



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

21 May 2024

Case Document No. 2

Confederación Sindical ELA v. Spain
Complaint No. 239/2024

OBSERVATIONS

Registered at the Secretariat on 14 May 2024



MINISTERIO
DE LA PRESIDENCIA, JUSTICIA
Y RELACIONES CON LAS CORTES

ABOGACÍA GENERAL DEL ESTADO

SUBDIRECCIÓN GENERAL DE ASUNTOS
CONSTITUCIONALES Y DERECHOS HUMANOS

TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

OBSERVATIONS ON ADMISSIBILITY

**COLLECTIVE COMPLAINT
No. 239/2024**

**CONFEDERACIÓN SINDICAL ELA
v. Spain**

On 28 March 2024 el Comité the Committee has communicated to the Kingdom of Spain the Collective Complaint submitted by the *CONFEDERACIÓN SINDICAL ELA*, which was registered on 12 March 2024 and has been given the reference no. 239/2023.

In this communication, the Spanish Government is invited to submit written observations on the admissibility of the complaint by 15 May 2024.

Accordingly, on behalf of Spain, we hereby submit observations on the admissibility of the complaint.

I. DESCRIPTION OF THE COMPLAINT

1. The complainant organisation requests the Committee to declare that in the Spanish system, the regulation of 16 weeks' birth leave and 16 weeks' additional leave to care for a newborn child in the case of single-parent families does not comply with Article 17 § 1.(a) of the Revised European Social Charter, among other provisions of that Charter that are alleged to have been violated.

II. ON THE ADMISSIBILITY OF THE COMPLAINT: lack of legal standing of the trade union involved

2. The Kingdom of Spain finds that the complaint, as detailed below, does not meet the requirement set out in Article 1(c) of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, which attributes standing to bring complaints to “*representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.*”
3. This is because the complainant is a trade union organisation which defends the interests of workers in a single part of the national territory – that is, workers of “*Euskal Herria*”, as noted in its Statutes-, and whose presence would be, eventually, limited to the territory of the Autonomous Communities of the Basque Country and Navarre.

4. The issue raised in the complaint at the origin of the present proceedings - the adaptation to the Revised European Social Charter of the regulation of childbirth and childcare leave in the Spanish system, in the case of single-parent families - is a general issue of national scope, insofar as it is a national regulation that applies throughout the national territory; in order to establish the representative nature of the national trade union organisation acting, the establishment, aims and activity of the *Confederación Sindical ELA* trade union at the national level must be assessed. And the result of this examination, as we shall see, leads to the rejection of the trade union's standing for the purposes of Article 1 (c) of the Protocol.

a) **The Committee's doctrine on the requirement of the "representative" character of the trade union submitting a collective complaint**

5. It is the Committee's well-established doctrine, dating back to the admissibility decisions in Complaints Nos. 6/1999 and 9/2000, in *Syndicat national des professions du tourisme v. France* and *Confédération Française de l'Encadrement (CFE-CGC) v. France*¹ and has been consistently reiterated, that the "representative" term used by Article 1(c) of the Additional Protocol is an autonomous concept, not coincides with the national notion of representativeness in the domestic sphere of each State.
6. In this regard, according to the Committee's doctrine, in certain cases the representative status, for the purposes of bringing a collective complaint before the Committee, of trade union organisations which have the status of "representative" at the internal level², may be rejected, but, on the other hand, the representative status of a trade union organisation which is not recognised as such at the internal level in a given area may be accepted in accordance with its doctrine³.

¹ "As regards the representative character of the trade union as referred to in Article 1 para. c, the Committee underlines that the representativity of national trade unions is an autonomous concept, beyond the ambit of national considerations as well the domestic collective labour relations context".

² In this regard, in the admissibility decisions of 28/01/2020 - delivered in *Syndicat CGT YTO France v. France*, Complaint No 174/2019 - or 13/05/2020 - delivered in *Syndicat CGT Ford Aquitaine*, Complaint No 184/2019, §§10 and 13 - the Committee denies "representative" status for the purposes of the collective complaints system to trade union organisations that do have representative status under domestic law.

³ "A trade union may be considered representative for the purposes of the collective complaints procedure whenever it exercises, in the geographical area in which it is based, activities in defence of the material and moral interests of personnel in a given sector, of which it represents a considerable number (Decision on admissibility of 12/09/2017, *Associazione Professionale e Sindicale (ANIEF) v. Italy*, Complaint 146/2017, §6).

