EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

16 April 2018

Case Document No. 5

UGL-CFS and SAPAF v. Italy
Complaint No.143/2017

RESPONSE FROM UGL-CFS AND SAPAF TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

Registered at the Secretariat on 12 March 2018

COUNSEL EGIDIO LIZZA

Admitted to the Court of Cassation bar

Studio Legale Romano

00193 Rome - Via Valadier, 43
T. +39 06 3224207
F. +39 06 32628371

67000 Strasbourg - Rue Gutenberg, 1
T. +33 (0)3 88224896
F. +33 (0)3 88224896

82100 Benevento - Viale Mellusi, 53
T. +39 0824 314197-98
F. +39 0824 334498

Rome Bar Council A41315
egidiolizza@ordineavvocatiroma.org
egidiolizza@hotmail.com

DEPARTMENT OF THE EUROPEAN SOCIAL CHARTER
DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW
COUNCIL OF EUROPE F-67075, STRASBOURG CEDEX

COMPLAINT NO. 143/2017

UGL-CFS AND SAPAF v. ITALY

OBSERVATIONS IN RESPONSE TO THOSE FORMULATED BY THE ITALIAN GOVERNMENT CONCERNING THE MERITS OF THE COMPLAINT FILED BY UGL-CFS AND SAPAF

Rome, 12 March 2018

Table of contents

We feel it necessary to submit the observations set forth below in response to the Italian government's written submissions on the merits of the violations of the Revised European Social Charter as alleged in the complaint filed by UGL-CFS and SAPAF. This submission does not consider the grounds for the admissibility of the complaint, which have once again been objected to by the Italian government, as the Committee has already ruled on this matter. A definitive decision may therefore be deemed to have been made pursuant to Article 7 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, and in any case in consideration of the fact that the ruling is legitimate, being based on the principles asserted within the precedents that have dealt with similar objections.

First of all, the Committee should be made aware – which the Italian government has failed to do in its Observations – that the serious violations of the social rights and fundamental rights and freedoms of former employees of the State Forestry Corps (*Corpo Forestale dello Stato*, hereafter CFS), along with the clearly irrational nature of the reform that abolished a highly specialised technical corps for the protection of the environment and the agri-food industry, have led the national courts to refer to the Italian Constitutional Court various questions concerning the constitutionality of the delegation laid down by Article 8 of Law no. 124/2015 along with the resulting Legislative Decree no. 177/2016: specifically, these rulings (which will be referred to at various points in these observations in response), are Order no. 235 of 17 August 2017 of the Regional Administrative Court for Abruzzo (Pescara) and Order no. 210 of 22 February 2018 of the Regional Administrative Court for Veneto (Venice). The Constitutional Court has scheduled the public hearing for the first referral order for 10 June 2018.

I. THE VIOLATION OF ARTICLE 1 AND ARTICLE E OF THE REVISED EUROPEAN SOCIAL CHARTER

1. The nature and functions of the CFS, the status of its employees.

1.1. Pursuant to Article 1 of Law no. 36/2004, the CFS was a civilian branch of the state police force governed by civilian law specialised in defending Italy's agricultural and forestry resources and protecting the environment, landscape and the ecosystem whilst also contributing to the performance of services for maintaining order and public safety pursuant to Law no. 121/1981, along with territorial supervision, in particular for rural and mountainous areas. The CFS carried out criminal investigation activities and monitored compliance with national and international regulations concerning the safeguarding of agri-environmental, forestry and landscape resources and the protection of national natural assets and food safety, engaging in the prevention and prosecution of related offences. It was also a national operational arm of the civil protection service. The CFS therefore had various institutional competences, which involved the conduct of operations in relation to: a) the prevention and punishment of environmental offences; b) environmental protection and safeguarding biodiversity, including through the management and enhancement of the natural resources entrusted to it and the application of the Washington Convention on the protection of endangered species of flora and fauna; c) territorial supervision with particular reference to rural and mountainous areas; d) its competence for fighting forest fires, in agreement with the regions; e) mountain safety; f) enforcement of compliance with international environmental agreements and treaties; g) updating the national forestry inventory and

environmental monitoring, also with the aim of preventing a hydrogeological imbalance; h) safety and controls within the agri-food sector.

