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Resolution CM/ResChS(2019)6
Confederazione Generale Italiana del Lavoro (CGIL) v. Italy, Complaint No. 140/2016

(Adopted by the Committee of Ministers on 11 September 2019 at the 1353rd meeting of the Ministers' Deputies)

The Committee of Ministers,[1]

Having regard to Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints;

Taking into consideration the complaint registered on 17 November 2016 by the Confederazione Generale Italiana del Lavoro (CGIL) against Italy;

Having regard to the report by the European Committee of Social Rights (ECSR) containing its decision on the merits, in which it concluded:

- ***by 9 votes to 2 that there is a violation of Article 5 of the Charter;***

With respect to the freedom to form trade unions, the ECSR noted that according to Article 1475 (1) of the Military Code, "the establishment of associations or clubs between military personnel is subject to the prior consent of the Minister of Defence." By its Decision No. 120/2018, the Constitutional Court held that this requirement also applied to military trade unions and that in any event the statutes of such trade unions had to respect the requirements of democracy and neutrality, and their structure, functioning and financing had to be checked.

The ESCR recalled that trade unions must be free to organise without prior authorisation, and initial formalities such as declaration and registration must be simple and easy to apply (Conclusions 2010, Georgia, Article 5). There must also be provision in domestic law for a right of appeal to the courts to ensure that these rights are upheld (Conclusions 2016, Malta, Article 5).

In the present case, the ECSR held that subjecting the establishment of trade unions or professional organisations by members of the *Guardia di Finanza* to the prior consent of the Minister of Defence is an excessive restriction on their right to organise with regard to Article 5 of the Charter and that this situation amounts to a violation of the said Article.

As regards the freedom to join trade unions, the ECSR noted that Article 1475 (2) of the Military Code prohibits the members of the *Guardia di Finanza* from joining other trade unions. The government maintained that the restriction is necessary for the protection of the rights and freedoms of others and for the protection of public order and national security.

The ECSR considered that the freedom of each member of the police force to join or not to join trade unions or professional associations as well as the freedom of police associations/trade unions to affiliate with national or international organisations is at the heart of the right to organise under the Charter. In this case,

[1] In accordance with Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints the following Contracting Parties to the European Social Charter or the revised European Social Charter participated in the vote: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Turkey, Ukraine and United Kingdom.

the prohibition on members of the *Guardia di Finanza* to join other trade unions is disproportionate since it deprives them of an effective means to assert their economic and social interests, which is not therefore necessary in a democratic society.

For these reasons, the ECSR held that the prohibition on members of the *Guardia di Finanza* to join other trade unions, where the *Guardia di Finanza* is functionally equivalent to a police force, amounts to a violation of Article 5 of the Charter.

As regards representative associations for the armed forces, the ECSR previously held that a complete ban on affiliation to national employees' organisations is not necessary or proportionate and therefore does not fulfil the requirements of Article 5 in the light of Article G of the Charter (European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, decision on the merits of 12 September 2017, §§ 51-57).

In considering whether the restriction is necessary in a democratic society within the meaning of Article G of the Charter, the ECSR considered that the members of the armed forces who can be excluded from the right to organise should be defined in a restrictive manner and that the complete suppression of the right to organise of members of the *Guardia di Finanza*, depriving them of an effective means of negotiating conditions of employment, is not a measure which is necessary in a democratic society for the protection of, *inter alia*, national security. Under Article 5, members of the *Guardia di Finanza* should be able to join a trade union of their own choice and trade unions should be able to affiliate with national and international organisations.

Thus, the ECSR held that the complete prohibition on members of the *Guardia di Finanza* to join other trade unions, where the *Guardia di Finanza* is functionally equivalent to an armed force, amounts to a violation of Article 5 of the Charter.