7. In the absence of any development in the Additional Protocol - or in the Committee's Rules of Procedure - of the "representative" concept used in Article 1, and given that this is a broad concept that can be defined in different ways, the Explanatory Report of the Additional Protocol is often consulted, which states the following in relation to Article 1.(c):

“c. national organisations of employers and trade unions ...

*23. To ensure the efficient functioning of the procedure established by the Protocol and in view of the very large number of trade unions operating in some states, it was deemed necessary to stipulate that **the organisation must be "representative"**. The Committee of Independent Experts will judge whether the organisation meets this criterion when examining whether the complaint is admissible, in the light of information and observations submitted by the state and the organisation concerned (see Article 6). In the absence of any criteria on a national level, **factors such as the number of members and the organisation's actual role in national negotiations should be taken into account. ...**”*

8. On the basis of these explanations contained in the Explanatory Report, the Committee, when assessing the representativeness of a trade union organisation for the purposes of the collective complaints system, takes into account a number of reasons related to the union's effective presence in the area concerned by the complaint, such as the number of members affiliated to the trade union⁴, or the role it plays in collective bargaining (for all, among the most recent, decision on admissibility of 28 January 2020 in *Syndicat CGT YTO France v. France*, Complaint No. 174/2019).
9. The two reasons mentioned above do not, however, preclude other factors from being assessed. According to the Committee, the determination of the representativeness of a trade union - within the meaning of Article 1.(c) of the Additional Protocol - requires, **in each case, an overall assessment of the various circumstances involved in order to establish whether the trade union, for the specific complaint it is making through the collective complaint, and in the geographical area affected by that complaint⁵, is "representative"**, such as the

⁴ While not automatically denying the representativeness for the purposes of the collective complaints system of smaller, recently established organisations to the detriment of larger, long-established organisations (e.g. *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, no. 74/2011, decision on admissibility of 23/05/2012).

⁵ Decision on admissibility of 12/09/2017, *Associazione Professionale e Sindicale (ANIEF) v. Italy*, Complaint 146/2017, §6: “A trade union may be considered representative for the purposes of the collective complaints procedure whenever it exercises, in the geographical area in which it is based, activities in defence of the material and moral interests of personnel in a given sector, of which it represents a considerable number”.

nature of the organisation, its purpose or interests for whose protection it is being established - in accordance with its statutes -, the activity it carries out, or its effective presence in the corresponding territorial area⁶. It is interesting to note the Committee's particular emphasis on the need to assess the representativeness of a trade union for the lodging of a collective complaint in view of (among other reasons) the specific scope of the complaint (“*The Committee examines representativeness in particular with regard to the field covered by the complaint* ...” (case *Sindacato Autonomo Europeo Scuola ed Ecologia (SAESE) v. Italy*, decision on admissibility of 20 October 2020, §8; a criteria reiterated in *Associazione Sindacale Militari (ASSO.MIL.) v. Italy*, complaint no. 213/2023, decision on admissibility of 23 May 2023)

b) Transposition of the Committee's doctrine on the requirement of "representativeness" of the trade union to the present case

10. Concerning its **nature and purpose**, and in accordance with the *Confederación Sindical ELA*'s Statutes available at its web (not provided by the complainant organisation), it is **a trade union “for Euskal Herria’s workers”**, which is **constituted for the better defence of their rights, interests and wishes in their working and living environment** [i.e. the rights, interests and wishes of the workers in that area of the territory] (Article 2 § 1 of the Statutes), specifying that its territorial scope of action is that of the territories that the organisation describes as forming part of "Euskal Herria" (Article 2 § 1 of the Statutes: "*Its territorial scope, historically defined, is that of the four territories of the peninsular Euskal Herria, Araba, Bizkaia, Gipuzkoa and Nafarroa*").

We are therefore dealing here with a "trade union" - there is no doubt as to the strictly trade union nature of the organisation - which was set up to defend the interests of workers in a specific region of the national territory, which operates in that territorial area and which is made up of workers from that region.

⁶“*The Committee consider that the number of members and the role performed at the national negotiations are not conditions of an exclusive nature (see Explanatory Report to the Additional Protocol to the Charter). It accordingly makes an overall assessment to establish whether or not an employers’ organisation or a trade union is representative within the meaning of Article 1§c of the Protocol*” (FFFS v. Norway, cited above, §20)

11. As regards **the establishment of the trade union organisation**, the *Confederación Sindical ELA* only refers to its status as “most representative trade union” [*sindicato más representativo*] under Article 7 of the Institutional Law on Freedom of Association, although the complaint does not provide specific data on its actual establishment, scope of activity, number of members or number of representatives it has, in territorial and national terms.

