



Governing Body

328th Session, Geneva, 27 October–10 November 2016

GB.328/INS/17/9

Institutional Section

INS

Date: 7 November 2016

Original: Spanish

SEVENTEENTH ITEM ON THE AGENDA

Report of the Director-General

Ninth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Spain of the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), made under article 24 of the ILO Constitution by the Independent Judicial Forum professional association

Contents

	<i>Page</i>
I. Introduction	1
II. Examination of the representation	2
A. The complainant's allegations	2
B. The Government's reply	6
III. The Committee's conclusions	9
1. Alleged violation of Directive 2003/88/EC concerning the maximum weekly working hours and the minimum hours of rest between working days.....	10
2. Alleged violation of judges' right to weekly rest (Articles 6 and 7 of the Convention)...	10
(a) Regulation of duty work	10
(b) Regulation of substitutions for judges	13
3. Difference in treatment of judges' weekly rest compared with other staff performing duty work	14
4. Flaws in the remuneration scheme for substitutions	15
IV. The Committee's recommendations	15

I. Introduction

1. By a communication received on 29 May 2014, the Independent Judicial Forum professional association made a representation to the International Labour Office under article 24 of the ILO Constitution alleging non-observance by the Government of Spain of the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), ratified by Spain on 5 May 1971. The Convention remains in force in the country.
2. The provisions of the ILO Constitution concerning the submission of representations are as follows:

Article 24

Representations of non-observance of Conventions

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

Publication of representation

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

3. In accordance with article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation, informed the Government of Spain and brought it before the Officers of the Governing Body.
4. At its 322nd Session (October–November 2014), the Governing Body found the representation to be receivable and appointed a Committee to examine it. The Committee is composed of Mr Pierre-Jean Rozet (Government member, France), Mr Juan Mailhos (Employer member, Uruguay) and Mr Antônio de Lisboa Amâncio Vale (Worker member, Brazil).
5. The Government of Spain sent its observations concerning the representation by communication dated 22 October 2015.
6. The Committee met on 1 November 2016 to examine the representation and adopt its report.

II. Examination of the representation

A. The complainant's allegations

7. In its communication which was received on 29 May 2014, the Independent Judicial Forum professional association alleges that both the regulations on duty work for judges (contained in Regulation No. 1/2005 governing matters ancillary to court proceedings, adopted by the Agreement of 15 September 2005, as amended in 2013) and the regulations on substitute judges (contained in the Organic Law on the Judiciary No. 6/1985 of 1 July (OLJ), as amended in 2012) affect Spanish judges' right to rest, in violation of both Convention No. 106 and 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. Furthermore, the complainant alleges that the current regulations governing the duty work of judges places them at a disadvantage compared with other staff who perform duty work, both within and outside the public administration. Lastly, the complainant alleges that there are multiple flaws in the system of remuneration for substitutions (contained in Royal Decree No. 431/2004, as amended by Royal Decree No. 700/2013).
8. Concerning the regulations on the duty work of judges, the complainant states that under the 2013 amendment of Regulation No. 1/2005, judges who were on duty may go off duty on the day on which the duty ends only in those judicial districts where the courts of preliminary investigation are separate from the courts of first instance, and in judicial districts where there is no such separation but where there are more than three courts of first instance and preliminary investigation.¹ In judicial districts with three or fewer courts, it provides only that, as a consequence of excess hours worked outside of the duty times, they may be granted compensatory time off within one month, provided that there are no proceedings pending or hearings.
9. The complainant notes that a distinction is made between the different situations of the Spanish courts:
 - (a) ***Judicial districts with only one court of first instance and preliminary investigation, where there is a continuous duty system*** (articles 60(3), 61(1), 61(2), and 61(4) and of Regulation No. 1/2005).² In the complainant's view, under the Regulation, in such

¹ Under article 30 of the Organic Law on the Judiciary No. 6/1985: "The State is divided territorially, for judicial purposes, into municipalities, districts (*partidos*), provinces and autonomous communities." Under article 32 of same: "1. The district is the territorial unit comprising one or more adjacent municipalities belonging to the same province. 2. Districts shall be modified, where appropriate, according to the number of cases, population characteristics, media, and areas with natural boundaries (*comarcas naturales*). 3. The area comprising the district may be the same as that of the province."

² Under article 61(1) of Regulation No. 1/2005, in such cases: "The duty work shall be continuous and shall be conducted during normal working hours without altering them in any way. Outside the normal working hours, the judge and the court clerk, and the official or officials scheduled to be on duty, shall remain on call and constantly available to attend promptly to any incidents which might arise from the duty, in which case they shall resume work immediately." Under article 61(2): "Judges and court clerks may be absent from their location of work on alternate weeks from the end of hearing hours on the Saturday until the commencement of hearing hours on the next working day, without prejudice to their duties of residence and of dedication to office." Article 61(4) provides that: "The President of the corresponding High Court of Justice may, by reasoned decision, suspend the system of absences under paragraph 2 of this article in such specific cases where its application would seriously disrupt the normal functioning of the court in question." Article 60(3)(c) provides that: "as a consequence of excess hours worked outside of the period of duty, judges may request, subject to

cases the ordinary judge of the only court must remain on call and constantly available for 12 consecutive days, without any guarantee of an opportunity to rest at the end of the duty. The complainant adds that this is the situation of 92 judicial districts in Spain.

