31/12/2021 RAP/Cha/ESP/34 (2022)

EUROPEAN SOCIAL CHARTER

34th National Report on the implementation of the European Social Charter

submitted by

THE GOVERNMENT OF SPAIN

Articles 2, 4, 5 and 6 of the European Social Charter of 1961

Articles 2 and 3 of the Additional Protocol of 1988

for the period 01/01/2017 – 31/12/2020

Report registered by the Secretariat on

31 December 2021

CYCLE 2022

VICEPRESIDENCIA
SEGUNDA DEL GOBIERNO

MINISTERIO
DE TRABAJO
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SECRETARÍA GENERAL TÉCNICA

SUBDIRECCIÓN GENERAL DE
RELACIONES INTERNACIONALES
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EUROPEAN SOCIAL CHARTER

34th NATIONAL REPORT (SPAIN) ON THE APPLICATION OF PROVISIONS FROM THE THEMATIC GROUP CONCERNING LABOUR RIGHTS AND ADDITIONAL INFORMATION REQUIRED IN CONCLUSIONS XXI-3 (2018) OF THE EUROPEAN COMMITTEE ON SOCIAL RIGHTS (ECSR)

Presented herein is Spain's 34th National Report, in accordance with article 21 of the European Social Charter on the measures adopted to put into effect the provisions of the Charter, ratified by Spain on 6 May 1980. In preparing this Report, due account was taken of the Committee's specific and strategic approach, adopted in 2019 and continued in 2020.

Under this approach, the Committee does not require national reports to address all of the provisions accepted in the Group, as was the case until 2019. Therefore, those provisions not falling within any of the following situations have been excluded:

• Those related to other provisions that are the subject of specific questions.
• When the previous conclusion was one of non-conformity.
• When the previous conclusion was postponed due to lack of information.
• When the previous conclusion was one of conformity pending the receipt of specific information.

This report provides information regarding the THEMATIC GROUP CONCERNING LABOUR RIGHTS, which includes the following articles:

- **2 (The right to just conditions of work)**
- **4 (The right to a fair remuneration)**
- **5 (The right to organise)**
- **6 (The right to bargain collectively)**
- **2 (Right to information and consultation) and 3 (Right to take part in the determination and improvement of the working conditions and working environment) of the Additional Protocol of 1988.The period of reference for the 2022 Conclusions is from 1 January 2017 to 30 December 2020.**

In accordance with article 23 of the European Social Charter, copies of this Report have been sent to the leading trade union and business organisations.

Article 2 - The right to just conditions of work

Paragraph 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

The Committee concludes that the situation in Spain is not in conformity with article 2.1 of the 1961 Charter, because the maximum working time may exceed 60 hours per week, within the framework of flexible work time formulas and for certain categories of workers.

1. As regards this conclusion of non-conformity, no changes were made to articles 34 and 37 of the Workers' Statute Act during the period of reference of this Report. However, Spanish legislation is in accordance with the requirements of the European Social Charter, especially in light of article 2.1 of the Charter, regarding which we believe the following arguments should be accepted:

> "**1.** In relation to this conclusion, first of all, we reiterate that the Committee of Experts is misinterpreting the European Social Charter, by specifying and quantifying the number of hours of work considered reasonable, and by assuming that any excess represents non-compliance with the European Social Charter. In fact, the Charter refers exclusively to the establishment of a reasonable working day, without going into further detail. Spain believes its labour law system to be totally reasonable, given that, under said system, the maximum length of the working week is, in general, 40 hours, which is eight hours below the limit stipulated in the EU law of reference. Moreover, and as is well known, this limit is exceeded by the countries that make use of the derogation provided for in article 22 of Directive 2003/88.
>
> Spain's working hours fall within the European limit and are applied in combination with the possibility that by collective agreement or, failing that, by agreement between the company and the workers' representatives, and therefore by the joint will of the employer and the workers' representatives, an irregular distribution of working hours over the course of the year may be established, as an element of flexibility in the organisation of work time. This has no impact on the total sum of work performed and nor, therefore, on the health and safety of the workers concerned. However, it is true that, following the 2012 labour reform, in the absence of an agreement, this kind of irregular distribution of working hours over the course of the year may be decided unilaterally by the company. Nevertheless, this possibility is limited to a maximum of 10% of working hours.
>
> The Committee's interpretation of our legal system assumes the general application of what is in fact a specific exception allowed by the regulations, combining criteria of protection for workers' health and safety with the flexibility required by the productive organisation.
>
> We would also stress that, under the regulations currently in force in Spain with respect to working hours, the possibility of the working week exceeding 60 hours—a limit that we reiterate is not stipulated in the Charter—is more a theoretical possibility than a reality, as evidenced by the approach taken to the question in collective agreements.

The irregular distribution of working hours is one of the most common clauses addressed in collective agreements, both sector-wide and within individual companies.

In the main, these clauses are intended to restrict the possibilities granted in this regard to the company by the Workers' Statute, usually by limiting the number of daily or weekly hours of work that the company may require.

The texts of several sectoral collective agreements that contain this type of clause are reproduced below[1].

- Collective agreement for the footwear industry (art. 23)

Companies, for unequivocal reasons of productivity, and to meet the needs arising from an accumulation of work, may make up to 10% of annual working hours more flexible (180 hours a year), distributed throughout the week from Monday to Friday, whilst always respecting the total number of hours worked per year.

