured satisfactory application of that provision (Section 6 below). In accordance with Article 5 of the implementing Protocol, this complaint is addressed to the person who holds the position of Secretary General and who is tasked with taking the most appropriate action, as provided for in this Article.

76. The Committee already assessed these considerations in a collective complaint lodged by the UGT before the ECSR, in the decision on admissibility of 14 September 2022 relating to Collective Complaint No. 207/2022, in which the claimant trade union sought a conclusion that the Spanish compensation system for unlawful dismissal did not comply with Article 24 ESCR. It states:

"3. *The Committee observes that Spain accepted the collective complaints procedure by a declaration made at the time of ratification of the Revised Charter on 19 May 2021 and that this procedure entered into force in respect of Spain on 1 July 2021.* In accordance with Article 4 of the Protocol, the complaint has been submitted in writing and concerns Article 24 of the Charter...".

6. On the merits of the collective complaint: reasons for the non-conformity of Spanish law with the right to an increased rate of remuneration for overtime work under Article 4.2 ESC, separately and in combination with the principle of non-discrimination (Article E).

78. Article 5 of the collective complaints Protocol requires the entity with standing to lodge complaints to set out precisely and specifically why, in its view, the contested national law, in this case Spanish law, does not fulfil, or conflicts with, the requirements laid down in the ESC provision concerned, in this case Article 4.2 (right to an increased rate of remuneration for overtime work).

The following pages will seek to explain clearly the arguments on which the UGT bases its collective complaint and seeks a finding of admissibility as well as an assessment of the complaint by the ECSR.

6.1. Current Spanish labour law does not guarantee per se an increased rate of remuneration for overtime work, as required by Article 4.2 ESC.

79. Article 35.1 of the Law on the Workers' Statute leaves it to collective bargaining or the individual contract to set overtime pay, in line with the conventional model. However, **unlike the provisions of the initial statutory labour law and its implementing regulations, *Article 35.1 of the current Law on the Workers' Statute does not generally guarantee an increase*** in the remuneration of overtime compared to the normal hourly rate, whether in the form of a premium, a financial increase or an alternative additional rest period. The minimum statutory rate, as a right unavailable in the case of individual autonomy, corresponds to the normal hourly rate, so the regulation allows that it may be equal to that rate.

In contrast, under the previous legislation, the minimum rate entailed an increase of remuneration of at least 75 per cent (STS, 4th, 10 November 2009, appeal 42/2008). The previous legislation also established a minimum percentage increase of remuneration for particularly demanding working hours, such as night shifts, **estimated to be at least 25 per cent higher than day shift working hours**. Current Spanish labour legislation, however, lacks mandatory numerical benchmarks for collective bargaining. The situation for overtime is less favourable or worse than for night work, because in the latter case specific remuneration must be set in collective agreements. In the case of overtime, though, collective bargaining is not obliged to set a higher specific amount, only a rate that is not lower than the rate for ordinary hours.

80. Consequently, the requirement laid down in Article 4.2 ESC is satisfied only in the case of companies and professional sectors where a bonus, premium or supplementary amount for overtime is established through collective bargaining (the main source of regulation of this issue, well above individual autonomy, especially in a context of labour relations in which one contracting party is in a weaker position). However, it is also well known that ECSR case law requires the guarantee of this increased remuneration for overtime to be established in general, which is far from being the case in the current regulation.

6.2. The ECSR has consistently held that Spanish law is not in conformity with Article 4.2 ESC, through the system of monitoring by means of reports.

81. It is the role of the ECSR to give opinions on Member States' conformity with the European Social Charter, both the 1961 and the 1996 (revised) versions. Spain has ratified both, although it only adopted the 1995 collective complaints protocol on 1 July 2021. As the right to an increased rate of remuneration for overtime is included in the 1961 European Social Charter as a guarantee of the effective exercise of the right to a fair remuneration (Article 4.2) or the right to reasonable working hours, with a progressive reduction in the working week (Article 2.1), the ECSR has issued several Conclusions on Spain in response to the national reporting system.