- (b) ***Judicial districts with two to three courts of first instance and preliminary investigation, where there is an on-call duty system*** (articles 60(1), 60(3)(b), 60(3)(c), and 60(4) of Regulation No. 1/2005).³ The complainant submits that the ordinary judge of a court on duty under this system must remain on call and constantly available for a period of eight consecutive days, without any guarantee of an opportunity to rest at the end of the duty.
- (c) ***Judicial districts with four to seven courts of first instance and of preliminary investigation, where there is an on-site duty system*** (articles 60(1), 60(3)(a) and 60(4) of Regulation No. 1/2005).⁴ According to the complainant, in such situations the tenured judge must remain on call and constantly available for a period of eight consecutive days, hence the working time under Regulation No. 1/2005 exceeds by four hours the weekly maximum of 48 hours stipulated in Directive 2003/88/EC.
- (d) ***Judicial districts with eight to 12 courts of first instance and of preliminary investigation, where there is an on-site duty system and, in addition, duty for the immediate trial of minor offences*** (articles 59(1), 59(3), 59(4) and 59(6) of Regulation No. 1/2005).⁵ According to the complainant, in such situations the ordinary judge must

the approval of the President of the High Court of Justice, compensatory time off within one month, provided that there are no proceedings pending or hearings scheduled”.

³ Article 60(1) of Regulation No. 1/2005 provides that: “The duty work shall be performed by the duty court for a period of eight days.” Article 60(3)(b) provides that: “The duty work shall be performed during the normal working hours of the court which is on duty, without altering them in any way.” Article 60(4) provides that: “Outside the time periods to which the preceding paragraph refers, the Judge and the Court Clerk, and the official or officials who are scheduled to be on duty, shall remain on call and reachable to attend to any incidents which might arise from the duty, in which case they shall commence work on them immediately.”

⁴ Article 60(3)(a) provides that: “The duty court shall operate under a system of split shifts, with the assigned court operating from 9 a.m. to 2 p.m. for the morning session and from 5 p.m. to 8 p.m. for the evening session, from Monday to Saturday. On Sundays and public holidays, the duty court shall work from 10 a.m. to 2 p.m. ... Upon completion of ordinary duty, the judge who was on duty may go off duty on the day on which the duty is completed or within the three subsequent working days, in accordance with the requirements of the service, provided that there are no pending proceedings arising from the duty or hearings scheduled, and shall so inform the Senior Judge so that an ordinary substitute may be arranged ...”

⁵ In accordance with article 59(1) of Regulation No. 1/2005: “Duty work shall be performed by a Court of Preliminary Investigation on a weekly basis for the purposes of ordinary duty, the handling of expedited proceedings and the issuance of rulings in accordance with article 801 of the Code of Criminal Procedure Law, and by a Court of Preliminary Investigation scheduled to be on duty, on a daily basis, from Monday to Friday, 9 a.m. to 7 p.m., for the immediate trial of minor offences and, where appropriate, for such functions as are allocated in the rules on distribution of tasks.” Under paragraphs 3 and 4 of the same article of the Regulation: “3. The Court assigned to ordinary duty shall operate under a system of split shifts, with the assigned court working from 9 a.m. to 2 p.m. for the morning session and from 5 p.m. to 8 p.m. for the evening session, from Monday to Saturday. On Sundays and public holidays, the duty court shall work from 10 a.m. to 2 p.m.” “4. Outside the specified time periods, the Judge and the Court Clerk, and the official or officials scheduled to be on duty shall remain on call and constantly available to attend immediately to any incidents which may arise in relation to the duty, in which case they shall resume work immediately.” Article 59(6) provides that: “Upon completion of ordinary duty, the Judge who was on duty may go off duty on the day on which the duty was completed or within the three subsequent working days, in accordance with the requirements of the service, provided that there are no pending proceedings arising from the

remain on call and constantly available for a period of eight consecutive days, such that the working time under Regulation No. 1/2005 exceeds by four hours the weekly maximum of 48 hours under Directive 2003/88/EC.

(e) *Judicial districts with 13 or more courts of first instance and preliminary investigation, where there is a system of 24-hour duty for regular proceedings and 12-hour duty to attend to detained persons and, in addition, duty for the immediate trial of minor offences* (articles 51(1) et seq., 54(2), 55(1), 55(2), 55(4), 56(3) and 58(2) of Regulation No. 1/2005).⁶ In the complainant's view, in these courts of ordinary duty of 24 hours, the daily rest period of 11 hours between working days is not respected nor are there any provisions for compensatory time off.

10. The complainant states that the preamble of the Agreement of 15 October 2013 governing the amendment of Regulation No. 1/2005 attempts to justify this difference in treatment between districts with three or fewer courts of preliminary investigation and districts with more than three courts of preliminary investigation by stating that in judicial districts with more than three courts, "the performance of duty work ... results in ... an extension of the normal working hours". The complainant states that, although in judicial districts with three or fewer courts the duty work is performed during the normal working hours of the court without altering the working hours, the judge must remain on call and available to attend to any incidents which might arise, in which case he or she must commence work on them immediately. The complainant states that account must be taken of the fact that in judicial districts with fewer courts, the situations in which judges perform duty work are more frequent.
11. Furthermore, the complainant considers that the use of the wording "Upon completion of ordinary duty, the judge who was on duty may go off duty on the day on which the duty was completed or within the three subsequent working days, in accordance with the requirements of the service, provided that there are no pending proceedings arising from the duty or hearings scheduled" in articles 54, 56, 58, 59 and 60 of Regulation No. 1/2005 does not envisage the concept of rest as a worker's right, but instead as an optional benefit that is available to the worker, which is contrary to both the Convention and Directive 2003/88/EC, under both of which rest is a statutory entitlement. The complainant considers that the word "may" should have been replaced with "shall be entitled to".

duty or hearings scheduled, and shall so inform the Senior Judge so that an ordinary substitute may be arranged."