(…) ***When, due to this flexible distribution of working hours, more than nine hours are worked per day (in no case may the company require more than ten hours), the tenth hour shall be compensated with an additional 15%,*** *to be made effective either by increasing the worker's rest time by 15%, or by increasing the amount paid for this hour by 15%.*

- National collective agreement for retail drugstores, herbalists and perfume stores (art. 32.2)

Notwithstanding the provisions of article 84 of the Workers' Statute regarding companies' work schedules, management may impose a flexible timetable regarding up to 10% of the annual hours subject to this Agreement, and class them as ordinary, despite their irregular nature, within the calculation of the annual hours worked.

These flexible hours shall be applicable on the working days corresponding to each worker according to the company's work schedule, and may exceed the daily limit of 8 hours per day established herein, always respecting the minimum rest periods established in current legislation and in this Agreement.

In general, the ordinary eight-hour working day may be exceeded by no more than one hour*, except when performing inventories and preparing balance sheets.*

The timetable extensions provided for in this article may be introduced at times other than the opening hours of the establishment to the public. In the event of a variation from the usual schedule, at least fifteen days advance notice must be given. If such extensions concern a Sunday or a public holiday, the hours shall be compensated as overtime or with an equivalent rest period, at the worker's discretion. The same remuneration

[1] (Source: MITRAMISS. Register of collective agreements) https://expinterweb.empleo.gob.es/regcon/pub/consultaPublicaEstatal

shall be paid for all hours worked on normal work days in excess of eight hours.

In all cases, the extension of the working day as a consequence of this irregular distribution and of the application of flexible hours cannot be applied to workers whose presence in the workplace is time-limited for reasons of safety, health, childcare, pregnancy or lactation.

Any compensatory rest period corresponding to the worker can be taken freely, provided it does not coincide with peak production periods, and preferentially by agreement with the workers' representatives or with the worker in person. In the event of disagreement, it shall be accumulated as full days and must be taken within four months of the beginning of the flexible work period.

- 7th national collective agreement for the sector comprising manufacturers of gypsum, plaster, whitewash and constituent products (art. 34)

The companies may distribute the working hours established in the previous article throughout the year, regularly or irregularly, with respect either to the entire workforce or to specific sections or departments, during seasonal periods or depending on the forecast workload, or variations in product demand or other aspects affecting the company.

When the company imposes an irregular distribution of working hours, said distribution shall be subject to the following limits: ***daily working hours may not be less than 7 or more than 9 hours; weekly working hours may not be less than 35 or more than 45 hours****.*

- 5th national collective agreement for tax administrators and advisors (art. 22)

During periods of maximum commercial activity, *as a special timetable provision,* ***companies may incorporate an irregular distribution of working hours*** *into annual work schedules****. In this case, the weekly workload, including overtime, may not exceed 48 hours*** *and must respect the daily and weekly rest periods stipulated in the Workers' Statute.*

- National collective agreement for the dairy industry and related products (art. 16)

Within the annual calculation presented at the beginning of this article, companies may employ 90 hours per year for the irregular distribution of working hours, which may be freely distributed throughout the year, in order to meet production needs. ***In applying this irregular distribution of working hours, and unless there is an individual or collective agreement to the contrary, a worker may not be obliged to extend his/her ordinary working day by more than 2 hours per day or to reduce it by more than 1 hour****.*

- Collective agreement for the wood sector (art. 47)

Companies shall be allowed to distribute the working hours established in the previous article throughout the year, according to regular or irregular

patterns. This regularity or irregularity may affect either the entire workforce or be applied in different ways by sections or departments, during seasonal periods, depending on forecast variations in workload and product demand.

The above-described distribution of working hours must be established and published before 31 January of each fiscal year. However, the aforementioned calendar may be modified no more than once before 30 April. Once the new calendar has been established, any modifications must be carried out in accordance with the provisions of articles 34 and 41 of the Workers' Statute, without prejudice to the provisions of paragraph 4 hereof.

When the company imposes an irregular distribution of working hours, it shall be restricted by the following limits: daily working hours may not be less than seven or more than nine hours; weekly working hours may not be less than 35 or more than 45 hours.

2. In relation to the Committee's request for information regarding the rules applicable to the on-call system and the specific question of whether periods of inactivity during the on-call period are counted, in whole or in part, as rest time, it must be conceded that Spanish law—which is fully in line with 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—currently has no general legal provision regulating availability times. However, there are specific regulations for certain sectors, including those for various transport sectors and for work at sea set out in Royal Decree 1561/1995 of 21 September, on special working hours, as well as those contained in Royal Decree 1146/2006 of 6 October, which regulates the special employment relationship for the postgraduate training of specialists in health sciences. Apart from these specific regulations, this question is addressed in collective agreements, whether sector-wide or company-by-company. All regulations in this regard must necessarily respect the legal standards established and be upheld both in individual employment contracts and, of course, in the performance of the employment relationship.

In all cases, the Spanish courts, following the criteria of the Court of Justice of the European Union, clearly distinguish between on-call obligations requiring the worker's physical presence in the workplace, and those merely requiring that the worker be contactable. In the latter case, the worker has freedom of movement, to stay at home or to be elsewhere, at his/her discretion, remaining accessible via telephone or pager and available to receive instructions to attend the workplace designated by the employer.

With respect to on-call obligations requiring the worker's physical presence, Spanish courts have ruled that if this duty prevents workers from freely organising their time, due to the obligation to attend matters within a certain period of time, or for any other reason, this on-call time may be considered work time (STJUE: ECLI: EU: C:2021:722).