1.2. In view of the general considerations set out above, it is necessary (including from a historical perspective) to ascertain whether or not the CFS is a military body, also for the purpose of verifying the accuracy of the conclusions reached by the Council of State (hereafter, CS) in advisory opinion no. 1183/2016 given in relation to the publication of Legislative Decree no. 177/2016, on which the Government will rely in its defence. When examining the objection raised within parliamentary hearings to the compulsory acquisition of military status by members of the CFS, the CS stated in paragraph 3.4.4. of the advisory opinion that: "*prior to the complete demilitarisation of the Forestry Corps, leaving aside formal status as a member of the corps mentioned above, their governing system, including that of the Forestry Corps, could be classified as 'military'. This means that the distinction between it and the Carabinieri Force was clearly blurred, and therefore a return to that original status does not appear to constitute a departure from the evolution of the legal order as a whole".*

1.3. However, this assertion is unconvincing and results from a misunderstanding. Law no. 3141/1928 and Royal Decree no. 1997/1929 stated that the National Forestry Militia formed part of the state's armed forces, operating as a militarised technical corps, whose members were subject to all the provisions applicable to voluntary militias tasked with ensuring national security. The Forestry Corps was demilitarised in 1948 with the adoption of Legislative Decree no. 804/1948, Article 8 of which provides that "*the personnel of the CFS shall be, for all purposes, civil servants of the State and shall be subject to the provisions governing such legal status. Officers, non-commissioned officers, select guards and forestry guards shall be exempt from call-up for military service by order or mobilisation*". Article 1 of Law no. 36/2004 on the "*Reorganisation of the CFS*" provides that: *"The CFS is a branch of the state police force governed by civilian law, which specialises in the defence of Italy's agricultural and forestry resources and the protection of the environment, landscape and ecosystem whilst also contributing to the performance of services for maintaining order and public safety pursuant to Law no. 121 of 1 April 1981, along with territorial supervision, particularly over rural and mountainous areas".* It is apparent from the overview of the legislation provided above that the assertion made by the CS was mistaken as the CFS was demilitarised not in 1981 (the date to which the CS appears to refer) but rather in 1948 and, as a general matter, public sector employees identifiable as forestry workers had military status and were incorporated into the armed forces only during the 20-year Fascist period. It follows from this that its singular situation in relation to the evolution of the legal system as a whole - which will be discussed in greater detail below – resides specifically in the acquisition of military status imposed by Legislative Decree no. 177/2016, as the distinction between the CFS and the Carabinieri Force (in terms of their membership of two different systems, civilian on the one hand and military on the other) has been well established since the birth of the Republic. Besides, the system of names used for forestry service roles for a specific period of time, which was entirely abandoned in 2004, did not have any specific implications in terms of legal status, nor less of their functions, which remained civilian and at no time became military.

1.4. Moreover, in judgment no. 3137/2005, the CS had previously defined with precision the nature of the CFS and the legal status of the members of the CFS, holding that: "*Legislative Decree no. 804 of 12 March 1948 laying down 'provisions to give effect to the re-establishment of the State Forestry Corps', in respect of the legal status of personnel, clarified that the 'personnel of the State Forestry Corps shall be, for all*

purposes, civil servants of the State and shall be subject to the provisions governing such legal status'. Article 15 of Legislative Decree no. 804 of 1948 went on to specify that measures concerning the personnel of the State Forestry Corps could be adopted only following the issuing of an opinion by the Board of Directors of the State Forestry Corps. The consolidated act laid down by Degree of the President of the Republic no. 3/1957 then stipulated in Article 384 (2) that the legislation was without prejudice to any special provisions applicable to the State Forestry Corps, except as regards the composition and powers of the Board of Directors of the Forestry Corps. The authors of the 1957 consolidated act had to reconcile the civil status of the employment relationship of Forestry Corps personnel with the specific functions they carried out, which included public safety. This resulted in the special choice to consider the status of public employee laid down in general terms in the consolidated act to apply also to those categories of employee, without prejudice to any special provisions already applicable, that is in accordance with an evolutionary trend within the legal order that does not disregard the special status of previously established bodies of rules but that seeks to 'reconcile' and 'harmonise' general forms with specific sectoral rules. However, the special provisions that were not stipulated as being unaffected include specifically those concerning the composition and powers of the Board of Directors…"

1.5. Accordingly, the assertions made by the CS in that opinion when stating that "*a return to that original status does not appear to constitute a departure from the evolution of the legal order as a whole*" appear to be entirely at odds with the text of the law, which unquestionably identifies the CFS as a civilian police force. However, it is necessary to stress that, leaving aside the evolution of the legal system, the issue under discussion concerns respect for the individual rights of individual members of the CFS. Therefore, the relevant consideration is not so much (or not only) what the CFS might historically have been, but what it was at the time the individuals joined it, having passed a public competitive examination. Ultimately, the aspect that must be considered in relation to the alleged violation of Article 1 of the European Social Charter is the legitimate expectation of individuals in maintaining the legal status of civilian employee acquired by virtue of having been successful in a public competitive examination.