⁶ Pursuant to article 55, paragraphs 1, 2 and 4 of Regulation No. 1/2005, in such cases: "1. ... Duty work shall be performed by two Courts of Preliminary Investigation performing ordinary duty for a period of 48 hours, and by one Court of Preliminary Investigation scheduled to be on duty, on a daily basis, from Monday to Friday, 9 a.m. to 7 p.m., solely for the immediate trial of minor offences." "2. The two Courts assigned to ordinary duty shall rotate such that each one shall be on duty for one day to attend to detained persons from 9 a.m. to 9 p.m., and the following day shall be on duty to attend to proceedings for 24 hours, from 9 a.m. to 9 a.m. The allocation of tasks shall be determined in the rules on distribution of tasks. These courts shall perform ordinary duty, handle urgent proceedings to prosecute specific offences which are initiated during ordinary duty, and issue rulings in accordance with article 801 of the Code of Criminal Procedure." ... "4. The Courts of these judicial districts, in addition to rotating between ordinary duty, duty to attend to detained persons and duty to attend to proceedings, shall also rotate, on a daily basis, duty for the immediate prosecution of minor offences." Article 51(1) provides that: "Ordinary duty shall commence at 9 a.m. each day and shall last for an uninterrupted period of 24 hours." Articles 54(2), 56(3) and 58(2) provide that: "Upon completion of ordinary duty, the judge who was on duty may go off duty on the day on which the duty was completed or within the three subsequent working days, in accordance with the requirements of the service, provided that there are no pending proceedings arising from the duty or hearings scheduled, and shall so inform the Senior Judge so that an ordinary substitute may be arranged."

12. With regard to the regulation of substitution of judges, the complainant states that the situation of a lack of provision for or legal recognition of the right to rest after completion of duty has worsened with the amendment of Chapter IV, Substitutions, (articles 207–216) of the O LJ No. 6/1985, implemented by Organic Law No. 8/2012 of 27 December. According to the complainant, the purpose of the reform, as stated in the preamble of Organic Law No. 8/2012, is to safeguard the provision of public services while increasing the levels of professionalism in the judiciary by making recourse to substitute and alternate judges the exception. In the complainant's view, pursuing this objective comes at the cost of an increased workload for professional judges, who are often obliged to take on not only the workload of their respective courts but also that of a judge who is absent from work. According to the complainant, the new regulation provides for the possibility for judges to assume such tasks voluntarily; otherwise, territorially appointed reserve judges will be called upon and, subsequently, judges with a lesser workload in their respective territorial jurisdiction, who may be so designated by decision of the presidents of High Courts of Justice or, where applicable, presidents of Provincial Courts. The complainant notes that there is currently no official means approved by the General Council of the Judiciary of measuring the workload which each judge must assume each year, and hence it may be argued that there is insufficient objective information to determine which judges have a lesser workload. According to the complainant, article 210(1)(e) of the amended O LJ No. 6/1985 provides that in the exercise of the functions of a substitution, the jurisdiction of another court may be extended. In the complainant's view, this has significant implications for the discharge of duty work, as under the legislation in force, a judge may be obliged to travel to another judicial district, sometimes at some distance from his or her usual place of residence or work, to cover the duty work of the colleague who is unable to work at that time, but the current regulations do not recognize the right to rest after this additional work nor do they expressly provide for reimbursement of the travel expenses incurred.
13. As to judges being treated differently with regard to weekly rest from the other staff working on duty, the complainant alleges that the current regulations place judges in a less favourable position than the other officials who perform duty work. According to the complainant, article 5 of Order No. JUS/615/2012 of 1 March governing the duration of the overall annualized working time and the duration of working time under special schedules for staff of the judicial administration refers to the ruling of 4 June 2003 of the Secretariat of State for Justice (amending the ruling of 5 December 1996 issuing instructions on the working day and hours of work within the judicial administration), which recognized the right of court officials who perform ordinary duty work, for 24 hours or on a weekly basis, to rest on the day on which the duty ends, and provided that if the duty ends on a Saturday, the day of rest shall be moved to the Monday. The complainant adds that Order No. JUS/797/2012 of 29 March governing the duration of the overall annualized working time and the duration of working time under special schedules for the Higher Judicial Body of Court Clerks also refers to the provisions of the ruling of 4 June 2003 concerning matters of duty work. Lastly, the complainant indicates that the right to rest is recognized for the entire public sector in Act No. 7/2007 of 12 April on the Basic Staff Rules and Regulations for Public Employees, and that, on account of the similarities with judicial duty work, the regulations on rest contained in Act No. 55/2003 of 16 December on the Framework Staff Rules and Regulations for Health Service Personnel may be cited, which mandates 24 hours of rest after a day on duty, and when the duty falls on the weekend, a right to 36 continuous hours of rest.
14. Concerning the remuneration scheme for substitutions, the complainant alleges that the reform of Royal Decree No. 700/2013 of 20 September (amending Royal Decree No. 431/2004 of 12 March governing the remuneration pursuant to the third transitional provision of Act No. 15/2003 of 26 May): (a) did not provide for retroactive application as from the date of the entry into force of Organic Law No. 8/2012, meaning that between 29 December 2012, the date on which Organic Law No. 8/2012 entered into force, and

21 September 2013, the date on which Royal Decree No. 700/2013 entered into force, the new system of substitutions was applied, but Spanish judges who took on the additional work resulting from the absence of one of their colleagues were not entitled to any additional remuneration whatsoever; (b) did not include a financial report in accordance with article 24(1)(a) of the Government Organization Act No. 50/1997 of 27 November, with a view to identifying whether the budget of the Ministry of Justice contained sufficient financial provisions to cover the obligations arising from the application of the legislation; (c) does not contain any reference to the need to ensure that the maximum workload of each judge does not exceed a defined upper limit beyond which the worker's health would be at risk; and (d) omits any reference to the right of judges who are obliged to travel away from their usual place of work owing to an extension of jurisdiction to receive the corresponding compensation.