By way of example, the judgment of the Supreme Court of Spain (Labour Chamber), handed down on 27 January 2009, includes the following text:
http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=4456541&links=tiempo%20de%20trabajo%20efectivo&optimize=20090312&publicinterface=true

"… /… The most recent case law of the Chamber continues to emphasise the difference between hours in which a worker is contactable and hours of work, as can be seen in the judgments of 27 February 2001 (RJ 2001, 2821) and 11 October 2006 (RJ 2006, 9381), in which it is stated that hours may only be excluded from the computation of the working day when corresponding to contactable on-call shifts or mixed on-call shifts of a proportion whereby such time is not considered to constitute effective work time. Furthermore, this exclusion cannot be applied to actual work performed or to time spent at the workplace. This stipulation clearly indicates that contactable on-call shifts, during which the worker is not physically presence in the workplace or at a place designated by the employer, are not considered working time. The same criterion is reflected in the judgments of the Court of Justice of the European Communities of 3 October 2000 (ECJ 2000, 234) (SIMAP case) and 9 September 2003 (ECJ 2003, 250) (Jaeger case), which distinguish between: 1) On-call duty performed on a contactable basis, without mandatory presence in the health centre, a situation that cannot be considered work time, since during this period workers can organise their time with fewer limitations and dedicate themselves to personal affairs, and 2) in-situ on-call duty, when the worker is obliged to remain available to work in the place determined by the employer for the entire duration of the service in question. In this situation, workers are subject to considerably more burdensome limitations, since they are separated from their families and social environment and enjoy less freedom to manage the time during which their professional services are not required. Therefore, the limitations inherent to in-situ on-call duty cannot be equated with the absence of limitations and the freedom of movement inherent to contactable on-call duty, as the appellant claims. In both modes of employment there are important limitations depending on availability. What varies is the intensity, which ranges from very strong or almost absolute when physical presence is required, to a level that is much less acute and is compatible with personal activities, when the worker is merely required to be contactable. The judgment of 1 December 2005 (TJCE 2005, 361) (Dellas case) underscores this distinction… /… "

2. Regarding the measures adopted in response to the Covid-19 pandemic, aimed at facilitating the enjoyment of this right, among which the Committee notes the establishment of flexible working hours, teleworking and measures to assist working people with children during the closure of schools, the following points should be noted:

- Article 5 of Royal Decree-Law 8/2020 of 17 March, on extraordinary urgent measures to address the economic and social impact of Covid-19, established the preferential nature of teleworking as an exceptional measure to guarantee the resumption of normal labour relations once the exceptional public health situation had elapsed. This measure, pursuant to article 15 of Royal Decree-Law 15/2020 of

21 April, remained in force until two months after the state of emergency had ceased to apply.

However, the widespread adoption of remote working during the health crisis revealed the need to improve ordinary labour regulations in this respect, creating a framework that would offer legal certainty to the parties to the employment relationship regarding their rights and obligations in this mode of service provision. Consequently, Royal Decree-Law 28/2020 of 22 September, on remote working, was approved. This was later superseded by Act 10/2021 of 9 July, on remote working.

- Furthermore, article 6 of the aforementioned Royal Decree-Law 8/2020 of 17 March, establishes the right of workers who are able to substantiate that they need to take care of their spouse or partner, or a first or second-degree relative, to be able to modify or reduce their working hours when exceptional circumstances arise in relation to necessary actions taken to prevent the spread of Covid-19. This measure has been subject to successive extensions given the persistence of the exceptional public health situation. Its validity has currently been extended until 28 February 2022.

- Although it is not directly related to the health crisis, article 34.8 of the Workers' Statute was amended by Royal Decree-Law 6/2019 of 1 March, on urgent measures to guarantee equal treatment and opportunities for women and men in employment and occupation, in order to establish the right of workers to request modifications to the duration and distribution of their working day, the organisation of their working time and the way in which they work. This provision was adopted in order to ensure the effective application of their right to reconcile work and family life.

Paragraph 3 - To provide for a minimum of four weeks' annual holiday with pay

The Committee concludes that the situation in Spain is not in conformity with article 2.3 of the 1961 Charter, because not all employees have the right to take at least two weeks of uninterrupted holiday during the year.

1. Article 2.3 of the revised Charter establishes the commitment of the Contracting Parties to grant paid annual leave of at least four weeks, without referring to the need for two of them to be taken uninterruptedly. Spanish regulations are fully compatible with this mandate, since article 38 of the Workers' Statute recognises a period of paid annual leave, not substitutable by financial compensation, to be stipulated in a collective agreement or individual contract. In no case may the duration of said leave be less than thirty calendar days. In addition, this period of paid leave shall be established by agreement between the company and the worker, in accordance with the content of collective agreements on annual vacation planning.

This configuration of the right to paid annual leave is also in accordance with article 8 of the ILO Holidays with Pay Convention (C-132, 1970), which states that one of the parts of the holiday period must consist of at least two uninterrupted working weeks, unless otherwise provided in a binding agreement between the company and the person concerned.