82. In exercising this function of monitoring compliance, the ECSR has consistently concluded, since the legislative change in Spain, that Article 35.1 of the Law on the Workers' Statute of Spain, against which this complaint is lodged by the trade union lodging its collective complaint, is not in conformity with Article 4.2 ESC of 1961. This interpretation must also be understood as being valid and effective for the revised version, now that Spain has also ratified it, because both versions have the same wording and content. This conclusion of non-conformity is thus clearly and unambiguously reflected in the most recent *conclusions* received by Spain, in *Conclusions XXII-3 (2022*). For example:

"Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 4§2 of the 1961 Charter on the ground that increased remuneration or an increased compensatory time off for overtime work is not guaranteed."[12]

83. In its previous conclusion, the Committee considered that the situation in Spain was not in conformity with Article 4§2 of the 1961 Charter because the Workers' Statute did not guarantee an increase in remuneration or increased compensatory time off for overtime (Conclusions XXI-3 (2018)). The Committee's new conclusion of non-conformity evidences a situation of repeated failure by Spain to ensure that workers who work overtime, which is very common in Spain, as demonstrated by the above-mentioned statistical evidence, are remunerated at a higher or supplementary rate in comparison to the ordinary working day.

[12] https://rm.coe.int/conclusions-xxii-3-2022-spain-e/1680aa9859

84. The Committee states that the purpose of Article 4§2 is to ensure that workers are rewarded for the extra work they do during overtime. Under this provision such reward must take the form of an increased rate of remuneration. However, the Committee recognises reward in the form of time off, provided that the aim of the provision is met. This means, in particular:

"… that where remuneration for overtime is entirely given in the form of time off, Article 4§2 requires that this time be longer than the additional hours worked (Conclusions 2014, Slovak Republic). The principle of this provision is that work performed outside normal working hours requires an increased effort on the part of the worker, who therefore should be paid at a rate higher than the normal wage (Conclusions XIV-2, Statement of Interpretation of Article 4§2)."

85. In short, **despite repeated conclusions of non-conformity of the Spanish law with Article 4.2 of the 1961 Charter, Spain has kept its regulation in place**, without guaranteeing the right to an increase (in financial terms or in terms of added equivalent rest periods) **in the remuneration of overtime**. Insofar as the wording of Article 4.2 of the 1961 Charter and that of the revised version is the same, and in view of the continuity between the ECSR doctrine set out in its Conclusions and the doctrine established in its Decisions on the Merits, the complainant trade union understands that the conclusion of non-conformity of Article 35.1 of the Law on the Workers' Statute must also apply with respect to the revised version. If the union has not submitted a complaint to this effect earlier, it is because Spain had not, until now, ratified the Additional Protocol on collective complaints. In fact, the ECSR has taken note in its conclusions of non-conformity of the UGT's critical position.

86. The complainant trade union also considers it important to bear in mind that this non-conformity takes place in a context of further non-compliance by Spain's legislation with the commitments of the European Social Charter. In its various conclusions for Spain, the Committee found the situation in Spain not to be in conformity with Article 2§1 of the 1961 Charter on the ground that the maximum weekly working time could exceed 60 hours in flexible working time arrangements and for certain categories of workers (Conclusions XXI-3 (2018); Conclusions XXII-3 (2022)).

87. The conclusion of non-conformity of Spanish regulations on overtime with Article 4.2 of the European Social Charter, which the complainant trade union respectfully requests from the ECSR, is even more compelling if one takes into account that the disregard of Spanish regulations on working time for the right to reasonable working hours may be even greater given the lack of legal provisions relating to and effective monitoring of "availability times" (on-call duty outside the place of work).

In its Conclusions XXII-3 (2022) for Spain, the ECSR postponed its assessment of this aspect of the regulation because it had not received sufficient information from the State of Spain, although it warned that, if in the next review such information was not provided (in our opinion, this will not be possible due to Spanish regulations and practice, which tend to consider availability times, even if they are remunerated at lower rates than those of effective working time, as rest time), a conclusion of non-conformity would be made. There is already reason to expect this assessment given the dissenting opinion accompanying these Conclusions, which considered that it should have been included in the assessment and that a conclusion of non-conformity should have been issued.

