EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

9 September 2013

Case Document No.7

***Confederazione Generale Italiana del Lavoro* (CGIL) v. Italy**
Complaint No. 91/2013

OBSERVATIONS FROM THE EUROPEAN TRADE UNIONS CONFEDERATION (ETUC)

Registered at the Secretariat on 2 September 2013

Collective Complaint
Confederazione Generale italiana del Lavoro (CGIL)
v. Italy
(No. 91/2013)

Observations by the European Trade Union Confederation (ETUC)

(02/09/2013)

Overview

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1. In availing itself of the opportunity provided in the Collective Complaints Procedure Protocol (Article 7§2) the European Trade Union Confederation (ETUC) would like to present the following observations on the case dealing mainly with the practical consequences of Article 9 of Law No. 194 of 1978, which governs the conscientious objection of medical practitioners in relation to the termination of pregnancy and its consequences.

2. The complaint alleges that the situation in Italy

   - concerning the pregnant women is in violation of Article 11 (the right to health) of the European Social Charter (Revised) - hereinafter the Charter[1] -, read alone or in conjunction with the non-discrimination clause in Article E, in that it does not does not protect the right guaranteed to women with respect to the access to termination of pregnancy procedures.

   - concerning the workers involved is in violation of Article 1 (the right to work), 2 (the right to just conditions of work), 3 (the right to safe and healthy working conditions), 26 (the right of dignity at work) of the Charter, the latter articles read alone or in conjunction with the non-discrimination clause in Article E. Moreover, the complainant organisation asks the Committee to recognise, with respect to the subject-matter of the complaint, the relevance of Articles 21 (the right to information and consultation) and 22 (the right to take part in the determination and improvement of the working conditions and working environment) of the Charter.

3. Italy has an important role in respect of the European Social Charter. Whereas many Council of Europe instruments are adopted in Strasbourg, two important instruments have been adopted in Turin, Italy: the original 1961 European Social Charter (on the 18.10.1961) and about 30 years later the Protocol amending the European Social Charter (CETS No.: 142), the so-called 'Turin Protocol' (on the 21.10.1991). Therefore it is to be welcomed that Italy, consequently, has ratified both the Charter (and accepted **all** its provisions) as well as the Collective Complaints procedure Protocol.

4. The complaint by the CGIL (hereinafter the 'complainant')[2] has been commented on by the Government which has responded by its memorial of 30 May 2013[3].

[1] For clarification purposes it should be noted that statements on the (1996) Charter apply in principle *mutatis mutandis* also to the original (1961) Charter. If, however, the original Charter is meant this is expressed by a reference to the '(1961) Charter'.
[2] RECLAMATION COLLECTIVE présentée en application des dispositions du Protocole additionnel de 1995 prévoyant un système de réclamations collectives ainsi que des articles 23 et 24 du Règlement du Comité européen des droits sociaux - Confederazione Generale Italiana del Lavoro contre Italie, 21 janvier 2013, Case Document no. 1, Complaint registered on 17 January 2013 (Italian) French.
[3] OBSERVATIONS DU GOUVERNEMENT ITALIEN SUR LA RECEVABILITÉ ET LE BIEN-FONDÉ, 30 mai 2013, Case Document no. 2, Submissons of the Government on the admissibility and the merits *(French only).*

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I. General observations

5. This case deals with the two sets of rights. On the one hand the rights of (pregnant) women are at stake (see below III.A). On the other hand the rights of the medical staff are concerned (see below III.B).

6. From the outset the ETUC would point out that it is completely supports the complaint.

7. In particular in line with the complaint[4] the ETUC does not question the right to conscientious objection of medical personal in relation to abortion. However, the ETUC would also like to point out that the right to conscientious objection should also be recognised in other areas of employment.

8. As regards the procedure, the ETUC would like to raise two points. The first is related to the question of admissibility in respect of the complainant. The ETUC continues to be of the opinion that each of its affiliates (such as CGIL) is admitted to file a collective complaint without the need to further demonstrate its representative character[5]. The second concerns the third party interventions. On the basis of Rule 32A of the Rules of Procedure, the Committee *ex officio* for the first time has asked three NGOs to submit observations. Irrespective of any other legal question the choice of the NGOs does not appear to represent the views of all main actors. The Committee might therefore wish to consider to seek also the opinion from organisations which protect and defend the (reproduction) rights of women.

II. International law and material

9. The complaint describes in detail the Italian domestic legislative framework as well as its practical impact. The ETUC would like to add pertinent references to international law and material[6].