1.6. Given the potential significance of that opinion in these proceedings, in view of the body from which it originates, it is necessary to consider the further arguments set forth therein with the aim of refuting the evident violation brought about by the attribution of military status through the law. It is in fact asserted that "*the features shared by the Forestry Corps with other civilian and military police forces performing similar functions are evident. The Constitutional Court itself has stressed this aspect, asserting that "As is known, by Law no. 121 of 1 April 1981, the legislature not only 'demilitarised' the State Police, but also pursued the objective of equalising all public order and public security forces. This establishment of substantive equivalence, aimed at achieving greater harmonisation between the various police forces, was accompanied by the creation of financial equivalence*" *(judgment no. 241 of 1996)*". The Council of State's repetition of that argument of the Constitutional Court adds nothing new to the problem at hand that could resolve the question of the attribution of military status, which was mandatory and therefore at odds with Article 1 of the Social Charter. This is because the issue does not concern the unquestionable establishment of equivalent status (in terms of the performance of common public order and safety functions) and consequently the equivalent remuneration of the members of the various police forces, but rather the establishment of equivalence (where it does not exist) between the legal status of members of civilian forces (State Police, CFS) and that of members of military forces (Carabinieri Force, Guardia di Finanza (Financial and Customs Police)), as the latter are

subject to a different body of legislation, which lays down disciplinary requirements and obligations that are not binding for members of civilian police forces.

1.7. The CS continues by highlighting that "*in a judgment issued shortly afterwards, the Court reiterated the concept. The above-mentioned Law no. 121 of 1981 incorporates provisions that treat all police forces as equivalent, irrespective of the status of the members of the various forces: in this regard the Constitutional Court upheld as constitutional for instance the fact that the allowance provided for under Article 43 of that Law was not available for the Fire Service and was reserved to members of the Carabinieri Force, the State Police, the Guardia di Finanza Corps, the Prison Police Corps and – specifically – the Forestry Corps. The Court stressed the common features of the activities of all police forces, pointing out on the other hand that the provisions applicable to the Fire Service were classified under the general provisions on public sector employment, both in terms of remuneration as well as collective bargaining resulting from the so-called 'privatisation' of public sector employment relations, whilst 'that development in the law did not [...] affect the personnel of the State Police and of other police forces, which were expressly excluded from the category of personnel falling under the new private law employment regime and collective bargaining, and which by contrast continued to be governed by their respective bodies of rules'* (*order no. 342 of 2000*). *It is no less significant that also in other judgments the Court placed the various police forces on the same level, irrespective of whether their personnel had civilian or military status. In proceedings concerning the constitutionality of Article 4(5) of Legislative Decree no. 546 of 23 December 1993 for violation of Article 3 of the Constitution on the ground that it was not applicable to personnel belonging to civilian police forces (whilst by contrast being applicable to other civilian employees of the State), the Court ruled the question unfounded on the ground that 'the contested exclusion does not appear to be massively unreasonable [...], taking account also of the nature of the special undertaking associated with activities of maintaining public order carried out by the police forces*", adding that "*Moreover, this fact results indirectly from Law no. 121 of 1981 itself, which extended to the personnel in question the provision laid down for public sector employees only 'insofar as compatible' and 'except as provided for under this law', establishing at the same time (Article 16 of Law no. 121 of 1981) that for the purposes of public order and safety not only the State Police but also the Carabinieri Force, the Guardia di Finanza Corps, the Prison Police Corps and the State Forestry Corps are to be regarded as 'Police Forces', which categories are excluded from the scope of continuing service for a two-year period as per a 'military system of rules'" (judgment no. 422 of 1994)*". Therefore, two rulings of the Constitutional Court were examined by the CS in this part of the opinion: order no. 342 of 2000 and judgment no. 422 of 1994. Before examining them, it must be pointed out that no substantial difference is apparent between the CFS and the other civilian police forces, and that differences may be identified exclusively with military police forces. Therefore, the view that all police forces, both civilian and military, are covered as such under Law no. 121 of 1981, which therefore lays down common provisions for them, is of no benefit for resolving the doubt that the legislation violates social rights and fundamental freedoms (having arisen during the legislative phase and been reasserted during the judicial phase). It is therefore necessary to conclude that the members of all police forces are to be considered as equivalent when compared with a civilian employee without any functions or status of criminal police and public security responsibilities.