2. Notwithstanding the foregoing, it is customary for collective agreements to determine an uninterrupted vacation period of two weeks, as shown in the following examples:

- General Collective Agreement for the Construction Sector (article 72)
The personnel to whom this General Agreement applies, regardless of their type of employment contract, shall be entitled to a period of paid annual leave of thirty calendar days, of which twenty-one days must be working days. This leave shall be distributed in ***periods of at least ten working days****. Each such period must always begin on a working day other than a Friday.*

- Collective agreement for the commerce sector in the Balearic Islands (article 36)
All workers included in this Agreement shall enjoy a paid vacation period of 31 calendar days each year. ***At least 15 days, to be taken uninterruptedly****, shall be granted in the summer season, unless an agreement to the contrary is reached between the company and the worker. The remaining days may be taken at another time. The summer season is defined as the period from 1 June to 15 October, inclusive. (...)*

- Agreement for the catering sector in Santa Cruz de Tenerife (article 27)
The workers included in this Agreement shall be entitled to paid annual leave of ***thirty uninterrupted calendar days*** *or the part proportional to the time worked. However, by common agreement, the parties may divide the vacation period into* ***two parts, neither of which may be less than 15 days****.*

Paragraph 4 – To eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupation

The Committee states that it requires additional information to assess the situation regarding article 2.4 of the Charter.

1. Regarding the elimination or adequate reduction of the risks inherent to dangerous or unhealthy occupations, the corresponding regulation is Act 31/1995 of 8 November, on occupational health and safety (LPRL). Article 14 of this Act establishes the right of all workers to effective protection in terms of health and safety at work and a correlative duty of the employer to protect workers against occupational risks. This duty of protection of the employer is specified in section 2 of the aforementioned article, as follows:

> "In compliance with the duty of protection, employers must guarantee the health and safety of their employees in all aspects of the work. For these purposes, within the framework of their responsibilities, employers must minimise occupational risks by incorporating preventive activities into company policies and adopting whatever measures are necessary to protect the health and safety of workers. Detailed stipulations are made in subsequent articles regarding the occupational risk prevention plan, risk assessment, provision of information, worker consultation, participation and training, action to be taken in cases of emergency and imminent severe risk, and health monitoring. All of these measures should be undertaken

through the constitution of an appropriate organisation and the provision of the necessary resources as described in chapter IV of this Act.

As part of an ongoing process, employers must monitor their risk-prevention activities to constantly enhance the identification, assessment and control of any risks that have not yet been avoided and to identify current levels of protection. In addition, employers must supply the necessary means to adapt the risk-prevention measures indicated in the previous paragraph to any modifications required by circumstances that may arise, affecting the work performed.“

The integration of preventive action into the company's activities is specified in a number of general principles and details in article 15 of the LRPL regarding the general duty of prevention, as follows:

“1. The employer must apply the measures comprising the general duty of prevention stipulated in the previous article, in accordance with the following general principles:

a) Avoid risks.
b) Assess the risks that cannot be avoided.
c) Address risks at their source.
d) Adapt the work to the person, in particular with regard to the design of tasks, the choice of equipment and the work and production methods employed, seeking, in particular, to alleviate the impact of monotonous and repetitive work and to reduce its detrimental effects on health.
e) Take into account the evolution of technical aspects of production.
f) Replace dangerous aspects of work with others presenting little or no danger.
g) Plan for risk prevention, seeking a coherent set of policies addressing technical questions, the organisation of tasks, working conditions, labour relations and the influence of environmental factors in the workplace.
h) Adopt measures prioritising collective protection over individual protection.
i) Give workers the necessary instructions.

2. When assigning tasks, the employer must take into account workers' professional capabilities in terms of health and safety.

3. The employer must adopt the measures necessary to ensure that only workers who have received sufficient and appropriate information can access areas presenting specific, serious risks.

4. The preventive measures adopted must take into account any potential distractions, as well as any imprudent (though not reckless) actions the worker may carry out. In adopting these measures, additional risks that may be posed by certain preventive measures must also be considered. However, such measures should only be adopted when the magnitude of any risks thus produced is substantially less than that of those to be controlled, and when there are no safer alternatives […]“

2. The second part of article 2.4 of the revised Charter refers to the commitment of the Contracting Parties, where it has not yet been possible to eliminate or sufficiently reduce occupational risks, to provide workers with a reduction in working hours or additional paid holidays.

As regards reducing working hours for certain occupations, we reiterate the observations made in Spain's 30th National Report regarding the application of provisions from the thematic group concerning labour rights, specifically, that for some occupations special limitations on the length of the working day are stipulated in **Royal Decree 1561/1995 of 21 September, on special working hours**.

Additionally, it should be taken into account that the organisation and management of work, including working time, are understood in article 4.7.d) LPRL as working conditions. From a joint reading of the latter with the aforementioned article 15.1.g) LPRL, it can be deduced that Spanish law does not provide for the limitation of exposure to risks by reducing their duration as a compensatory measure, but rather as one of various organisational measures taken to protect workers' health and safety. In this respect, numerous regulations stipulate the company's obligation to adopt appropriate technical and/or organisational measures to reduce workers' exposure to risk. See, for example, the following provisions:

- **Royal Decree 374/2001 of 6 April, on the protection of workers' health and safety against risks related to chemical agents during work.**

The purpose of this Royal Decree, in the framework of Act 31/1995 of 8 November, on occupational health and safety, is to stipulate the minimum provisions for protecting workers against the risks produced by, or that may arise from, the presence of chemical agents in the workplace or from any activity involving chemical agents.

Article 4, which includes the general principles for the prevention of risks from chemical agents, states, among other precepts, the following:

"Risks to the health and safety of workers in work involving hazardous chemical agents must be eliminated or minimised by:

Minimising the number of exposed or potentially exposed workers.