A. United Nations (UN)

10. There several UN human rights committees which have dealt with the question of abortion. The following quotations relate to the main aspects of women's autonomy to choose as well as the need to guarantee practical access to abortion facilities from recent concluding observations:

[4] See note 2, p. 35 : « Sans nier le droit du personnel médical de soulever l'objection de conscience ».
[5] See *mutatis mutandis* Collective Complaint No. 32/2005 Confederation of the Independent Trade Unions in Bulgaria (CITUB) / Confederation of Labour "Podkrepa" / European Trade Union Confederation v. Bulgaria, 8 August 2005 Case Document No. 1, p. 6: « According to Art. C RESC in relation with Art. 23§1 ESC the affiliation to the ETUC provides them with a special role. They are thus entitled to receive the Government's reports for the supervision of the RESC. Looking at the paragraph 22 of the Explanatory report to the Protocol it was evident that those organisations should - without further examination of representativity requirements - be entitled to submit complaints."
[6] As to legal impact of the 'Interpretation in harmony with other rules of international law' see the ETUC Observations in No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden - Case Document no. 4, Observations by the European Trade Union Confederation (ETUC), paras. 32 and 33.

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1. Committee on the Elimination of Discrimination against Women (CEDAW)

11. In its Fifty-second session the Committee on the Elimination of Discrimination against Women (CEDAW) "urged the State party"[7] concerned

> **(a) To review the abortion law and *practice* with a view to simplifying it and to ensure women's autonomy to choose; …** (Emphasis in *italics* added)

2. Committee on Economic, Social and Cultural Rights (CESCR)

12. In its Forty-eighth session[8] Committee on Economic, Social and Cultural Rights (CESCR) was explicit about the necessity to "guarantee equitable access to elective abortions":

> The Committee notes with concern the difficulties that women may encounter, depending on their place of residence, in obtaining an abortion under Organic Act No. 2/2010 of 3 March 2010. The Committee is also concerned that, in the majority of autonomous communities, bureaucratic and time constraints force many women to resort to private clinics (arts. 12 and 10).
>
> **The Committee recommends that the State party guarantee the full application of Organic Act No. 2/2010 of 3 March 2010 in all parts of Spain. To that end, the Committee recommends that the State party adopt a basic procedure *common to all the autonomous communities in order to guarantee equitable access to elective abortions*; *ensure that the exercise of conscientious objections by physicians or other members of the health profession does not pose an obstacle for women who wish to terminate a pregnancy; and pay special attention to the situation of adolescent and migrant women*.** (Emphasis in *italics* added)

B. World Health Organisation (WHO)

13. Within the framework of "Sexual and reproductive health" the WHO is also concerned about abortion. Two points are of specific interest:

> **Internationally agreed policy**
>
> In international fora, abortion is mainly discussed in the context of reducing the impact of unsafe abortions on women's health, but it is about women's right to affordable and accessible abortions.
>
> One of the objectives of WHO/Europe's regional strategy on sexual and reproductive health (2001) was to reduce the number of abortions by:
>
> - providing adequate reproductive health services;
> - integrating family planning into primary health care policies and programmes;
> - removing legal obstacles to contraceptive choices.
>
> WHO's global reproductive health strategy (2004) identified unsafe abortion as a preventable cause of maternal deaths and injuries, and the steps needed to prevent them, including:
>
> - strengthening family planning services to prevent unintended pregnancies;
> - training health-service providers in modern techniques and equipping them with appropriate drugs and supplies for gynaecological and obstetric care;

[7] 9-27 July 2012 - Concluding observations - CEDAW/C/NZL/7, para. 35 (para. 34: "The Committee commends the State party for its advocacy on the protection of women's sexual and reproductive health rights and prevention of maternal mortality. The Committee notes with concern, however, the convoluted abortion laws which require women to get certificates from two certified consultants before an abortion can be performed, thus making women dependent on the benevolent interpretation of a rule which nullifies their autonomy. ….")

[8] 30 April–18 May 2012 - Concluding observations – Spain - E/C.12/ESP/5, para. 24.

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- providing social and other support to women with unintended pregnancies;

to the extent allowed by law, providing abortion services in primary health care.

Similarly, the 1994 Programme of Action of the United Nations International Conference on Population and Development agreed that:

"In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and nongovernmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion, through expanded and improved family-planning services. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be given to eliminate the need for abortion."

"Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeat abortion."

Unsafe abortion

Unsafe abortion is defined as a procedure for terminating an unwanted pregnancy either by people lacking the necessary skills or in an environment lacking the minimal medical standards or both. Preventing unsafe abortion involves:

- finding out what is happening now;
- basing policies on what works (evidence);
- improving technologies;
- building capacity, training staff;
- testing interventions.