B. The Government's reply

15. In its reply, the Government indicates that the Independent Judicial Forum professional association lacks legitimacy and has low representativeness, as only around 300 judges are members. Furthermore, the Government notes that article 127 of the Spanish Constitution prohibits judges from organizing, in view of their role, and recognizes only their right to join a "professional association" for "the defence of the occupational interests of their members", in accordance with article 401 of the OLJ No. 6/1985 of 1 July. On this basis, the Government submits that professional associations of judges do not represent the entire judiciary, only their own members, and only in relation to occupational interests.
16. Furthermore, the Government states that the General Council of the Judiciary is the governance organ of the judiciary in Spain, in accordance with article 104(2) of the OLJ No. 6/1985 of 1 July, and consequently the condition of being a member State of the ILO against which a representation may be made under article 24 of the ILO Constitution is not satisfied.
17. As to the grounds and basis of the representation, the Government states that some of the arguments submitted exceed the scope of the Convention. In this respect, the Government indicates that the representation alludes to non-compliance with Directive 2003/88/EC and to the workload resulting from the system of substitution of judges, which are matters not covered by the Convention, which governs weekly rest.
18. Furthermore, the Government submits that, based on their special status as members of the judiciary with autonomous decision-making authority and on the specific characteristics of their office, the duration of judges' working time is not measurable and/or predetermined. In the Government's view, this freedom means that it is impossible to establish general standards of rest similar to those of occupational groups with a total number of attendance hours, as the rules would have to be adapted to each individual situation. Referring to the ruling of the Supreme Court of Spain (Administrative Disputes Chamber) of 10 July 2013 (Administrative Dispute Appeal No. 358/2011), the Government avers that: "With the exception of the ex officio assistance mandated by the requirements of the service and of the obligation to work during the hours of hearings, judges do not have fixed hours of work. Their hours of work are those required by the functions entrusted to them, with the aforementioned provisos. These other undefined hours of work required by their position need not be performed at the seat of the court at which they serve." Such circumstances impede the application of international standards on the right to rest, at least under the same conditions as employees who are obligated to be on duty and to work fixed hours for their job.

19. Accordingly, the Government submits that, notwithstanding Article 6 of the Convention, Article 7 envisages the possibility of each country applying special weekly rest schemes, where appropriate, to specified categories of persons or specified types of establishments, regard being paid to all proper social and economic considerations, where the nature of the work, the nature of the service performed by the establishment, the size of the population to be served or the number of persons employed is such that the provisions of Article 6 cannot be applied. The Government contends that while Regulation No. 1/2005 contains references to rest periods for judges after being on duty, the specific conditions of judges and the particularities of the work of duty courts mean that different rules must be applied which combine the need for rest of all professionals with the need to ensure that court operations are fulfilled.
20. The Government notes that, as expressed in the preamble of the Agreement of 15 October 2013 amending Regulation No. 1/2005, the revision expanded the scope of article 54(2) – which permits the judge who was on duty to go off duty after the duty has ended in the case of judicial districts with 33 or more courts of preliminary investigation – to include all judicial districts whose courts of preliminary investigation are separate from the courts of first instance, and to other judicial districts where there is no such separation but where there are more than three courts of first instance and preliminary investigation. Thus, in the Government’s view, the weekly rest required by the Convention is sufficiently safeguarded under Regulation No. 1/2005, as amended in 2013. According to the Government, that also applies in judicial districts with fewer than four courts of first instance and preliminary investigation, in view of the fact that any excess hours worked may be compensated with rest time within the same month, which should not be obstructed by the provision that this is subject to the agreement of the president of the relevant High Court of Justice, provided that there are no pending proceedings or hearings scheduled.
21. Furthermore, the Government indicates that in case law a distinction is made between on-site duty requiring judges to be physically present and on-call duty, such that, unless demonstrated otherwise in each case, the principle has been upheld that hours of on-call duty where workers must be reachable are not considered to be hours of work which qualify for greater remuneration than that specifically foreseen for such hours, nor do they qualify for compensatory time off (Judgment of the Supreme Court of Spain (Fourth Chamber of the Labour Division) of 10 March 1999 (Appeal No. 2155/1998)). The Government adds that where workers are required to take action during such periods of duty, those hours are, however, considered to be actual working time.
22. The Government also indicates that, in addition to judges’ flexibility and autonomy in the discharge of court duties, there are normative, statutory and regulatory mechanisms, as well as unifying principles emanating from the General Council of the Judiciary and its governance organs (presidents of the High Courts of Justice, Provincial Courts and senior judges), which may be used, in exceptional cases, to prevent situations which may be detrimental to the necessary rest due to excess hours of work after being on duty. In this respect, the Government states that: (a) under article 317 of the Regulation governing the Legal Profession No. 2/2011: “1. Judges shall be entitled to effective protection of their safety and health in the discharge of their duties. 2. The General Council of the Judiciary shall promote whatever measures and actions are necessary to safeguard the right under the preceding paragraph, as required by the regulations on the prevention of occupational hazards”; (b) the duty schedules, substitutes scheme and substitution plans approved by the Committee of judges and, where applicable, the Administrative Divisions of the High Courts and the General Council of the Judiciary, may make provision for exceptional circumstances and prevent the violation of the right to rest after excess hours of work on account of the requirements of the service; (c) the detailed system of leave responds to various needs, including work–life balance, illness, vacation, study and personal leave; (d) article 419(4) of the OLJ No. 6/1985 characterizes as minor misconduct “an unauthorized continuous absence

for more than one calendar day and fewer than four calendar days from the seat of the court to which the judge is appointed”; and (e) the broad range of agreements, guidelines and unifying principles of the General Council of the Judiciary emanating from governance meetings prescribe respect for judges’ right to work–life balance.