- ***unanimously, that there is no violation of Article 6§1 of the Charter;***

The ECSR noted that the military representative bodies may be involved in consultation on legislative and regulatory provisions concerning the social and economic rights of military personnel (Article 1478 (4) and following of the Military Code). The ECSR further noted that mechanisms for the purpose of consulting members of the *Guardia di Finanza* on issues relevant to their professional lives exist. The existing consultation mechanisms enable discussions between representative bodies of members of the *Guardia di Finanza* and their employer on matters of mutual interest which is in line with Article 6§1 of the Charter.

The ECSR also considered that CGIL did not sufficiently substantiate how the government had failed to promote joint consultations or to what extent the existing mechanisms were ineffective in practice.

In the light of the above, the ECSR held that there is no violation of Article 6§1 of the Charter.

- ***unanimously, that there is a violation of Article 6§2 of the Charter;***

The ECSR previously had the opportunity to consider the issue of collective bargaining and more specifically negotiation over pay in respect of the police and the armed forces. It has examined under Article 6§2 of the Charter whether, based on practical examples, police trade unions or military professional associations had effectively been consulted and whether their opinions had been taken into account (European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012, decision on the merits of 2 December 2013, §§161-178 and EUROMIL v. Ireland, *op. cit.*, §§ 84-94).

In the present case, the ECSR noted that legislation provides for a procedure of consultation of the representative bodies of the *Guardia di Finanza* before a Presidential Decree regulating pay and working conditions of its personnel is adopted. The ECSR further noted that according to the law, in case of disagreement, COCER (the Central Representative Body for Police Forces with Military Status) may only send its observations to the respective Ministers within five days of receipt of the "scheme". The ECSR considered that this procedure does not present the characteristics of a real negotiation between two parties – the representative bodies of the *Guardia di Finanza* on one side and the representatives of the Ministries concerned on the other side – with the purpose of regulating the terms and conditions of employment, including pay, in the sense of Article 6§2 of the Charter, but rather a mere consultation.

The ECSR found that the procedure provided by Articles 2, 4 and 7 of Legislative Decree No. 195/1995 and Article 1478 of the Military Code does not represent a reasonable alternative to the bargaining process. Moreover, the representative bodies of the *Guardia di Finanza* are not able to formulate opinions and requests on matters of interest for their members such as training, the hierarchical functional relationship and the deployment of personnel.

In the light of the above, the ECSR considered that the representative bodies of the *Guardia di Finanza* are not provided with the means to effectively negotiate their members' terms and conditions of employment, including remuneration, and that there is therefore a violation of Article 6§2 of the Charter.

- ***by 9 votes to 2 that there is a violation of Article 6§4 of the Charter.***

The ECSR recalled that Article 6§4 makes no distinction between the restrictions or limitations on the rights guaranteed to the police and those guaranteed to the armed forces. It has already recognised the right to strike of police officers (EuroCOP v. Ireland, *op. cit*., §§211-214). It has also held that restrictions on the right to strike for members of the armed forces may be in conformity with the Charter provided that the requirements of Article G are met, namely the restrictions are prescribed by law, pursue a legitimate aim such as the protection of the rights and freedoms of others or the protection of public interest, national security, public health, or morals and are necessary in a democratic society (Conclusions I (1969), Statement of Interpretation on Article 6§4; EUROMIL v. Ireland, *op. cit.*, §§113-117). The ECSR noted that the Constitutional Court in its Decision No. 120/2018 maintained the prohibition on strikes by military personnel as established by Article 1475 (4) of the Military Code.

In the view of the ECSR, States have a wide margin of appreciation on how they may restrict the right to strike of the armed forces. It thus falls to States to decide, within their margin of appreciation and in light of the circumstances of a given national system, whether such a restriction is truly necessary to achieve the legitimate objective pursued. However, restrictions on rights guaranteed by the Charter must be interpreted narrowly and must comply with the requirements of Article G. In the present case, it was not disputed that the prohibition of strikes was provided for by law, namely by Article 1475 (4) of the Military Code. The ECSR noted that it pursued a legitimate aim particularly related to the protection of the rights and freedoms of others (through the *Guardia di Finanza* mission of overseeing compliance with the rules of political and economic interest), and the objective of protecting public order (the contribution of the *Guardia di Finanza* to the maintenance of both internal security and the military defence of national and European borders and the fight against tax and financial evasion and various surveillance missions).