1.8. In view of the above, it must be pointed out that order no. 342/2000 relates to a question concerning the constitutionality (with reference to Articles 3, 36 and 97 of the Constitution) of Articles 16(2) and 43 of Law no. 121 of 1 April 1981 and Article 2(5) of Law no. 34 of 20 March 1984 insofar as they do not extend to National Fire Service personnel the allowance awarded thereunder to personnel from the State Police, the Carabinieri Force, the Guardia di Finanza

Corps, the Prison Police Corps and the State Forestry Corps. The Constitutional Court resolved the question by pointing out that, in line with developments in the law, the remuneration of members of the Fire Service had, under the new system of "privatised" public sector employment, been assigned to collective and individual bargaining and that the State Police and other police forces had been exempted from this change in the law, having been explicitly excluded from the category of personnel subject to the new private law employment regime and collective bargaining. These forces are still governed by their respective bodies of rules, which means that there is a fundamental difference between the systems concerned. The differences that characterise the sources of the respective bodies of rules and, in structural and functional terms, the categories of employee compared with one another, mean that it is unreasonable and unjustified - in the interests of equality - to seek to extend to members of the Fire Service the award of a single salary component provided for under specific provisions applicable to members of the police forces. However, far from constituting evidence of the complete legal equivalence – in the thinking of the Constitutional Court - of all police forces, the judgment establishes only the difference, in terms of the regulation of the employment relationship and remuneration, between state employees whose employment relationship has been privatised (who include those of the Fire Service) and those not affected by privatisation, such as members of the police forces. However, this certainly cannot result in a finding of equivalence between employees who are subject to a civilian body of rules (such as members of the CFS or the State Police) and those vested with military status (such as members of the armed forces), irrespective of whether or not the latter also perform functions of public order and safety on a par with civilian police forces.

1.9. Moving on to the next judgment of the Constitutional Court considered by the CS, judgment no. 422/1994 upheld as constitutional a provision (Article 4(5) of Legislative Decree no. 546 of 23 December 1993) that prevented members of the State Police from remaining in service for two years pursuant to Law no. 421 of 23 October 1992 in the manner provided for public employees. According to the referring court, this constituted a violation of Articles 3 and 97 of the Constitution, arguing that it was unlawful on the grounds that it discriminated irrationally against a specific sub-category (personnel from civilian police forces) of the same general class (civilian employees of the State). There was no reason for this difference in treatment as the State Police had been demilitarised, with the result that its members fall to all intents and purposes within the category of civilian employees: differences in treatment are limited to certain special operational aspects, which are therefore cannot preclude status as civilian employees. The Constitutional Court held in relation to this situation that the difference in treatment provided for "*must be upheld as constitutional first and foremost because in the parent statute the legislature had made provision for the possibility of creating exceptions from the new legislation for certain categories of employees; moreover, with specific reference to cessation of service by 'civilian' police officers and members of the Fire Service, Legislative Decree no. 503 provided (Article 5(3)) that 'this Decree shall be without prejudice to any special provisions laid down by the respective bodies of rules'. Secondly, the contested exclusion does not appear to be massively unreasonable … taking account also of the nature of the particular commitment inherent within the maintenance of public order carried out by the police forces*". The rationale of the ruling therefore lay in differentiating between members of the police forces insofar as they carry out functions involving a particular commitment compared to those of other civilian employees. The justification for the difference in treatment compared to civilian employees does not therefore lie in the fact that the members of police forces have military status

but rather that, as civilians, they have special and demanding powers (gathering information on criminal offences, the maintenance of public order and safety), which justify the difference in treatment compared to civilian employees with regard to the ability, which is recognised only for the latter, to remain in service for two years beyond retirement age. The reference to the "*military system of rules*" contained in the final part of the judgment does not therefore have any relevance in resolving the question arising here and that reference did not purport (and could not have purported) to extend the rules applicable to personnel governed by the military system of rules to members of the State Police, the CFS and the Prison Police Corps, who objectively do not fall under that body of rules.