Minimising the duration and intensity of any exposure."

- **Royal Decree 286/2006 of 10 March, on the protection of workers' health and safety against risks related to exposure to noise.**

The purpose of this Royal Decree, in the framework of Act 31/1995 of 8 November, on occupational health and safety, is to stipulate the minimum provisions for protecting workers against health and safety risks produced by, or that may arise from, exposure to noise, particularly risks to hearing.

Article 4, which regulates the provisions aimed at avoiding or reducing exposure, states that the risks produced by exposure to noise must be eliminated at their source or reduced to the lowest possible level, taking into account technical advances and the availability of risk control measures at source. Specifically:

"The reduction of these risks must be based on the general principles of prevention set forth in article 15 of Act 31/1995 of 8 November, taking into particular consideration:

a. Noise reduction through better organisation of work:

1. Limiting the duration and intensity of exposure;
2. Properly organising working time.

On the basis of the risk assessment mentioned in article 6, when a given action causes the exposure limits to be exceeded, the employer must establish and implement an appropriate programme of technical and/or organisational measures, as part of its risk prevention planning, to reduce exposure to noise, taking particular account of the measures mentioned in section 1."

- **Royal Decree 1311/2005 of 4 November, on the protection of workers' health and safety against the risks produced by, or that may arise from, exposure to mechanical vibrations.**

The purpose of this Royal Decree, in the framework of Act 31/1995 of 8 November, on occupational health and safety, is to stipulate the minimum provisions for protecting workers against the health and safety risks produced by, or that may arise from, exposure to mechanical vibrations. Article 5 thereof, on provisions aimed at preventing or reducing exposure, stipulates that:

"On the basis of the risk assessment mentioned in article 4, when the values specified in paragraph 1.b) and in paragraph 2.b) of article 3 are exceeded, the employer must design and implement a programme of technical and/or organisational measures aimed at reducing to a minimum any exposure to mechanical vibrations and the risks deriving therefrom, taking into particular consideration:

a. Limiting the duration and intensity of exposure.

b. Properly organising working time."

- **Royal Decree 486/2010 of 23 April, on the protection of workers' health and safety against risks related to exposure to artificial optical radiation.**

The purpose of this Royal Decree, in the framework of Act 31/1995 of 8 November, on occupational health and safety, is to stipulate the minimum provisions for protecting workers against the health and safety risks produced by, or that may arise from, exposure to artificial optical radiation during their work. Article 4 thereof, on provisions aimed at preventing or reducing exposure, stipulates that:

"On the basis of the risk assessment mentioned in article 6, if there is a possibility of exposure limit values being exceeded, the employer must design and implement an action plan, as part of its risk prevention planning, which must include technical and/or organisational measures aimed at preventing exposure from exceeding said limit values, paying particular attention to the following aspects: limiting the duration and the degree of exposure."

Article 4 – The right to a fair remuneration

Paragraph 1 - To recognise the right of workers to a remuneration such as will give them and their families a decent standard of living

The Committee concludes that the situation in Spain is not in conformity with article 4.1 of the 1961 Charter, because the minimum wage for private sector workers and the minimum wage for public sector employees are not sufficient to ensure a decent standard of living.

1. Firstly, it should be noted that the Committee's conclusion of non-conformity is due to the omission of information regarding issues such as net minimum wages and average income for the period of reference, social benefits for workers earning the minimum wage, the collective bargaining coverage rate and minimum wages set forth in agreements, and minimum wages applicable to economically dependent self-employed workers (TRADE, its Spanish acronym).

2. With respect to the period of reference covered by this report, note should be made of the following provisions:

- **Royal Decree 742/2016 of 30 December, which set the minimum wage for 2017** at 707.70 euros/month, representing an eight percent increase with regard to the 2016 amount.

- **Royal Decree 1077/2017 of 29 December, which set the minimum wage for 2018** at 735.9 euros/month, representing a four percent increase with regard to the 2017 amount.

- **Royal Decree 1462/2018 of 21 December, which set the minimum wage for 2019** at 900 euros/month, representing a 22.3 percent increase with regard to the 2018 amount.

- **Royal Decree 231/2020 of 4 February, which set the minimum wage for 2020** at 950 euros/month, representing a 5.5555555556 percent increase with regard to the 2019 amount, after an initial 22.3% rise in the same year. This resulted in a total rise of 31% from 2019 to 2021.

- **Royal Decree 817/2021 of 28 September, which set the minimum wage for 2021** at 965 euros/month, representing a 1.579 percent increase with regard to the 2020 amount.

As shown, in the years covered by this report the minimum wage has been significantly increased, taking into account the improvement in the general conditions of the economy with regard to the previous period, and with the aim of preventing working poverty and fostering a more dynamic general salary growth. These significant increases are in line with the recommendation of the Committee, whose interpretation of the right to a fair and sufficient remuneration that gives workers and their families a decent standard of living sets the threshold at 60% of workers' average salary. The increases applied by Spain seek to steadily reach that threshold.

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

The Committee concludes that the situation in Spain is not in conformity with article 4.2 of the 1961 Charter, because the Workers' Statute does not guarantee that an increased rate of remuneration or an increase in free time shall be granted for overtime work.

1. With regard to said conclusion, it should be observed that, as the Committee already knows, article 35 of the Workers' Statute provides that remuneration for overtime work shall be established by collective bargaining, and under no circumstances shall it be lower than the amount paid for ordinary working hours. This provision must be analysed in the context of the regulation of overtime working hours.