88. The complainant trade union considers it very relevant to insist that this conclusion of non-conformity of Article 35.1 of the Law on the Workers' Statute with Article 4.2 ESC (1961 and revised) is all the more pressing **if one takes into account that there is a widespread practice of unpaid overtime** across many sectors (such as banking, textiles, hotels, commerce and metal and car repair shops), as well as in companies with fewer than 50 workers (90 per cent of the companies in Spain).

89. Furthermore, the disproportionately negative impact of the situation on women, as reflected by statistical data and described in this collective complaint, must be emphasised. Official studies (labour force survey) and those of the complainant trade union[13] confirm that women suffer, by approximately 10 more percentage points, from higher rates of non-payment of overtime. The detrimental difference for women is not caused directly by Article 35.1 of the Law on the Workers' Statute, as the regulation is the same for both women and men, but by its practical application, insofar as for years women have been working many more unpaid hours than men in Spain. This constitutes indirect discrimination on grounds of gender, and it stems from sexist, social and cultural stereotypes in the labour market rather than from other, more specific factors. The reason for this is that it occurs in particularly feminised sectors characterised by greater precariousness and less control over the effectiveness of compliance with the rules, and also because of a lack of unitary representation. Moreover, the absence of specific and effective guarantees to prevent this difference in impact must be regarded, according to the doctrine of the ECSR, in accordance with the principles reiterated above, as a source of discrimination.

90. This greater differential in the abuse (through non-remuneration) of overtime to the detriment of women, which has been noted in official studies in Spain and in the

[13] Servicio de Estudios: 'La pandemia intensifica el uso de las horas extras' [The pandemic intensifies the use of overtime] (servicioestudiosugt.com)

reports of the complainant trade union, is also reflected in the comparative studies carried out by the International Labour Organisation (ILO) and the European Foundation for the Improvement of Living and Working Conditions (Eurofund).

These studies confirm that men accumulate more hours of paid work, while women do more hours of unpaid work.[14] According to these ILO and EUROFOUND studies, this gap is a reflection, as in the case of other gender gaps in the labour market, of both the gender-based distribution in the commercial sector (commerce, hotels, catering, health, etc.) and the unequal burden of family work. All of this would explain why unpaid hours are soaring among women, reaching 52 per cent, according to the labour force survey, an indicator that is updated quarterly, making its statistics quite reliable.

91. New ways of working are also having an impact. In this respect, teleworking and longer working hours from home are causing an increasing number of women to declare overtime hours that they used to work in the workplace, but for which they did not receive 'overtime', although they are not paid as such. In this context, 61% of teleworkers work overtime on a recurring basis and are not paid for it, nor do their companies compensate them with public holidays. Likewise, a clear distribution of the labour market along gender lines is also playing a role. The sectors that have recovered the most activity after the pandemic employ a high rate of women. A clear case in point is that in the healthcare sector, which is highly feminised, overtime has increased by 32.1%. For home-based activities, overtime increased by 24% compared to the pre-covid period. In the scientific sector (also feminised), overtime has increased by 30.7%.

92. It should also be noted that part-time work is even more prevalent among women (70 per cent of part-time contract holders are women). In Spain, as mentioned above, overtime is prohibited in this form of hiring, except in cases of force majeure, although there are additional (supplementary) hours, whose function is analogous to overtime (to give companies greater management flexibility by accumulating hours over and above those agreed), although they are paid as ordinary hours. Therefore, the regulation makes it easier to resort to the use of additional hours. Moreover, quarterly labour force surveys (the aforementioned official survey carried out by the National Statistics Institute) show that, despite their illegality, a significant number of overtime hours continue to be worked in part-time work, largely to the detriment of women.

The lack of effective monitoring leads to indirect discrimination, in addition to other forms of discrimination associated with these types of contracts (for a recent case of direct discrimination of part-time work with regard to overtime, see the Judgment of the Court of Justice of the European Union - CJEU - 19 October 2023, C-660/20).