When examining whether the complete ban on the right to strike of the members of the *Guardia di Finanza* was proportionate to the aim pursued and therefore necessary in a democratic society, the ECSR considered that measures to compensate the prohibition must be found that are compatible in practice with the exercise of the missions. Minimum services may be imposed in the defence sector in the event of a strike. Other measures may be provided for by law, such as an effective and regular procedure of negotiation at the highest level between the members of the *Guardia di Finanza* and the command authority regarding not only material and salary conditions but also work organisation, or the conciliation or arbitration procedure. With such measures – minimum services and/or an effective procedure of negotiation or conciliation – the prohibition on the exercise of the right to strike would be proportionate.

However, in the absence of such measures, the ECSR considered that the absolute prohibition of the right to strike imposed on members of the *Guardia di Finanza* is not proportionate to the legitimate aim pursued and is not necessary in a democratic society. It therefore held that there is a violation of Article 6§4 of the Charter.

Having regard to the information communicated by the Italian delegation at the meeting of the Rapporteur Group on Social and Health Questions (GR-SOC) of 18 June 2019 (see Appendix to the resolution), the Committee of Ministers:

1. takes note of the statement of the Italian Government and of the information provided on the follow-up to the decision of the European Committee of Social Rights, in particular that three trade unions within the *Guardia di Finanza* were approved by the Minister of Defence (see Appendix to the resolution);

2. looks forward to Italy reporting, at the time of the submission of the next report concerning the relevant provisions of the Charter, on any measures taken to bring the situation into conformity with the Charter.

Appendix to the Resolution CM/ResChS(2019)6
***Confederazione Generale Italiana del Lavoro* (CGIL) v. Italy,**
Complaint No. 140/2016

Government observations on the report of the European Committee of Social Rights of 6 February 2019 on Collective Complaint No. 140/2016
Confederazione Generale Italiana del Lavoro (CGIL) v. Italy

Trade union rights and administrative and judicial remedies

The domestic courts have repeatedly held that the Guardia di Finanza is an armed force, performing military functions, and that its members are subject to military law. Since the adoption of Decision No. 120/2018 by the Italian Constitutional Court, the staff of the Guardia di Finanza has been authorised to set up new professional associations of a trade union nature. As noted in this decision, the point of seeking the Ministry's consent is to uphold the democratic principles of the organisation of the armed forces and the neutrality of state apparatus. Consequently, three trade union-type professional associations have been set up within the Guardia di Finanza and the Ministry has given its consent for all three.

The Committee finds that there is a violation of Article 5 because there is no judicial or administrative remedy in the event of an arbitrary refusal to approve the establishment of a trade union. In the Italian legal system, the general constitutional principle of the right to judicial protection applies to each subjective legal situation (Article 24 of the Constitution): it is possible to lodge an extraordinary appeal with the President of the Republic (under Article 9, paragraph 1, of Presidential Decree 1199/1971) or a judicial appeal with the Regional Administrative Court against any administrative measure (including therefore refusal to approve a trade union).

On the latter point, it is difficult to understand on what evidence the Committee based itself to draw the conclusion that the judicial protection afforded by the Italian constitutional system does not apply in such cases.

Right to join other associations (Article 5)

The ban on registering with other non-military associations is compatible with the safeguards set out in Articles 52 and 97 of the Constitution, which imposes a total prohibition on the military forces establishing any link with other associations, the aim being to provide citizens with a guarantee of the absolute impartiality, democracy, cohesion and unity of the armed forces. In Decision No. 120/2018, the Constitutional Court stressed that the principle of neutrality, which applied to the entire public system, was a "crucial value for the bodies charged with the defence of the country". It should be recalled that the armed forces have a legal monopoly over the use of force and hence that the requirements of neutrality, internal cohesion and impartiality are even stronger when compared with other associations in the civil field.