In 1994, Spain's legislator chose not to stipulate a salary increase by law for remuneration of overtime work, as a disincentive, because that wage increase could make overtime work more attractive to workers, even at the risk of endangering their health. Therefore, even though collective agreements usually establish salary increases for overtime working hours, the legislative option of giving preference to compensatory rest over remuneration, together with the absence of an increase by law of the salary corresponding to those hours, are more coherent with our legislation and with article 2.1. of the ESC itself, which inclines towards a reduction in working hours.

2. In addition, the maximum working hours set forth in Spanish legislation amount to 40 hours per week, eight hours less than the maximum envisaged in EU law and in ILO Conventions. In this regard, thought must be given to whether it would be more in line with the ESC goals for Spanish law not to consider as overtime work any working hours exceeding 40 hours per week, but, rather, to include those hours (up to a maximum of eight hours per week) as ordinary working hours, without their being subject to requirements regarding remuneration, limitation, etc., as is the case in other States with longer working hours. In our opinion, this would penalize those who have maximum working hours that are more beneficial for workers.

Moreover, article 35.4 of the Workers' Statute states that "the provision of work in overtime hours must be voluntary, unless said provision has been agreed in a collective agreement or individual employment contract, within the limits of paragraph 2 of this article." Said paragraph stipulates a maximum of 80 hours per year, except for those hours of work that are necessary to prevent or repair damage caused by accidents, or other extraordinary damage requiring urgent attention.

Thus, Spanish legislation includes the general principle of the voluntary nature of overtime hours, and, consequently, their obligatory nature appears as an exception, and as such, recourse to this possibility must necessarily be limited. Furthermore, the provision of work in overtime hours by workers providing full-time services is limited, and is prohibited for those working part-time.

To conclude, the legal provision stating that overtime hours must be paid pursuant to a collective agreement, and that under no circumstance may the amount paid be less than for ordinary working hours, is understood not to be non-compliant with the ESC. Remuneration for such overtime hours shall be determined by collective bargaining, in accordance with the system of sources of labour relations stipulated in article 3 of the Workers' Statute: the State's legal and regulatory provisions, collective agreements, the will of the parties expressed in the employment contract, and, lastly, local and professional customs and traditions.

3. Also worth noting is the reform of the Workers' Statute, effected through **Royal Decree-Law 8/2019 of 8 March, on urgent measures for social protection and to combat insecurity regarding working hours.** Article 34.9 of said Royal Decree-Law introduces the obligation to keep a daily record of the working hours of the entire staff, including the specific time at which such hours start and end for each worker.

This amendment constitutes a significant improvement to the instruments for effectively monitoring compliance with the necessary rules of law imposed by Spanish labour law to limit working hours. And its raison d'être is the protection of workers with regard to their rights to rest, to work-life balance, and ultimately, to their health. This facilitates the work of the Labour and Social Security Inspectorate as regards monitoring the provision of and remuneration for, or compensation with equivalent rest periods for, overtime hours.

The obligation to record working hours is also fully applicable in the case of workers performing remote work, as set forth expressly in article 14 of Royal Decree-Law 28/2020 of 22 September, on remote working, now replaced by Act 10/2021 of 9 July, on remote working, guaranteeing workers' rights to a record of working hours that is appropriate to the manner in which they provide their services, and the capacity to control their working hours.

Paragraph 4 - To recognise the right of all workers to a reasonable period of notice for termination of employment

The Committee concludes that the situation in Spain is not in conformity with article 4.4 of the 1961 Charter because the two-week period of notice is not reasonable for workers who have provided more than six months of service, and because in the event of incapacity or death of the employer there is no period of notice, nor is there such a period for workers on a probationary period.

1. When the Committee deems unreasonable the period of notice for workers who have provided more than six months of service, it is considered that Spain's labour law framework has not been fully and sufficiently taken into account, because the Committee itself has admitted that the period of notice may be replaced with payment of salary, provided that the amount paid is equivalent to that which the worker would have received during said period of notice.

For fixed-term contracts of less than one year, another aspect that must also be taken into account is the payment of the corresponding compensation in accordance with the duration of the provision of services, stipulated in article 49.1c) of the Workers' Statute as 12 days per year of service.

As regards the case of termination of the employment contract for objective reasons in cases exceeding six months of service, it must be recalled that article 53 of the Workers' Statute provides that the adoption of the decision to terminate a contract on such grounds requires, among other requisites, the granting of a 15-day period of notice, counted from the delivery of the personal notice to the worker until the termination of the employment contract. Also set forth is the payment of compensation: the company is required to pay the worker compensation of 20 days of salary per year of service, with periods of under one year being calculated on a pro rata basis in months, and with a maximum of 12

monthly payments. Therefore, in the case of a worker who has provided six months of service to the company, the payment of an amount equivalent to 10 days' salary would have to be added to the 15-day period of notice that is required in all cases. Logically, given that the amount of the compensation increases in accordance with the seniority of the worker in the company, this is equivalent, in practice and through economic compensation, to a 20-day period of notice for each year of seniority. Therefore, the greater the worker's seniority, the greater the amount of the compensation, which must be considered a replacement of a longer period of notice.