[14] ILO-EUROFOUND (2019). Working conditions in a global perspective
https://www.eurofound.europa.eu/es/publications/2019/working-conditions-global-perspective

93. Against the background of these facts and reasons, the complainant trade union not only considers that there is a direct and independent violation of Article 4.2 ESC by Spanish regulation and practices relating to overtime. It also finds that this violation occurs in association or in combination with violations of the principle of equality within the meaning of Article E, given the indirect discrimination suffered by women workers in respect of increased overtime remuneration. Overtime in feminised jobs, as well as in part-time work, despite being unlawful, and the practice of higher unpaid overtime for women than for men, causes unjustified and unjustifiable disproportionate harm to women. The poorly monitored obligation to keep records of working hours is not helping to do away with these practices.

6.3. A decision on the merits (complaints system) condemning Spain's disregard of the conclusions of non-conformity it has been receiving through the reporting system is necessary, not only desirable.

94. The complainant trade union further argues that it is necessary to issue a substantive decision concluding that Article 35.1 of the Law on the Workers' Statute is not in conformity with Article 4.2 ESC (1961 and revised), given the lack of confidence in Spanish legal practice in the monitoring systems based on the Reports. The proof of this is the lack of attention to the ECSR's very clear position regarding the non-conformity on this point of Spanish (social) labour law, so that the discrepancy has been sustained over time. Therefore, and insofar as there is a genuine adversarial principle underlying the collective complaints procedure, a decision on the merits finding non-conformity, as requested, in keeping with what the ECSR has been reiterating for a long time through the Conclusions (system of monitoring through reports), will lead not only to reform in the law (legislative power), but also in case law and legal doctrines, which currently pay no attention, despite being obliged to do so by Article 96 of the Spanish Constitution as read with Article 10.2, to this non-conformity when performing due assessment of compatibility with international standards and treaties.

95. Such an assessment has not yet been carried out in Spanish legal doctrine or case law. One key reason is that they do not yet have a substantive decision from the ECSR that would make this clear and help guide the judicial application in Spain of regulations on overtime. Consequently, a specific ruling condemning the situation in Spain is particularly necessary and useful, which is why the Committee is respectfully called upon to restore the conformity of Spanish law with the ESC system. **This conformity ended following the reforms to the Law on the Workers' Statute, which eliminated the existence of quantitative rates for overtime hours in relation to ordinary hours**.

Such conformity and such rates are what are being sought from the ECSR through this collective complaint, with the aim of attaining compliance with Article 4.2 ESC itself and in combination with Article E.

6.4. An interpretation of Article 4.2 ESC in accordance with the relevant ILO Conventions requires that the normal hourly rate be increased by a minimum of 25 per cent.

96. The Committee has been demanding that the content of the social right guaranteed by the Charter be specific and effective, so that it is real, factual and predictable. To this end, on the basis of the necessary interpretation of Article 4.2 ESC in accordance with the relevant ILO Conventions on overtime work, and following the doctrine of the CEAR, a minimum rate for the increase for overtime has to be established. International standards and the repeated interpretation of the CEAR, which is consistent with the Committee's doctrine, **place this minimum rate of increase at an additional 25 per cent above the ordinary working hour**.

97. Certainly, in accordance with the application practice of the benchmark International Conventions ratified by Spain, national practice in most countries places this minimum increase at between 25 and 50 per cent. In Spain's earlier legislation, it stood at 25 per cent in the labour law of the Second Republic, and even reached 75 per cent in the original statutory legislation (1980).

98. While the complainant trade union is aware of the fact that a margin of discretion is left to States Parties to the European Social Charter, according to the settled doctrine of the Committee to which the complaint is addressed, for the purpose of complying with the commitments of the Charter, it is understood that the minimum to be established by the Committee should at least correspond to that set by the international standards: the 25 per cent increase of the normal hourly rate (General Survey concerning working-time instruments, Report of the Committee of Experts on the Application of Conventions and Recommendations - Report III, Part B, adopted at the International Labour Conference, 107th Session, 2018; Ensuring decent working time for the future, para. 158).[15]

[15] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_618490.pdf

6.5. Experience shows that application of the new regulation on the recording of working time is still not effective in ensuring the effectiveness of the overtime regime, and better monitoring of compliance is needed.