23. Regarding the new system of professional substitutions, the Government submits that Organic Law No. 8/2012 did not bring about any substantial regulatory change compared to the previous system of substitution of judges, as the OLJ No. 6/1985 prior to the reform already comprised an obligation to rely on substitution mechanisms among professional judges before calling on a substitute. According to the Government, the former article 212 of said Law provided that appointments of substitute judges “shall be on an exceptional basis and the need shall be duly authorized”. However, in the Government’s view, the exceptional nature was not respected in practice and frequently recourse was had to substitutes. According to the Government, the 2012 reform sought to facilitate the use of existing mechanisms such that absences would be covered by other professional judges as a matter of priority and that recourse to substitute judges would truly be on an exceptional basis.
24. The Government emphasizes in particular that, apart from in highly exceptional cases, the system of substitutions is founded on the principle that it is voluntary: it is the judges who voluntarily arrange among themselves, through rosters or the annual plans for substitutions, to cover absences and vacancies. According to the Government, schedules are drawn up to that end to prevent overlaps between hearings and to ensure that the duty work is fully covered. The Government indicates that it is therefore simply a matter of developing mechanisms with appropriate organization and foresight that enable substitutions among professional judges and have recourse to substitutes only in exceptional circumstances. Lastly, in the Government’s view, it has not been established that the new system of substitutions affects the right to rest of duty judges, given that the governance organs of the judiciary are competent to establish plans for substitutions among judges, autonomously and without interference from other authorities, respecting the right to the necessary rest in the situations which are the subject of the representation.
25. With reference to the different treatment of judges compared to the other staff who perform duty work within the public administration, the Government contends that, as stated in the preamble of the Agreement of 15 October 2013 through which the reform was enacted, the reform “is consistent with the changes introduced through the ruling of 4 June 2003 of the Secretariat of State for Justice (amending the ruling of 5 December 1996 issuing instructions on the working day and hours of work of the judicial administration), taking account of the fact that the said ruling recognizes the right to rest after duty work for those officials who have performed the service, in judicial districts where there is a separation of courts, or where there are four or more courts of first instance and preliminary investigation, as well as to compensatory time off for those officials working in the remaining courts who perform duty work”.
26. Concerning the remuneration scheme for substitutions, the Government states that the corresponding rates of remuneration were updated through Royal Decree No. 700/2013, with a view to encouraging and incentivizing the substitution scheme. According to the Government, the reform resulted in a fivefold increase in the sums paid for such substitutions, which encouraged professional substitutions through the monetary incentive. The Government also states that the said Royal Decree encourages secondments and support assignments, which has allowed many judges to be more appropriately remunerated for such assignments. The opportunities to allow assignments to provide support to those locations with a greater workload have also increased, which has resulted in improved working conditions for judges. The Government also indicates that the retroactive effects alleged by the complainant basically concern those who decided of their own volition to participate in the aforementioned substitution plan. Lastly, the Government submits that there are no legal

grounds to support the claim that the voluntary substitutions which took place prior to the entry into force of Royal Decree No. 700/2013 and, more specifically, after the entry into force of Organic Law No. 8/2012 on 29 December 2012 must necessarily be adapted in line with the remuneration scheme set by that legislation, and not with the scheme which was in force at the time.

III. The Committee's conclusions

27. The Committee's conclusions are based on its examination of the allegations made by the Independent Judicial Forum professional association and of the reply sent by the Government in the instant proceedings.
28. The Committee observes that the complainant's allegations concern: (1) the violation 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; (2) the violation of judges' right to weekly rest under Articles 6 et seq. of the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), both through the provisions on duty work contained in Regulation No. 1/2005 (as amended by the Agreement of 15 October 2013) and through the provisions on substitution of judges contained in the OJ No. 6/1985 of 1 July (as amended by Organic Law No. 8/2012 of 27 December); (3) the different treatment of judges with regard to weekly rest with the other staff performing duty work, both within and outside the public administration; and (4) the existence of flaws in the remuneration scheme for substitutions of judges.
29. Articles 6, 7 and 9 of Convention No. 106, which are relevant to the examination of this representation, read as follows:

Article 6

1. All persons to whom this Convention applies shall, except as otherwise provided by the following Articles, be entitled to an uninterrupted weekly rest period comprising not less than 24 hours in the course of each period of seven days.
2. The weekly rest period shall, wherever possible, be granted simultaneously to all the persons concerned in each establishment.
3. The weekly rest period shall, wherever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the country or district.
4. The traditions and customs of religious minorities shall, as far as possible, be respected.

Article 7

1. Where the nature of the work, the nature of the service performed by the establishment, the size of the population to be served, or the number of persons employed is such that the provisions of Article 6 cannot be applied, measures may be taken by the competent authority or through the appropriate machinery in each country to apply special weekly rest schemes, where appropriate, to specified categories of persons or specified types of establishments covered by this Convention, regard being paid to all proper social and economic considerations.
2. All persons to whom such special schemes apply shall be entitled, in respect of each period of seven days, to rest of a total duration at least equivalent to the period provided for in Article 6.
3. Persons working in branches of establishments subject to special schemes, which branches would, if independent, be subject to the provisions of Article 6, shall be subject to the provisions of that Article.

4. Any measures regarding the application of the provisions of paragraphs 1, 2 and 3 of this Article shall be taken in consultation with the representative employers' and workers' organisations concerned, where such exist.

Article 9

In so far as wages are regulated by laws and regulations or subject to the control of administrative authorities, there shall be no reduction of the income of persons covered by this Convention as a result of the application of measures taken in accordance with the Convention.

- 30.** Furthermore, the following Paragraphs of the Weekly Rest (Commerce and Offices) Recommendation, 1957 (No. 103), are of relevance:

Paragraph 2

The weekly rest provided for by Article 6 of the Weekly Rest (Commerce and Offices) Convention, 1957, should, wherever practicable, be so calculated as to include the period from midnight to midnight and should not include other rest periods immediately preceding or following the period from midnight to midnight.

Paragraph 3

Special rest schemes provided for by Article 7 of the Weekly Rest (Commerce and Offices) Convention, 1957, should ensure – (a) that persons to whom such special schemes apply do not work for more than three weeks without receiving the rest periods to which they are entitled; and (b) that, where it is not possible to grant rest periods of 24 consecutive hours, rest periods comprise not less than 12 hours of uninterrupted rest.