Indeed, it can be seen that the trade union organisation concerned does not provide any data or information that would allow the Committee to assess that in the geographical area covered by the present complaint - namely, at the national level, since the legislation whose compliance with the Charter is State legislation, which applies throughout the national territory - the trade union is sufficiently well-established to be considered representative in the sense required by the system of collective complaints.

12. If we look at the information appearing at the website -<https://www.ela.eus/es/>- it is noted that the trade union concerned has a representativeness of the 35% - it is not made clear whether this figure refers to the territory of the Autonomous Community of the Basque Country, or also to the territory (in whole or in part) of Navarre - in the sense that in this area it represents the 35% of workers or employees in the private and public sectors.

Bearing in mind that the Autonomous Community of the Basque Country, according to the official population data published by the National Institute of Statistics⁷, has a population of 2,213,993 people, and that the total national population is 47,385,107 people, it can be seen that the *Confederación Sindical ELA* would then be 35% representative in an area of national territory in which 4.67% of the total population of Spain lives, which means a representativeness of 1.63% in national terms.

13. With regard to the organisation of the trade union, also according to the information provided on the website itself, it can be seen that the trade union - as stated in its Statutes - is exclusively territorial in scope, being organised in four "*uniones comarcales*" [regional entities] - *Alava, Vizcaya, Guipúzcoa* and *Navarra* - with no evidence of any organisational structure outside that territory.
14. In the light of the foregoing, the Government of Spain is of the view that it cannot be affirmed that the trade union organisation in question meets the requirement of

⁷ <https://www.ine.es/jaxiT3/Datos.htm?t=2915>

"representativeness" in Article 1(c) of the Additional Protocol, in the framework of the complaint raised.

Indeed, the complaint raised by the organisation refers to an aspect of national legislation that is applicable to the entire territory of the State, so that **the scope of the complaint is national**, and yet the complainant organisation carries out its activity in a specific geographical area (an Autonomous Community), its purpose being the protection of the specific interests of workers in that geographical area.

15. Accordingly, and without prejudice to the fact that domestic law acknowledges the status of "most representative trade union" [*sindicato más representativo*] (which can allow it to develop some institutional representativeness and participation in matters of general scope) to the *Confederación Sindical ELA*, it does not mean that they have "representativeness" before an international body such as the European Committee of Social Rights and can intervene by lodging a collective complaint. In particular, when **the status of "most representative trade union" is only recognised at the regional level**, an aspect that is omitted by the complainant, which states that it "holds the legal status of most representative trade union", or that it "is representative at the national level", although the truth is that **it does not have the status of "most representative trade union" at the national level**, but only at the regional level.
16. It is striking that, although the complainant is aware of the doctrine of the European Committee of Social Rights on the concept of "representativeness" of trade unions⁸, it does not, however, provide the Committee with any specific data or information, beyond the mere fact that the *Confederación Sindical ELA* is "representative" according to national legislation - because it has a "special audience" in the Autonomous Community of the Basque Country, as it states - which would allow it to be inferred that by applying the criteria used by the Committee, referred in its observations, it should be considered "representative" before the Committee⁹.
17. Finally, it should be noted that the complainant organisation, as pointed out in its written statement, is a trade union member of the European Trade Union Confederation (ETUC), which means that, although it cannot, as an individual, directly lodge a collective complaint with the Committee on a State-level issue, it

⁸ In its written statement, the complainant organisation considers that "representativeness" for the purpose of collective complaints is an "autonomous concept" - "not having the same scope as the national concept of representativeness", as acknowledged by them - and the committee therefore should examine a "set of criteria" when assessing the representativeness of a trade union in each case.



can do so through the European Confederation to which it belongs, whose standing in this area is beyond doubt, being therefore the appropriate channel for doing so.

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

To declare the collective complaint submitted by the *Confederación Sindical ELA, inadmissible*, on the ground that the complainant organisation lacks standing in accordance with the explanations contained in these observations.

In the event that the complainant organisation submits allegations in response to the present observations, we request that they be transmitted to the Kingdom of Spain, in order to submit the corresponding reply, if appropriate, in accordance with the provisions of Rule 29 § 3.bis of the Committee's Rules.

Madrid for Strasbourg, 14 May 2024

THE CO-AGENT OF SPAIN

Heide-Elena Nicolás Martínez