The cost of conducting a safe abortion is thought to be one tenth of the cost of treating the consequences of an unsafe one.[9]

C. Council of Europe

14. In its Resolution 1607 (2008)1 - Access to safe and legal abortion in Europe - the Parliamentary Assembly dealt with the access to safe and legal abortion in Europe. Its recommendations included i.a. the practical aspects of the access to abortion:

> 7. The Assembly invites the member states of the Council of Europe to: …
>
> 7.4. *lift restrictions which hinder*, de jure or *de facto, access to safe abortion*, and, in particular, take the necessary steps to create the appropriate conditions for health, medical and psychological care and offer suitable financial cover; …[10] ('emphasis in *italics* added)

III. The law

15. This case is less related to interpretation questions. Instead, it focusses more on the practical application of the Charter's provisions. That is why these observations will not reiterate the

[9] WHO, Report on safe and legal abortion in Europe (http://www.euro.who.int/en/what-we-do/health-topics/Life-stages/sexual-and-reproductive-health/activities/abortion).

[10] See also the respective Report (Doc. 11537 - 17 March 2008).

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general outline on interpretation questions which were extensively described in the recent ETUC observations in Case 85/2012 to which it nevertheless refers here more generally[11].

A. The rights of the pregnant women

1. Article 11 of the Charter (The right to protection of health)

16. This brings the Committee to examine the substance of the case. The ETUC refers to the complaint in particular in respect of the practical consequences of the legislation (in particular Article 9 of the law 194/1978).

a) Preliminary observations

(1) Wording of Article 11 of the Charter

17. Article 11 of the Charter reads as follows

> **Article 11 – The right to protection of health**
> With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:
> 1 to remove as far as possible the causes of ill-health;
> 2 to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; …

(2) Main content of the complaint: Article 11 §§ 1 and 2 of the Charter

18. The complaint refers in general terms to Article 11 of the Charter. This is reinforced by two elements:

- In contrast to all the other articles of the Charter, the three paragraphs of Article 11 are preceded by an '*inter alia*' meaning that these are non-exhaustive and thus giving the right to health guaranteed in Article 11 of the Charter in a more general perspective.

- In line with this approach the Committee also made a 'Statement of Interpretation' concerning (all provisions of) Article 11 of the Charter by referring to Articles 2 and 3 of the European Convention on Human Rights (Convention)[12].

19. However, it is clear from the motivation of the complaint focusses more on §§ 1 and 2 than on § 3.

[11] See note 6, paras. 26 – 41.
[12] In this respect, the complaint in 3.8.1 refers to the Digest (DIGEST DE JURISPRUDENCE DU COMITE EUROPEEN DES DROITS SOCIAUX, 1er septembre 2008, the page numbers differ in respect of the English version which is used in these observations (DIGEST OF THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, 1 September 2008): p. 80 in the French version, p.81 in the English version) in a general way. The reference in footnote 321 to the "Statement of Interpretation on Article 11§5" is to be understood as Article 11 in general, see the following footnote).

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(3) Article 11 of the Charter as human right

20. On the basis of the Charter's general human rights nature, the ETUC would like to specifically point out the character of Article 11 expressed by the Committee in its 2005 'Statement of Interpretation':

> "The Committee notes that the right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights - as interpreted by the European Court of Human Rights - by imposing a range of positive obligations designed to secure its effective exercise. This normative partnership between the two instruments is underscored by the Committee's emphasis on human dignity"[13] by the referring to:
>
> "Human dignity is the fundamental value and indeed the core of positive European **human rights law** – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity."[14]

b) Legal analysis on the merits

(1) The Committee's case-law

21. Until now, the Committee did not embark on situations with abortion *in extenso*. However, there are certain elements when the Committee mentioned questions related to abortion. Concerning Article 11§1 (Removal of the causes of ill-health) it noted "that family planning services are governed by the Act … on the prevention of illegal abortions and the rules governing the termination of pregnancy."[15] As regards Article 11§2 (Advisory and educational facilities) the Committee was confronted with certain aspects in Case No. 45/2007 by the parties (the complainant organisation 'Interrights' highlighting the problems in education; the Government referring to stable number of abortions) [16], it did however not deal with these questions in any detail. It is interesting to note that the Committee considered it necessary to be informed about abortion rates: "The Committee strongly urged that the next report give the requisite information … on recent developments with regard to abortion."[17]

(2) The substance of the problem

22. The substance of this complaint lies in the insufficient application of the pertinent provision of the Italian legislation. The relevant part of Article 9 of the Law 194/1978 may be described as:

> The … law 194/1978 … provides that hospitals and health care clinics are required to ensure that the medical procedures are carried out and pregnancy terminations requested are performed in accordance with standardized procedures. The regions are to supervise and ensure implementation of this requirement, if necessary, by transferring personnel from one

[13] Conclusions 2005 (and Conclusions XVII-2), Statement of Interpretation on Article 11 (point 5).
[14] Decision on the merits, 10/07/2004, Complaint No. 14/2003 *International Federation of Human Rights Leagues (FIDH) v. France*, Para. 31 (emphasis added).
[15] Conclusions XIII-5 – Luxembourg - Article 11§1.
[16] ECSR, Decision on the merits, 30 March 2009, Collective Complaint No. 45/2007, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* (see for Interrights para. 28 and for the Government para. 42).
[17] Conclusions XIII-1 Turkey, Article 16 (but the Committee is referring at the beginning of its conclusions to the (Turkish) report under Article 11§1).

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institution to another, according to the needs. In any event, the law lays down that conscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger.[18]

23. The Committee therefore has to assess whether this legislation is applied in practice sufficiently:

> The Committee also recalls that it "assesses the efforts made by states with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations (Conclusions XV-2, Italy, Article 11§3), and in terms of **how the relevant law is applied in practice**." (Marangopoulos Foundation for Human Rights (MFHR) c. Greece, complaint No. 30/2005, aforementioned decision, §204).[19] (Emphasis added)

24. In interpreting Article 11 of the Charter the Committee will have to take into account the case-law of other international bodies[20]. As it has been pointed out above, the CEDAW (see above para. 11) and CESCR (see above para. 1112) have expressed clear views on the necessity to provide for equal and effective access to abortion facilities in practice. Important requirements concerning safe abortion are outlined by the WHO (see above para. 13). On a similar line, the Parliamentary Assembly of the Council of Europe requires access to safe and legal abortion in Europe (see above para. 14).

25. Although the complaint contains important information including figures[21] demonstrating the necessity for concrete practical steps the Government does not indicate any measure taken in order to fulfil the obligations deriving from Article 9 of the Law 194/1978.

c) Interim conclusions

26. Lacking any concrete steps to remedy the non-application of Article 9 of the Law 194/1978 the Government is violating Article 11§§ 1 and 2 of the Charter.

2. Article E (Non-discrimination)

27. Article E of the Charter reads as follows:

> **Article E – Non-discrimination**
>
> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

28. The complaint alleges mainly two forms of indirect discrimination on the ground of territory[22] and health[23]. Whereas the latter might be included in the examination of Article 11 of the Charter itself the former will be dealt with in more detail:

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[18] http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopinion4_2005_en.pdf

[19] Decision on the merits, 01/23/2013, Collective Complaint No. 72/2011, *International Federation of Human Rights Leagues (FIDH) v. Greece* , para. 138.

[20] See note 6.

[21] See note 2, in particular pp. 20 – 23 (« 3.7. Données relatives au nombre de médecins objecteurs de conscience en Italie »)

29. From the outset, it is important to recall, as the complaint points out clearly[24], that Article E does not contain an exhaustive list of grounds of discrimination ("discrimination on any ground such as"). Therefore the difference in territorial application is prohibited in the same way as the other grounds expressly mentioned in Article E. It would appear obvious that the equal territorial implementation of a (domestic) law is an important element of the principle of 'equality before the law'. All over the Italian territory women must be guaranteed the same quality of effective access to the abortion facilities. This statement is reinforced by the recent CESCR recommendations quoted above (see above para. 12): "the Committee recommends that the State party adopt a basic procedure common to all the autonomous communities in order to **guarantee equitable access to elective abortions**" (emphasis added).

30. The Government rejects the allegation of discrimination by referring to the legislative provisions and principles prohibiting discrimination[25]. In just one sentence it assesses the documentation presented by the complainant as insufficient[26]. However, in no way it denies any of the facts presented by the complainant[27]. Therefore it is clear that great differences exist between many provinces and other entities.

31. In the end the justification by the Government comes down to the fact that the objecting medical staff is availing itself of a fundamental right and that the access to abortion facilities is not considered as a human right. Even if this assumption were correct this 'justification' does not respond to the substance of the case which is that the Italian Government has to guarantee effectively the equal access to these abortion facilities.

32. In conclusion, at least the 'territorial discrimination' in respect of the totally unequal delivery of services for the interruption of pregnancy is in violation of Article E of the Charter.