1. Alleged violation of Directive 2003/88/EC concerning the maximum weekly working hours and the minimum hours of rest between working days

- 31.** With regard to the alleged violation of Directive 2003/88/EC through the 2013 reform of Regulation No. 1/2005, the Committee considers that it can examine only those matters related to the application of the Convention to which the representation refers. *Consequently, the Committee will not proceed to examine this allegation.*

2. Alleged violation of judges' right to weekly rest
(Articles 6 and 7 of the Convention)

(a) Regulation of duty work

- 32.** The Committee notes that the complainant alleges that the provisions on the duty work of judges (articles 38–63 of Regulation No. 1/2005 governing matters ancillary to court proceedings, as amended by the Agreement of 15 September 2013 of the Plenary of the General Council of the Judiciary) affects their right to weekly rest, in violation of the Convention. Specifically, the Committee notes that the complainant alleges that: (a) in judicial districts with only one court of first instance and preliminary investigation (articles 60(3)(c), 61(1), 61(2), and 61(4) of Regulation No. 1/2005) and in judicial districts with two to three courts of first instance and preliminary investigation (articles 60(1), 60(3)(b) and (c), and 60(4) of Regulation No. 1/2005), the tenured judge of the court must remain on call and constantly available for a period of 12 or eight consecutive days, respectively, with no opportunity to rest after completing duty work; in such cases, the legislation provides only that, as a consequence of excess hours worked outside of the duty times, they may be granted compensatory time off within one month, provided that there are no proceedings pending or hearings scheduled; (b) although duty work in judicial districts with three or fewer courts is performed during the normal working day, while in districts

with more than three courts it entails an extension of the working day, the situation where judges must remain available and constantly reachable during duty work is absolute in both cases; (c) the need for rest after completing duty work is greater in the case of judicial districts with fewer courts, given that judges in those districts are on duty and are required to take action more frequently; and (d) for judicial districts with more than three courts of first instance and preliminary investigation, articles 54(2), 56(3), 58(2), 59(6), and 60(3)(a) of Regulation No. 1/2005 provide that: “Upon completion of ordinary duty, the judge who was on duty may go off duty on the day on which the duty was completed or within the three subsequent working days, in accordance with the requirements of the service, provided that there are no pending proceedings arising from the duty or hearings scheduled.” According to the complainant, this wording does not appear to envisage the concept of rest as a worker’s right, but instead as an optional benefit available to the worker, in violation of the provisions of the Convention.

33. The Committee notes the Government’s response in this regard, in which it states that Article 7 of the Convention envisages the possibility of each country applying special weekly rest schemes to specified categories of persons where the nature of the work is such that the provisions of Article 6 cannot be applied. The Government submits that the members of the judiciary fall under such special schemes, as professionals performing tasks with a special responsibility and with autonomous decision-making powers. The Committee notes that the Government indicates in particular that: (a) the 2013 reform of Regulation No. 1/2005 extends the recognition of rest after performing duty work to include all judicial districts where the courts of preliminary investigation are separate from the courts of first instance, and to other districts where there is no such separation but where there are more than three courts of first instance and preliminary investigation; (b) under the same reform, the other courts, in which duty work is performed during the normal working day, are entitled to compensatory time off, which must be granted by the president of the High Court of Justice, provided that there are no pending proceedings or hearings scheduled; (c) as stated in the Supreme Court ruling of 10 July 2013: “With the exception of the ex officio assistance mandated by the requirements of the service and of the obligation to work during the hours of hearings, judges do not have fixed hours of work; instead, their hours of work are those required by the functions entrusted to them, with the aforementioned provisos. These other undefined hours of work required by their position need not necessarily be performed at the seat of the court in which they serve”, and this freedom means that it is impossible to establish general standards of rest similar to those of occupational groups that have a total number of attendance hours; (d) a distinction should be made between on-site duty requiring judges to be physically present and on-call duty, as the case law has upheld the principle that hours of on-call duty are not hours of work which qualify for greater remuneration than that specifically foreseen for such hours, nor do they qualify for compensatory time off; and (e) there are normative, statutory and regulatory mechanisms which may be used in exceptional cases to prevent situations which may be detrimental to the necessary rest.
34. First of all, the Committee would emphasize that, given the nature of judges’ work, their inclusion as a category of workers to whom a special weekly rest scheme may apply does not present any problems of compatibility with Article 7(1) of the Convention.
35. Second, the Committee considers it necessary to assess weekly rest in the specific circumstances of the various judicial districts, with a view to verifying compliance with Article 7(2) of the Convention.
36. With regard to weekly rest in judicial districts with only one court of first instance and preliminary investigation, the Committee notes that, in accordance with article 61(1) of Regulation No. 1/2005, duty work is continuous and is conducted during normal working hours without altering them in any way (Monday to Saturday, from 8 a.m. to 8 p.m., with a

minimum of four hours of public hearings each day where the judge must be present);⁷ outside of those hours, judges remain on call and available to attend to any incidents which may arise in relation to the duty, in which case they shall resume work immediately. The Committee also notes that under article 60(3)(c) of the same Regulation, where they work excess hours outside of the duty times, “they may request, subject to the approval of the president of the High Court of Justice, compensatory time off within one month, provided that there are no proceedings pending or hearings scheduled”.