In its decision of 27 January 2016 on Collective Complaint No. 101/2013, the Committee found the French legislation which, with reference to the Gendarmerie (even in the context of its policing tasks), authorised military trade unions to federate only within another military association compatible with Article 5 of the Charter. It is unclear what the difference is between the Italian legislation and the French legislation on the Gendarmerie (even when acting as a police force), to warrant the argument that there is a violation of Article 5 in this respect, even when the Guardia di Finanza is performing military functions.

Right to strike (Article 6, paragraph 4)

The Committee asserts that the prohibition under Italian legislation of the right to strike of members of the armed forces pursues a legitimate aim but is not proportionate. In the Committee's view, this prohibition would be proportionate if it was limited to the provision of minimum services in the defence sector or if, at least, an appropriate negotiation or conciliation procedure was guaranteed. However, it does not seem to take into account the fact that the need for the neutrality, cohesion and maximum efficiency of these forces if they are to protect the citizens' fundamental interests is totally incompatible with recognition of the right to strike and the possibility for the military personnel of the Guardia di Finanza to decide autonomously to "abstain" from the duties and obligations imposed on them when defending the integrity, the fundamental interests and the democratic life of the country.

As to the organisation of minimum services in the event of a strike, as noted by the Committee, this is not a practical proposition because of the very nature of the status of a member of the armed forces, who must be available at all times to defend the nation. The assertion by the Committee of the right to strike of military forces poses problems of compliance with the higher interests protected by the Constitution.

Furthermore, in its decision of 12 September 2017 on Complaint No. 112/2014, EUROMIL v. Ireland, §§ 113-117, the Committee neither noted (nor raised) any disproportionality in the prohibition on the right to strike or found that the measure should be offset at least by effective collective bargaining (although even in the EUROMIL case, the Committee found a violation of Article 6, paragraph 2, with regard to the matter of effective negotiations). In § 117 of the EUROMIL decision, reference was made to the legislation of most Council of Europe member States, including Italy. The similarities between the Italian and Irish legislations on the military do not seem to justify the Committee's assertion that in the case of the Italian military forces, a prohibition on strike action is disproportionate, whereas in the case of the Irish military forces (EUROMIL) it is not.

Collective bargaining (Article 6, paragraph 2)

The Committee notes that the working and pay conditions of members of the civil and military police forces are established by a Decree of the President of the Republic. In this context, the Central Representative Bodies (COCERs) for military personnel may present proposals and requests to the relevant ministers through the Chief of the Defence Staff or the Commander General. The Committee noted, however, that in the event of disagreement, the COCER could only send observations to the respective ministers, from which it concluded that this procedure did not present the characteristics of a real negotiation between the parties. As a result, it found that the representative bodies of the military did not have the means of properly negotiating the working conditions, including the pay, of their members.

In this connection, those who drafted the domestic legislation decided to rule out a more conventional form of negotiation so as to preserve the fundamental principles of "neutrality" and "internal cohesion" which must characterise a military organisation such as the Guardia di Finanza whose role it is to protect the interests of all citizens in an impartial and apolitical manner.

Under Article 1478 of the Italian Military Code:

a) the bodies representing the military do not just perform consultative functions but are fully empowered to present collective demands and formulate opinions, requests and proposals on all issues covered by statutory or regulatory norms concerning the conditions, pay and protection – in the legal, economic, cultural and moral sphere or in relation to social security or health – of the military personnel they represent;

b) the COCER may be heard – at its own request – by parliamentary commissions dealing with the above issues.

Article 879 of Presidential Decree No. 90 of 15 March 2010 consolidating the texts on military law regulations provides that the COCER draws up "opinions, proposals and requests on all matters which are subject to legislative or regulatory provisions concerning the condition, the treatment, the legal, economic, social, health, cultural and moral protection of the army".