B. The rights of the (non-objecting) medical staff

1. General considerations

33. For justification reasons the Government, in general terms, asks the question how it could or should be able to reduce the numbers of objectors[28]:

> Or, une demande se pose d'emblée: comment l'État pourrait-il réduire la proportion des objecteurs de conscience au sein d'une profession sans porter atteinte au droit lui-même à

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[22] See note 2, p. 25 in the French version: « Premièrement, il existe une discrimination territoriale et économique, qui ne repose sur aucune justification objective ou raisonnable, entre les femmes qui souhaitent faire interrompre leur grossesse. »)
[23] See note 2, p. 26: « L'état de santé d'un individu ne peut donc être considéré comme un critère justifiant un traitement discriminatoire ou permettant d'établir une différence entre les règles applicables à certaines personnes et non à d'autres. »)
[24] See note 2, pp. 25 and 31.
[25] See note 3, paras. 11, 13 and 14.
[26] See note 3, para. 12 (« A ce propos, la CGIL n'a pas présenté une documentation suffisante qui démontre ses affirmations »).
[27] See note 21.
[28] In Italian politics this question is obviously also discussed, see e.g. Tony Connelly "Conscientious objection a controversial issue in Italy's abortion regime (14 June 2013)" http://www.rte.ie/blogs/european/2013/06/14/conscientious-objection-a-controversial-issue-in-italys-abortion-regime/.

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> l'objection de conscience, et sans, in fine, fermer l'accès aux professions médicales aux personnes qui ne peuvent pas moralement commettre des avortements volontaires?[29]

34. However, the main obligation to guarantee the effective access to the appropriate abortion facilities. In order to give alternative examples, the Government should take concrete steps to increase the number of the required medical staff and to improve its working conditions of the in an effective way[30].

35. To a certain extent the Government itself refers to alternative approaches:

> Consciousness objection in bioethics must be regulated in such a way that there is no discrimination of objectors or non-objectors and therefore no burdening of either, on an exclusive basis, with services that are particularly heavy or deskilled. For this purpose, we recommend the setting up of an organization of tasks and recruitment in the fields of bioethics in which consciousness objection is applied which may include forms of personnel mobility and differentiated recruitment so as to balance, on the basis of available data, the number of objectors and non-objectors.[31]

36. Moreover, the Government provides two factual arguments in order to prove that the situation is not in conflict with the Charter[32], the stabilisation of the number of objections and the reduction of the number of abortions.

37. Both factual arguments cannot be considered as unchallenged. For the first argument no figures are referred to in order to verify this assumption. In any event, even 'pro-life information' refers to the extremely high number of 80% of objectors[33]. The second argument might be true. It is nevertheless not appropriate for the consideration of the problem. Indeed, there is information drawing a different picture as regards the reasons for this reduction, such as clandestine abortion[34] and abortion abroad[35]. The former poses even more a problem

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[29] See note 3, para 19.
[30] The complaint refers to more alternatives, see note 2, pp. 19 and 20.
[31] See note 3, para 20, quoting from the National Council of Bioethics document "CONSCIENTIOUS OBJECTION AND BIOETHICS" (published on the 30th of July 2012, approved on the 12th of July 2012) http://www.palazzochigi.it/bioetica/eng/pdf/Conscientious_objection_bioethics_12_06_2012.pdf .
[32] See note 3, para 22 : … pendant les dernières années, on assiste à une stabilisation générale du phénomène de l'objection de conscience. On fait référence aux suivantes données significatives : les recours répétés à l'IVG ont représenté 27.2% en 2010 par rapport à un niveau prévu (calculé par des modèles mathématiques) de 50%. en considérant comme constantes les caractéristiques des femmes. En effet, les femmes italiennes qui ont fait recours à l'IVG en 2010 et 2011: les cas sont au nombre de 76.948, ce qui montre une diminution des recours à l'IVG de 67,2% par rapport au nombre du 234.801 du 1982. Le taux de propension à l'IVG qui représente l'indicateur les plus précis en matière de recours à l'IVG (nombre d'IVG des femmes âgées de 15 à 45 ans), est diminué de 54,7% avec une baisse du 17.2%oau8,3%
[33] Nearly 80% of Italian doctors refuse abortion; MPs attack conscience rights, By Hilary White, Rome Correspondent, 17 June 2013: "A report by the Italian government has found that more than 80 per cent of gynecologists – in some areas it is believed to be as much as 91 per cent – and over 50 per cent of anesthesiologists and nurses refuse to participate in abortions, and the number is growing." http://www.lifesitenews.com/news/nearly-80-of-italian-doctors-refuse-abortion-mps-attack-conscience-rights/.
[34] See Tony Connelly, note 28, "In May, La Repubblica reported that the scale of conscientious objection was driving more and more women into a shadowy world of illegal abortions, claiming that the true figure of clandestine terminations was up to 50,000 annually, far above the official figure of 15,000."