37. Moreover, the Committee notes that there is a system under article 61(2) of Regulation No. 1/2005 whereby judges may be absent from their location of work on alternate weekends, from the end of hearing hours on the Saturday until the commencement of hearing hours on the next working day. The Committee also notes that article 61(4) of the said Regulation provides that the president of the corresponding High Court of Justice may, by reasoned decision, suspend the said system of absences in such specific cases where its application would seriously disrupt the normal functioning of the court in question.
38. The Committee understands from the aforementioned provisions of the Regulation that the scheme of rest for judges in these judicial districts operates as follows: (a) every two weeks,

⁷ Articles 182(1), 182(2) and 186 of the OJL No. 6/1985 and articles 8(2)(a), 10(1), 10(3)(a) and 12(1) of Regulation No. 1/2005 govern the working times of judges:

Article 182 of the OJL No. 6/1985: 1. The following shall be *non-working days for the purposes of proceedings: Saturdays and Sundays*, 24 and 31 December, national holidays and holidays in the corresponding autonomous community or locality. The General Council of the Judiciary may, by means of a regulation, authorize work on those days for the purposes of judicial proceedings in such circumstances not expressly provided for by law. 2. *Working hours shall be from 8 a.m. until 8 p.m., unless otherwise provided for by law.* (emphasis added)

Article 186 of the OJL No. 6/1985: The courts and tribunals *shall hold public hearings on all working days* for the taking of evidence, hearing of disputes and cases, publication of the rulings issued and any other purposes provided for by law.(emphasis added)

Article 8 of Regulation No. 1/2005: 1. The working days and hours for judicial proceedings shall be those established in articles 182 et seq. of the Organic Law on the Judiciary. 2. *Saturdays shall be considered to be working days for the purposes of the following: (a) duty work of courts of preliminary investigation; (b) offices of criminal courts, for the provision of the requisite information and documents to the duty courts concerning the presentation of persons subject to an indictment or arrest warrant.* 3. In the offices of courts, non-procedural duties attached to public information and awareness and to governance may be performed on Saturdays when so agreed by the General Council of the Judiciary, the Ministry of Justice or the autonomous communities competent in matters of staff and resources in the service of the justice administration. (emphasis added)

Article 10 of the Regulation No. 1/2005: 1. In accordance with article 186 of the Organic Law on the Judiciary, courts and tribunals *shall hold public hearings on all working days* for the taking of evidence, hearing of disputes and cases, and publication of the rulings issued. ... 3. The hours of public hearings observed by the presidents of the courts and the judges shall be those necessary to conduct the activities set out in the preceding subparagraphs, as well as to ensure that trials are conducted without undue delay and that hearings are held in a timely manner, subject to the following limits: (a) *The minimum amount of time devoted to public hearings shall be four hours on each working day.* (emphasis added)

Article 12 of the Regulation No. 1/2005: 1. In accordance with article 188(2) of the Organic Law on the Judiciary, the judges and presidents, or their substitutes, *shall be present at the public hearings every day* unless they have a valid reason not to. 2. The senior judges who must form a chamber shall also be present at hearings unless they have a valid reason not to. 3. All must provide justification for non-attendance to the president of the tribunal or hearing. 4. Furthermore, judges must be present at their official office when the needs of the service so require. (emphasis added)

the judges in these districts are entitled to be absent from the location where they work for 24 hours (from midnight on the Saturday until midnight on the Sunday), under the scheme of absence from the work location on alternate weeks; and (b) on Sundays between those weeks where the scheme of absence from the work location does not apply, the judges are on call, with no obligation to be present at the workplace unless the requirements of the service so demand, in which case they will be given compensatory time off within one month. In this respect, the Committee considers that the fact that the compensatory weekly rest is contingent on there being no proceedings pending or hearings scheduled and that the system of absences may be suspended in cases where its application would seriously disrupt the normal functioning of the court in question may give rise in practice to a situation of non-compliance with Article 7(2) of the Convention under which ordinary judges in these courts are entitled to an equivalent of 24 hours of rest for every seven days worked. ***In these circumstances, the Committee requests the Government to ask the General Council of the Judiciary to inform the social partners about the additional measures adopted to ensure that judges in those judicial districts enjoy in practice the weekly rest established in the Convention.***

39. As to the weekly rest of tenured judges of courts in judicial districts with two or more courts of first instance and preliminary investigation, the Committee understands, after analysing the relevant articles of the OLJ No. 6/1985 on normal working days (see supra paragraph 36) and the relevant articles of Regulation No. 1/2005 concerning duty work for courts in such judicial districts (see supra paragraph 9(b)), that the judges in those districts enjoy weekly rest equivalent to at least 24 hours for every seven-day period worked. ***Consequently, the Committee concludes that the legislation on duty work of courts in those judicial districts does not appear to raise problems of consistency with the Convention.*** However, the Committee wishes generally to recall the importance of ensuring that the weekly rest provided for in the Convention is respected in practice.

(b) Regulation of substitutions for judges

40. With regard to the regulation of substitutions for judges, the Committee notes the complainant's allegation that the reform of Chapter IV, Substitutions, (articles 207–216) of the OLJ No. 6/1985, implemented by Organic Law No. 8/2012 of 27 December, on budget efficiency in the justice administration, exacerbated the situation of a lack of predictability for or legal recognition of the right to weekly rest for judges performing duty work. In particular, the Committee notes that the complainant alleges that: (a) the pursuit of the objective of the reform – to increase the levels of professionalism in the judiciary by making recourse to substitute and alternate judges exceptional – comes at the cost of an increased workload and greater strain for professional judges, who are often obliged to take on not only the workload of their respective courts but also that of a judge who is absent from work; (b) the new regulation provides for the possibility of judges assuming such tasks voluntarily; otherwise, territorially appointed reserve judges will be called upon and, subsequently, judges with a lesser workload in their respective territorial jurisdiction, who may be so designated by decision of the presidents of high courts or, where applicable, presidents of provincial courts; however, in the complainant's view, given that there is no official means approved by the General Council of the Judiciary of measuring the workload which each judge must assume each year, there is insufficient objective information to determine which judges have a lesser workload; (c) article 210(1)(e) of the OLJ No. 6/1985 (as amended in 2012) provides that in the exercise of the functions of a substitution, the jurisdiction of another court may be extended, meaning that a judge is obliged to travel to another judicial district, sometimes at some distance from his or her usual place of residence or work, to cover the duty work of a colleague, without any recognition under the current regulations of the right to rest after this additional work.