99. Given the case law of the ECSR, which requires an assessment not only of the regulatory framework but also of the experience of its application, the complainant union also requests the ECSR to assess the need to improve the mechanism for recording working time, given the regulatory shortcomings (unreliability of the records, which do not comply with EU law) and the inadequacy of monitoring practices.

In Conclusions XXII-3 (2022), the ECSR takes note of the new Article 34.9 of the Law on the Workers' Statute, which introduced the aforementioned obligation to keep daily records of the working time of the entire workforce, including the specific start and end time of the working day for each worker. This change was intended to facilitate the work of the Labour and Social Security Inspectorate with regard to the monitoring of hours worked and remuneration or compensation with equivalent rest periods of overtime. The obligation to record working hours also applies to telework.

100. However, as already explained above, neither the regulation nor the practical application is in line with the objective pursued by the legal change, which makes it extremely difficult to monitor overtime and thus comply with the purpose or principle underlying Article 4.2 ESC (1961 and revised).

101. This regulatory non-conformity stems from the absence of a legal guarantee requiring an objective, reliable and accessible system for recording working hours (ordinary or overtime) in all cases, because these matters are left to collective bargaining or, failing that, to unilateral decisions. The case law has accepted systems of self-declaration by the worker, albeit by means of a computer application. These systems are hardly in line with the CJEU's requirement that states take "all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation", which is imposed both on the public authorities (including the legislature) and, within the scope of their competence, also on the judicial authorities. However, it has already been mentioned that neither Article 35.5 of the Law on the Workers' Statute nor its Article 34.9 establishes any presumption in this respect, contrary to the case of part-time work in Article 12. 4(c) of the Law on the Workers' Statute.

The case law is very reluctant to provide an expansive interpretation of this technique of presumptions, a useful guarantee permitting the monitoring of overtime and, on this basis, making it possible to identity overtime hours and establish additional remuneration, thereby preventing fraud or abuse, and discouraging the use of overtime

in favour of hiring people. This is of particular importance given the persistently higher unemployment rate in Spain compared to all the countries of the Eurozone.

102. On the practical level, the extreme dysfunctional nature of this new working time recording regime is highlighted by the lack of significant change in Spain's statistics in this regard, given the high rates of overtime (over 13 million overtime hours per month, equivalent to more than 150 million overtime hours per year; equivalent to more than 180 000 jobs).[16] Moreover, almost half of these overtime hours are unpaid, thus exacerbating in practice the violation of the right to fair remuneration for overtime in Spain. Both of these findings highlight the enormous limitations of the Labour and Social Security Inspectorate's effective monitoring of these records. As set out above, there is also no transparency as to the intended improvements in this respect (algorithmic management).

6.6. Absence of grounds relating to the protection of public interest to justify restrictions on the right enshrined in Article 4.2 in accordance with Article G RESC.

103. To justify this clear contradiction or non-conformity, it is not reasonably possible to rely on the content of Article G of the ESCR, which provides:

"1. *The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II,* ***shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary*** *in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.*

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

104. However, it is clear, according to the ESC system and to settled ECSR case law, that such restrictions can only be taken into account if they are strictly necessary for the intended purposes and do not lead to a weakening of the guarantees of effectiveness provided for in Article 4.2 ESC (1961 and revised).

ECSR case law in this respect is clearly set out in decisions such as Conclusions III-1 Netherlands, decision on the merits of 2 December 2013, and Collective Complaint No. 83/2012, paragraphs 207 et seq., among others, in which it

[16] Servicio de Estudios: "Por una jornada laboral de 32 horas semanales [For a 32-hour working week]" (servicioestudiosugt.com)

interprets the need for a democratic society via the concept of "pressing social need", i.e. cyclical circumstances. Therefore, they cannot become structural, as has been the case in Spain.