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concerning compliance with the provisions of the Charter (in particular Article 11) because this is a clear indication for a malfunctioning of the health-care system.

38. Summing up, the Government's general argumentation is not convincing.

39. Coming more specifically to the alleged violations of the Charter's provisions there is a set of rights of the 'non-objecting' medical staff referred to by the complainants (Articles 1 to 3 and 26 of the Charter). In general, the complaint stresses the violation of the right to non-discrimination in this respect (Article E of the Charter)[36].

2. Article 1 of the Charter (The right to work)

40. Article 1 of the Charter reads as follows:

> **Article 1 – The right to work**
> With a view to ensuring the effective exercise of the right to work, the Parties undertake: …
> 2 to protect effectively the right of the worker to earn his living in an occupation freely entered upon; …

41. The complaint[37] concentrates on two aspects of Article 1§2:

- 1) the prohibition of all forms of discrimination in employment,
- 2) the prohibition of forced or compulsory labour.[38]

42. Concerning the first point on the prohibition of all forms of discrimination in employment it is the practice of the Committee to examine under Article 1§2 of the Charter under the non-discrimination aspect.

43. The Committee´s previous point of view was more related to a limited approach on discrimination based on the wording of the respective recital in the Preamble of the (1961) Charter[39]. By referring to the wider approach based on Article E the case-law of the

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[35] See Tony Connelly, note 28, "A growing number of women are travelling to Switzerland, Spain, France, the UK and the Netherlands for terminations, even though abortions are theoretically legal at home."

[36] See note 2, p. 32 : « Le choix de ne pas invoquer l'objection de conscience a en effet pour conséquence de placer les intéressés dans des conditions de travail mauvaises ou défavorables par rapport à ceux qui l'invoquent, sans que l'on puisse trouver un quelconque fondement raisonnable et objectif pour justifier pareille discrimination. »

[37] See note 2, pp. 26 seq. (« 3.9.1. Article 1er de la Charte sociale européenne (droit au travail) »).

[38] See Digest, note 12, p. 20.

[39] In contrast to the wording in the 4th recital of the 1961 Charter („Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin") the new Article E in the (19967) Charter has a general anti-discrimination approach (see para. 27 above) which is confirmed by the Explanatory Report for the Charter:
"135. This new Article of the Revised Charter confirms the case law of the Committee of Independent Experts in respect of the Charter, that is that the non-discrimination clause in the preamble to the Charter applies to all the provisions of the Charter. Accordingly, the Revised Charter does not allow discrimination on any of the grounds listed in this Article in respect of any of the rights contained in the instrument.
136. The Article has been based on Article 14 of the European Convention on Human Rights which contains a more extensive enumeration of grounds than the preamble to the Charter…"

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Committee stresses the need for the Governments concerned to take (positive) "adequate steps":

> In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.

44. It has therefore to be assessed in what kind of comparable situations the medical staff in general or specific categories of doctors (mainly gynaecologist) in respect of having exercised the right to conscientious objection. It would appear obvious that the employment development of 'non-objectors' is quite different from that of 'objectors'. The complaint describes the respective problems (excessive workload, limitation of the work mainly to abortions, isolation[40], career problems[41] etc.).

45. The Government is not denying specifically any of the complainant's assertions[42].

46. In conclusion, there is a violation of Article 1§2 of the Charter.

3. Article 2 of the Charter (The right to just conditions of work)

47. Article 2§1 of the Charter reads as follows:

> **Article 2 – The right to just conditions of work**
> With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:
> 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; …

48. The complaint under Article 2 of the Charter concentrates on the most important working time aspect provided for in its paragraph 1[43].

49. In its latest conclusions on Italy the Committee has stated:

> The Committee refers to its Introductory Observation on the relationship between European Union Law and the European Social Charter in collective complaint No. 55/2009, *Confédération Générale du Travail (CGT) v. France*, decision on the merits of 23 June 2010, paragraph 38. It reiterates that the fact that a domestic regulation is based on a European Union Directive does not remove it from the ambit of an assessment under Article 2 of the

[40] See below para. 64.
[41] See note 2, p. 32 : « deux catégories de personnes qui ont décidé de mener une carrière professionnelle identique sont traitées sans raison de manière différente selon qu'elles choisissent d'invoquer ou non l'objection de conscience ».
[42] The reference in para. 38 to Conclusions I, Statement of Interpretation on Article 1§1, p. 13 ("Article 1§1 is an obligation as to means rather than as to result in the meaning that failure to achieve full employment does not as such lead to a conclusion of non-conformity.") is not pertinent to this case dealing mainly with Article 1§2 of the Charter.
[43] See note 2, p. 29 (« 3.9.2. Article 2 de la Charte sociale européenne (droit à des conditions de travail équitables) », see in particular the reference to respective Committee's case law concerning Article 2§1, see Digest, note 12, p. 27 in the English and p. 24 in the French version).