41. In this respect, the Committee notes the Government's reply stating that: (a) Organic Law No. 8/2012 amending the OLJ. 6/1985 did not entail any relevant regulatory change in the system of substitutions for judges, but instead sought to facilitate existing mechanisms so that absences would be covered by other professional judges as a matter of priority, without recourse to non-professional substitutes; (b) apart from in highly exceptional cases, the system of substitutions is founded on the principle that it is voluntary: it is the judges who voluntarily arrange among themselves, through rosters or annual plans for substitutions, to cover absences and vacancies; (c) to that end, schedules are drawn up to prevent overlaps between hearings and to ensure that the duty work is fully covered; (d) it has not been established that the new system of substitutions affects the right to rest of duty judges, given that the governance organs of the judiciary are competent to establish plans for substitutions among judges, autonomously and without interference from other authorities, respecting the right to the necessary rest in the situations which are the subject of the representation; (e) as a consequence of the monetary incentive, tenured judges are increasingly volunteering to cover the vacancies arising, without any reduction in the quality of service; and (f) the adoption of an occupational hazard prevention plan for judges is planned.
42. The Committee observes that OLJ No. 6/1985 and Regulation No. 1/2005 do not contain mechanisms to prevent a judge from renouncing, voluntarily or under obligation, the minimum weekly rest equivalent to 24 hours for every seven-day period owing to an extension of jurisdiction. The Committee also observes that, according to the Government, judges are increasingly offering to cover vacancies arising and that the impact of the 2012 reform on judges' right to weekly rest does not appear to have been assessed. The Committee recalls that "[p]hysiologically and psychologically, rest is necessary to restore and renew the worker's physical strength and also his mental functions, and ... [s]ocially, it gives him more time for family and community life".⁸ *The Committee requests the Government to ask the General Council of the Judiciary to assess the impact of the new system of substitutions on the right to weekly rest for judges, and to inform the social partners, in order to ensure that in practice they benefit from the equivalent of a minimum of 24 hours of rest for every seven days worked, in accordance with the Convention.*

3. Difference in treatment of judges' weekly rest compared with other staff performing duty work

43. As to the allegation that the current provisions governing the duty work of judges places them at a disadvantage compared with other staff who perform duty work, both within and outside the public administration, the Committee notes that, according to the Government, the 2013 reform of Regulation No. 1/2005 is consistent with the changes introduced through the ruling of 4 June 2003 of the Secretariat of State for Justice (amending the ruling of 5 December 1996 issuing instructions on the working day and hours of work in the judicial administration), taking account of the fact that the said ruling recognizes the right to rest after duty work for those officials who were on duty in judicial districts where there is a separation of courts or where there are four or more courts of first instance and preliminary investigation, as well as to compensatory time off for those officials working in the remaining courts who perform duty work.
44. The Committee considers that the question of the difference in treatment which may arise for categories of workers and establishments under the special regimes adopted by the competent authority pursuant to Article 7 is not governed by the Convention. *Consequently, the Committee will not pursue its examination of this allegation.*

⁸ ILO: Report VII(1), International Labour Conference, 39th Session, 1956, p. 6.

4. Flaws in the remuneration scheme for substitutions

45. Concerning the remuneration scheme for substitutions, the Committee notes that the complainant alleges that the reform of Royal Decree No. 431/2004 of 12 March governing the remuneration pursuant to the third transitional provision of Act No. 15/2003 of 26 May (implemented by Royal Decree No. 700/2013 of 20 September): (a) did not provide for its retroactive application as from the date of the entry into force of Organic Law No. 8/2012, meaning that between 29 December, the date on which Organic Law No. 8/2012 entered into force, and 21 September 2013, the date on which Royal Decree No. 700/2013 entered into force, the new system of substitutions was applied, but Spanish judges who took on the additional work resulting from the absence of one of their colleagues were not entitled to any additional remuneration whatsoever; (b) does not contain any reference to the need to ensure that the maximum workload of each judge does not exceed a defined upper limit beyond which the worker's health would be at risk; and (c) omits any reference to the right of judges who are obliged to travel away from their usual place of work owing to an extension of jurisdiction to receive the corresponding compensation for travel expenses.
46. The Committee notes that, according to the Government, the remuneration rates for the system of substitutions were updated through Royal Decree No. 700/2013, resulting in a fivefold increase in the sums paid for such assignments. The Government also states that the retroactive effects to which the complainant alludes mainly affect those who decided of their own volition to participate in the substitution system.
47. The Committee observes that, on the matter of income related to weekly rest, Article 9 of the Convention provides only that "[i]n so far as wages are regulated by laws and regulations or subject to the control of administrative authorities, there shall be no reduction of the income of persons covered by this Convention as a result of the application of measures taken in accordance with the Convention". The Committee observes that this provision is limited to income in relation to the compulsory nature of weekly rest and is not applicable with regard to the allegation under examination. *In these circumstances, the Committee will not pursue its examination of this allegation any further.*

IV. The Committee's recommendations

48. *In the light of the conclusions set out in paragraphs 27–47 above with regard to the matters raised in the representation, the Committee recommends that the Governing Body:*
- (a) approve this report;*
 - (b) request the Government to ask the General Council of the Judiciary to inform the social partners about the additional measures adopted to ensure that, in practice, judges in judicial districts with only one court of first instance and preliminary investigation benefit from the weekly rest established under the Convention;*
 - (c) request the Government to ask the General Council of the Judiciary to assess the impact of the new system of substitutions on the right to weekly rest for judges, and to inform the social partners, in order to ensure that in practice they benefit from the equivalent of a minimum of 24 hours of rest for every seven days worked, in accordance with the Convention;*

- (d) invite the Government to send in its next report to the Committee of Experts on the Application of Conventions and Recommendations information related to its observations; and*
- (e) make this report publicly available and close the procedure initiated by the representation.*

Geneva, 1 November 2016

(Signed) Pierre-Jean Rozet

Antônio de Lisboa Amâncio Vale

Juan Mailhos

Point for decision: Paragraph 48