Given that the main purpose of a reasonable period of notice is to give workers whose contract is terminated a certain period of time to seek new employment before the end of their current employment, it is clear that in order to adequately assess national law it is necessary to take into account not only the specific periods of notice that may be stipulated, but also the economic compensation set forth in law, because these provide workers with sufficient economic resources to ensure such a period for seeking new employment.

2. For similar reasons, Spain does not share the Committee's opinion regarding the termination of employment contracts due to the death, retirement or incapacity of the employer, circumstances which, moreover, are completely beyond the employer' control. However, the law provides that in such cases the worker is entitled to payment of an amount equivalent to one month's salary (article 49.1.g of the Workers' Statute), which must be considered in practice as equivalent to a one-month period of notice, a duration that must be considered reasonable in all cases for such causes of termination.

3. Lastly, with regard to the probationary period, it should be noted that, during this period, and pursuant to article 14 of the Workers' Statute, the parties are obliged to perform the activities that are the purpose of the period, and the worker has the rights and obligations corresponding to the job performed, on the same terms as any other worker in the company's employ, with the sole exception of those relating to the termination of the employment relationship.

Thus, in our country it is possible to stipulate a probationary period during which either party may terminate the contract without the need to allege a just cause, without a period of notice, and without any compensation. However, this pact must be formalised in writing, in all cases, so that the parties are perfectly cognizant of the existence of such a probationary period and of its duration.

Therefore, given the nature and purpose of the probationary period, and both parties being cognizant in all cases of its existence and of its duration and consequences, we understand that it is redundant to require compliance during this probationary period with a period of notice of termination of the employment contract. And this is because, as set forth in paragraph 3 of article 14 of the Workers' Statute, until the probationary period has ended, the employment contract does not have full effect. Therefore, it does not make sense to require a period of notice when both parties already have, in fact, been notified. Indeed, both parties are cognizant of the fact that throughout the duration of the probationary period they may withdraw from the contract without the need to allege any cause or to pay any compensation, unless a period of notice has been agreed upon.

This does not mean that workers cannot appeal to the courts should they disagree with the termination of the contract notified by the company during the probationary period; such workers have a period of 20 working days to file an appeal.

However, the existence of a cause for discrimination among those banned by the Constitution and by the Workers' Statute renders the termination null and void, and consequently the employer shall be obliged to readmit the worker. Therefore, the possibility of withdrawal is not absolute, as it may not be exercised for misguided or fraudulent reasons.

In short, the possibility of terminating the contract during the probationary period without the need for a period of notice is a reasonable legal provision, and proof of this is the fact that it is not only included in different European labour laws, but it is also expressly set forth in ILO Convention No. 158, the Termination of Employment Convention, 1982.

Thus, even though article 11 of said Convention recognises that "A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period", article 2.2 of the same Convention, for its part, sets forth the following:

> "2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
> (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;"

Article 6 – The right to bargain collectively

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

The Committee concludes that the situation in Spain is not in conformity with article 6.2 of the 1961 Charter, because the law enables employers unilaterally not to apply the conditions agreed in collective agreements.

1. With regard to this conclusion of non-conformity, to begin with and reiterating previous reports, it should be noted that the lack of conformity perceived is not in line with the provisions of article 6.2 of the Charter, which refers exclusively to the State's commitment to promote machinery for voluntary negotiations to regulate terms and conditions of employment by means of collective agreements. Spanish law grants trade unions and employers' associations a prominent role in the defence and promotion of the economic and social interests which they represent (article 7 of the Spanish Constitution), recognises the fundamental right to trade union freedom (article 28 of the Spanish Constitution) and guarantees the right to collective bargaining (article 37 of the Spanish Constitution). The Workers' Statute dedicates its Title III to defining the framework for collective bargaining, and includes, throughout its texts, a great many calls to collective bargaining to establish these terms and conditions.

2. Moreover, we must clarify a point of apparent confusion on the part of the Committee, which refers to the employer having the unilateral possibility not to apply the conditions agreed upon in collective agreements. Such a possibility is not permitted in Spain's labour law. What is set forth in article 41.6 of the Workers' Statute is a mechanism for the non-application of the working conditions stipulated in collective agreements, but this cannot be imposed by the company, but, rather, refers to the negotiation procedure set forth in article 82.3 of the Workers' Statute, which requires the concurrence of economic, technical, organisational and production-related causes.

A different issue is the provision of article 41.2 of the Workers' Statute, pursuant to which "any substantial amendments to working conditions may affect the conditions accorded to workers in their employment contract, in collective agreements or pacts, or granted to workers by virtue of a unilateral decision by the employer with collective effects." The company agreements or collective pacts referred to in the paragraph quoted are an expression of the right of workers' representatives and employers to collective bargaining, but they are not subject to the legal standing or other requirements set forth in the Workers' Statute; therefore, they fall outside of its Title III, without prejudice to the obligatory nature they have for the parties and to the decisive role they play in establishing labour relations.

Given that they are not included in the Workers' Statute, the functioning of these agreements and of compliance with the obligations deriving therefrom can be found in legal provisions regarding obligations and contracts in general. Therefore—and without prejudice to its binding nature, as it is law between the parties—the unilateral amendment of an agreement must follow the rationale pertaining to compliance with contractual obligations, and entails the possibility of compensation, provided that there is no cause to sufficiently justify it, and given the existence of certain circumstances with particular effect, even if there is sufficient cause.