> Charter. Therefore, exceptions expressly provided by Directive 2003/88/EC must be assessed on a case-by-case basis as they are applied by the States Parties.
>
> In this respect, the Committee recalls that weekly working time of more than sixty hours is too long to be considered as reasonable under this provision. This is a limit which cannot be exceeded even in the context of flexibility schemes, where compensation is granted by rest periods in other weeks, or in specific occupations. It therefore finds that Section 18 of Legislative Decree No. 66 of 8 April 2003, which sets working time limits for workers in the fishing industry, does not comply with the Charter.
> Finally, the Committee asks the next report to provide information on the supervision of working time regulations by the Labour Inspection, including the number of breaches identified and penalties imposed in this area.[44]

50. The conclusions of non-conformity specifically refer to the fishing industry. Nevertheless, the same principles apply to the problem of doctors because there is obviously also an exception for this category (considering them as managerial personnel).

51. Indeed, the problem of the working time of doctors in Italy is already well known and the complaint expressly refers to it[45]. The European Commission has sent a 'reasoned opinion' to the Italian Government, a further step an infringement action before the Court of Justice of the European Union against Italy based i.a. on several complaints concerning the fact that, as a result of the Directive not being correctly applied, doctors are obliged to work excessive hours without adequate rest[46]:

> The European Commission has requested Italy to respect the rights of doctors working in public health services to minimum daily and weekly rest periods, as required by Working Time Directive (Directive 2003/88/EC). Under Italian law, several key rights contained in the Working Time Directive, such as the 48-hour limit to average weekly working time and minimum daily rest periods of 11 consecutive hours, do not apply to "managers" operating within the National Health Service. The Directive does allow Member States to exclude "managing executives or other persons with autonomous decision-taking powers" from these rights. However, doctors working in the Italian public health services are formally classified as "managers", without necessarily enjoying managerial prerogatives or autonomy over their own working time. This means that they are unjustly deprived of their rights under the Working Time Directive.
> In addition, Italian law contains other provisions and rules that exclude workers in the national health service from the right to minimum daily and weekly rest. The Commission has received several complaints concerning the fact that, as a result of the Directive not being correctly applied, doctors are obliged to work excessive hours without adequate rest.
> The request takes the form of a 'reasoned opinion' under EU infringement procedures. Italy now has two months to notify the Commission of the measures taken to bring national legislation in line with EU law. …[47]

52. If this is already the case for the doctors' situation in general it would appear obvious that it is an even aggravated problem for the respective non-objectors (in particular the gynaecologist)

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[44] Conclusions 2010 - Italy - Article 2-1.
[45] See note 2, p. 29, footnote 19.
[46] Commission asks Italy to respect doctors' right to minimum daily and weekly rest periods, 30/05/2013, http://hudoc.esc.coe.int/esc2008/document.asp?item=0.
[47] http://europa.eu/rapid/press-release_MEMO-13-470_en.htm

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all the more so as the Government does not deny any of the assertions in the complaint in this respect.

53. In conclusion, the excessive working time of doctors in general is aggravated for certain categories of doctors which are at the core of this case, such as 'non-objecting' gynaecologist. The Committee should therefore come to the conclusion that Article 2§1 of the Charter is violated in this respect.

4. Article 3 of the Charter (The right to safe and healthy working conditions)

54. The importance of the right to safe and healthy working conditions is underlined by the Committee:

> The right of every worker to a safe and healthy working environment is a "widely recognised principle, stemming directly from the right to personal integrity, one of the fundamental principles of human rights".[48] The purpose of Article 3 is thus directly related to that of Article 2 of the European Convention on Human Rights, which recognises the right to life.[49] It applies to the whole economy, covering both the public and private sectors.[50]

55. Article 3 of the Charter reads as follows:

> **Article 3 – The right to safe and healthy working conditions**
> With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations: …
> 3 to provide for the enforcement of such regulations by measures of supervision; …

56. The complaint[51] mainly refers to Article 3§3 of the Charter[52], i.e. on the necessity to effectively supervise the relevant legal framework on occupational health and safety.