105. Moreover, according to the ECSR, even in situations of economic crisis, states may not disproportionately restrict the social rights protected by the Charter (ESCR, *Greek General Confederation of Labour – GSEE - vs. Greece,* Complaint No. 111/2014, decision on the merits of 23 March 2017; ECSR, Conclusions XIX-II, 2009, General Introduction; *ECSR Federation of employed pensioners of Greece (IKA-ETAM) v. Greece,* Complaint No. 76/2012, decision on the merits of 20 December 2012, paragraph 75).

7. Findings and complaint

106. In the light of the legal argumentation and documentary evidence provided in the preceding observations, the normative, jurisprudential and practical situation in Spain regarding the right to increased pay for overtime is manifestly at odds with Article 4.2 ESC (1961 and revised), both on its own and in combination with Article E ESCR.

107. This non-conformity is consistent with that referred to in Conclusions XXII-3 (2022).

108. Since the text of Article 4.2 of the 1961 ESC (with which the ECSR found Spain to be in non-conformity) and that of Article 4.2 of the revised ESC are identical, and taking into account the absolute consistency and continuity between the ECSR doctrine established in the Conclusions and that set out in the Decisions on the Merits, the complainant trade union considers that the non-conformity of Article 35.1 of the Law on the Workers' Statute, and its set of regulations, as regards this aspect of the rules on reasonable working hours (Article 2.1 ESC) and their fair remuneration (Article 4.2 ESC) must be established through the decision on the merits resulting from this collective complaint procedure.

109. Given the constant failure of the Spanish authorities, both legislative and judicial, to carry out with due diligence this alignment of the national rules with those provided for in the European Social Charter on additional remuneration for overtime, despite the consistent conclusion of non-conformity issued by the ECSR through its Conclusions, the complainant trade union considers that a decision on the merits requiring a radical change of the situation in Spain is crucial.

110. The current Spanish regulation (Article 35.1 of the Law on the Workers' Statute) on overtime remuneration is also contrary to the relevant ILO International Conventions on working hours, despite Spain's having ratified both the 1919 and 1930 Conventions. In these international standards, the content of which also serves as a reference for the Committee to determine the specific and effective content of the social right protected by the ESC, in the case of Article 4.2, a minimum increase of 25 per cent is established.

111. If the complainant trade union has not lodged a collective complaint to this effect earlier, despite the constant criticism of the regulatory and practical situation of the Spanish overtime regime in the national reports, it is because Spain had yet to accept the collective complaints procedure.

Consequently, from the moment it was able to institute a legal (quasi-jurisdictional) challenge to Spain's breaches of the 1961 and revised ESC, it has done so, as is now the case in relation to overtime.

111. For these reasons, the UGT respectfully calls on the ECSR, as the highest body guaranteeing compliance with the ESC:

1) **To accept this collective complaint and declare it admissible so that it may be processed in accordance with the (adversarial) procedure laid down in the Protocol of 1995;**

2) **To conclude that Spanish regulations on overtime pay (Article 35.1 of the Law on the Workers' Statute, as well as all the respective legislation referred to in the arguments developed in this complaint), are not in conformity with Article 4.2 ESC (1961 and revised), separately and in combination with Article E ESCR, insofar as neither the Spanish regulations, nor the practice, guarantee, as a general rule, increased remuneration for overtime hours with respect to ordinary hours, to the detriment of women workers;**

3) **To take such action as is provided for in the ESC system to ensure that the State of Spain rectifies this breach of the right recognised therein to adequate protection in respect of overtime, in particular:**
   - **(i) a conclusion of non-conformity of Article 35.1 of the Law on the Workers' Statute;**
   - **(ii) the recognition, without prejudice to the State's margin of appreciation, of a minimum legal percentage of increased remuneration in relation to the normal hourly rate, in line with the requirements of international standards in force in Spain, which is set at a minimum of 25% above the normal hourly rate;**
   - **(iii) the inclusion of the requirement for a system to monitor working hours actually worked, which are much higher than those formally recognised in many cases (almost half of them unpaid, especially for women - difference of 10 percentage points).**

It is requested that the use of the Spanish language be allowed in this procedure, particularly for all written documents.

Madrid-Strasbourg 08 January 2024

[signature]

Mr José María Álvarez Suárez Ldo.

[signature]

Fernando Luján de Frias