In all cases, with regard to this type of substantial amendment with collective effects, provision has been made for the possibility of establishing specific collective bargaining procedures. In their absence, there must be a period of consultation with the workers' representatives regarding the causes, the possibility of reducing the effects, and the necessary measures to mitigate the consequences for those affected. During this period, the parties must negotiate in good faith in order to reach an agreement. They may also agree to replace the consultation period with a mediation or arbitration procedure. As has already been explained, the law does not limit the negotiation possibilities for addressing the amendment of working conditions that have been agreed collectively, and the possible replacement of consultations must be, in itself, the result of an agreement between the company and the workers' representatives.

3. The Committee requests information about the circumstances in which a company agreement has priority over a national sectoral agreement, and to what extent. This issue, as explained in section 1, goes beyond the content of article 6.2 of the Charter.

Without prejudice to the above, it should be noted that, generally speaking, a collective agreement, during its period of validity, may not be affected by the provisions of agreements in a different sphere, unless agreed otherwise pursuant to article 83.2 of the Workers' Statute, which provides, precisely, that company agreements shall be applied with priority over national, regional or lower-sphere sectoral agreements. This priority of application, which entails the possibility of negotiating a company agreement at any time

during the period of validity of the higher-sphere agreement, is limited to matters that are listed exhaustively in said article, namely the following:

> “a) The amount of the base salary and of salary supplements, including those linked to the situation and results of the company.
> b) Payment or compensation for overtime hours and the specific remuneration for shift work.
> c) The schedule and distribution of working hours, the shift work scheme and the annual planning of holiday leave.
> d) The adaptation to the company of the workers’ professional classification system.
> e) The adaptation of the aspects of the hiring modalities attributed by this law to company agreements.
> f) The measures to favour work-life balance.
> g) Any other matters set forth in the collective agreements referred to in article 83.2.”

Paragraph 3 - To promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes

As regards the situation in Spain with respect to article 6.3, the Committee requires additional information to be able to carry out an evaluation, and requests information about this issue.

1. The **Decision of 10 December 2020, of the Directorate-General for Labour, on the registration and publication of the Sixth Agreement on Autonomous Labour Dispute Resolution** (**Out-of-court system**) resulted in the publication of the agreement reached by the social partners on this matter pursuant to articles 83.3, 90.2 and 90.3 of the Workers' Statute. This agreement has a long-standing tradition in our collective bargaining history; this is the sixth agreement reached and the first such agreement dates back to 1996.

The purpose of this Agreement is to maintain and develop an autonomous system for settling collective labour disputes between companies and workers, or the respective organisations that represent them. The Agreement seeks to facilitate and make more effective the settlement of disputes leading to stalemates in the bargaining of collective agreements, of disputes in joint collective bargaining committees, of disputes in certain consultation periods provided for in the Workers' Statute, and of disputes that lead to the calling of strikes, among others.

The Agreement regulates the nature, functions and composition of the Inter-Confederation Mediation and Arbitration Service (SIMA-FSP, its Spanish acronym), as a tripartite institution involving the trade union and employers' organisations that are signatories thereto, as well as the General State Administration. This Service coordinates mediation and arbitration procedures that are free of charge for the parties, as SIMA-FSP was formally constituted, under the aegis of the Ministry of Labour and the Social Economy, as a publicly funded Foundation of the State Public Sector.

2. It should also be noted that Royal Decree 499/2020 of 28 April, defining the basic organisational structure of the Ministry of Labour and the Social Economy, and amending Royal Decree 1052/2015 of 20 November, stipulating the structure of the Departments of

Employment and Social Security abroad and regulating their organisation, duties, and filling of vacancies, attributes to the Directorate-General for Labour certain functions pertaining to conciliation, mediation and arbitration in labour disputes, as well as to anticipating, analysing and monitoring collective disputes.

Paragraph 4 - Right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into

The Committee concludes that the situation in Spain is not in conformity with article 6.4 of the 1961 Charter as the legislation allows the Government recourse to arbitration to end a strike in cases that exceed the limits set forth in article 31 of the 1961 Charter.

As regards recourse to arbitration to end a strike, it should be noted that article 31 of the Charter envisages this possibility, provided that it is prescribed by law, that it is necessary in a democratic society for the protection of the rights and freedoms of third parties or for the protection of public interest, national security, or public health. There have been no legislative changes in relation to article 6.4 of the Charter. Nevertheless, the Committee's conclusion of non-conformity still cannot be shared.

Mandatory arbitration to end a strike may only be used in the exceptional circumstance provided for in Royal Decree-Law 17/1977 of 4 March, which requires the concurrence of the following three conditions: that the strike continue for an extensive period or that it produce serious consequences; that the parties hold irreconcilable positions; and that the strike cause serious harm to the national economy. These conditions, which must all be present simultaneously, refer to the serious implications of the strike for the rights and freedoms of third parties, and therefore the circumstances permitting the authorities recourse to arbitration cannot be considered broader in scope than those considered in article 31 of the Charter.

Furthermore, this is a little used instrument, which, while mandatory, is, nevertheless, arbitration, and therefore arbitrator impartiality requirements must be guaranteed. Jurisdictional oversight of such arbitration must also be possible. In addition, it should be noted that, in accordance with Constitutional Court ruling 11/1981 of 8 April, article 10.1 of Royal-Decree Law 17/1977 of 4 March, on labour relations, which regulates this legal concept, does not empower the Government to order the resumption of work activities; rather it empowers the Government to initiate mandatory arbitration proceedings, which must respect the requirements regarding arbitrator impartiality.

Madrid, December, 2021