57. Generally, the Committee has required rigorous supervision under Article 3§3 of the Charter:

> The proper application of the Charter "cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised"[53] Monitoring of compliance with occupational health and safety regulations including coercive measures (prevention is dealt with under Article 3§1, above) is a prerequisite for the right guaranteed by Article 3 to be effective.[54]

58. The Committee has already concluded negatively on the absence of an effective labour inspection system in Italy:

> **Activities of the labour inspectorate**

[48] Footnote 69 refers to „Conclusions I, Statement of Interpretation on Article 3, p. 22."
[49] Footnote 70 refers to „Conclusions XIV-2, Statement of Interpretation on Article 3, p. 36."
[50] Footnote 71 refers to "Conclusions II, Statement of Interpretation on Article 3, p. 12."
[51] See note 2, pp. 29 – 30 (« 3.9.3. Article 3 de la Charte sociale européenne (droit à la sécurité et à l'hygiène dans le travail »).
[52] See the respective references to the Digest, note 12, pp. 39 and 40 in the English version (pp. 38 and 39 in the French version).
[53] Footnote 103 refers to "International Commission of Jurists (CIJ) v. Portugal, Complaint No. 1/1998, Decision on the merits of 9 September 1999, §32."
[54] See Digest, note 12, p. 39.

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> … In the absence of information specifically on health and safety activities of the labour inspection authority (number of inspections dealing with health and safety, number of enterprises subject to such inspection and proportion of workers covered, enforcement measures imposed as a result of breach of health and safety regulations), the Committee is not in a position to establish the effectiveness of labour inspection concerning compliance with health and safety regulations.
>
> **Conclusion**
>
> The Committee concludes that the situation in Italy is not in conformity with Article 3§3 of the Revised Charter on the ground that it has not been established that labour inspection, insofar as it concerns occupational health and safety, is effective.[55]

59. The information and arguments contained in the complaint clearly demonstrate the necessity of effective supervision in an area in which the workload is extreme and where the medical staff is under specific psychological pressure. Nevertheless, the Government has indicated no substantive improvement (even not denying the facts and arguments presented in the complaint).

60. In conclusion, the Committee should state that Italy has violated Article 3§§ of the Charter also in this respect having already come the negative conclusion on Article 3§3 of the Charter in respect of Italy.

5. Article 26 of the Charter (The right to dignity at work)

61. This right to dignity at work was newly recognised by the (1996) Charter. Article 26§2 of the Charter reads as follows:

> **Article 26 – The right to dignity at work**
>
> With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations: …
>
> 2 to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

62. Referring not to sexual harassment (Article 26§1) but to the more general moral harassment the complaint concentrates on Article 26§2 of the Charter[56].

63. In its last conclusions the Committee has acknowledged that the legal framework in this respect was in conformity with the Charter's requirements[57]. However, this examination did not deal with the application in practice.

64. The complaint refers at different places to the situation of individual doctors (being often the only ones in the hospitals as non-objectors)[58]. Moreover, it points out the specific problem of

[55] Conclusions 2009 - Italy - Article 3§3.
[56] See note 2, p. 31 (« 3.9.4. Article 26 de la Charte sociale européenne (droit à la dignité au travail) »).
[57] Conclusions 2010 - Italy - Article 26§2.
[58] See the examples (in the three tables) provided for in the complaint, note 2, p. 31.

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isolation which they are in[59]. This is comparable to the situation which is described in the Explanatory report as example for moral harassment[60].

65. In conclusion, the specific situation of non-objecting doctors in practice amounts a violation of Article 26§2 of the Charter.

IV. Conclusions

66. As demonstrated above, the ETUC considers that the measures criticised by the complainant organisations are not in conformity with:

- Article 11§§ 1 and 2 (see III.A.1 and para. 26 as interim conclusion) and Article E (see III.A.2 and para. 32 as interim conclusion) as regards the rights of (pregnant) women;

- Article 1§2 (see III.B.2 and para. 32 as interim conclusion 46), Article 2§1 (see III.B.3 and para. 53 as interim conclusion), Article 3§3 (see III.B.4 and para. 60 as interim conclusion) and Article 26§2 (see III.B.5 and para. 65 as interim conclusion) as regards the rights of medical staff.

[59] See note 2, p. 31 : « Cette situation explique l'isolement dans lequel se retrouvent ces médecins, devenus une véritable « catégorie » de praticiens – les non-objecteurs de conscience –… ».
[60] Explanatory Report: "100. … An example illustrating this would be that of a worker who for reasons of hostility on the part of the employer and/or his colleagues, is systematically excluded from discussions relating to the organisation of work to which his colleagues are invited to take part..."

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