1.10. Once again, in order to resolve the doubts concerning the constitutionality of the legislation that had arisen in the discussion of Legislative Decree no. 177/2016 on the acquisition of military status by public sector employees with civilian status, albeit as members of a police force, the CS pointed out that the Constitutional Court had held (in judgment no. 449 of 1999) that "*the republican Constitution fundamentally supersedes the institutionalist logic of the military system of rules, as this system must be placed within the general state legal system 'which respects and guarantees the substantive and procedural rights of all citizens'".… The Court therefore concluded that "The guarantee of the fundamental rights of 'military citizens' does not lapse in the face of requirements associated with the military structure; as a result, the collective interests of members of the armed forces also deserve protection (see judgments no. 24 of 1989 and 126 of 1985, also referred to by the Council of State) in order to ensure that the military system of rules is compliant with the democratic spirit" (judgment no. 449 of 1999, cited above)*". Once again, the findings of the Constitutional Court did not resolve (as could legitimately be expected) the doubt raised since to assert that respect for the substantive and procedural rights of all citizens is guaranteed in any case for "*military citizens*" and that the military system of rules is compliant with the democratic spirit is not tantamount to asserting that the attribution of military status does not in any case entail evident and far-reaching changes to the legal status of the individual (even while democratic principles evidently continue to characterise the military system of rules). Those changes certainly do not involve the denial of the rights of democratic citizenship but pertain to the performance of functions that inevitably entail being subject to burdens and tasks including, for example, the obligation to bear arms in defence of the State against wartime enemies, which are entirely distinct from those normally incumbent upon the members of a civilian police force. For that reason, the final argument of the CS in that opinion is irrational in asserting that: "*the personnel, the change in whose status is a matter for discussion here, do not belong to a civilian public administration like any other, but rather a service characterised by distinct features analogous to those of a military service (uniforms, ranks, use of arms, etc.). Consequently, the change in status entails effects for individual circumstances that are far less intense compared with those that would result for ordinary civilian state employees*".

1.11. This reflection does not, in fact, capture the essence of the question raised there – which it has been necessary to refer to the Committee by means of the Complaint – concerning a change in the employment relationship that is so intense as to have resulted in a reversal of legal status, which is unlawful if it is not expressly desired, resulting in an extremely intense weakening of the fundamental rights and freedoms which the acquisition of military status entails, a question which is therefore clearly separate from the use of "*uniforms, ranks, use of arms, etc.*", which is moreover a prerogative of just some and not all CFS roles.

1.12. Having sufficiently considered the "justifications" provided by the CS for the legality of the reform to be introduced at the time, it is necessary to consider in greater detail which specific functions involving the protection of public order, public safety and public assets and interests are carried out by the members of the CFS. It is important to note that, in enacting Law no. 36/2004, the Italian legislature had defined the CFS's legal status and official duties, functions, organisation and links with the regions and local authorities. As a civilian police force under the legislation referred to, the CFS therefore had the official tasks of protecting Italy's agricultural and forestry resources and protecting the environment, landscape and ecosystem. Its main task was to exercise territorial supervision, particularly over rural and mountainous areas; Article 2 of Law 36/2004 listed the functions specific to the CFS, providing for exclusive competence in the area of protection of the environment, civilian biosecurity and agri-food controls.

1.13. In order to ensure the effective pursuit of those goals, CFS personnel were recognised, depending upon the circumstances, as having the status of criminal police officials, substitute public security officers, criminal police officers and public security employees. Consideration should be given in this regard to the legislation that vested them with powers; pursuant to Legislative Decree no. 201/1995: "*Personnel with the status of tenured officers and assistants shall have the status of public security employee and criminal police officers*" (Article 3); "*Personnel with the status of tenured superintendents shall have the status of public security employee and criminal police officials*" (Article 8); "*Personnel with the status of tenured inspectors shall have the status of public security officers and criminal police officials*" (Article 14); pursuant to Article 2(1) of Legislative Decree no. 155/2001, performing managerial-level administrative functions in the CFS: "*shall have the status of substitute public security officer or criminal police official*". These provisions supplemented those of the Italian Code of Criminal Procedure: pursuant to Article 55 entitled "*Functions of the criminal police*": "*1. The criminal police shall, acting also on its own initiative, receive notification of crimes committed, prevent offences from producing further consequences, search for offenders, take any measures necessary to ensure sources of evidence and collect any other material which may be needed for the application of criminal law. 2. It shall carry out any investigation and activity ordered or delegated by the judicial authorities. 3. The functions referred to in paragraphs 1 and 2 shall be carried out by officials and officers of the criminal police.* Article 56 entitled "*Criminal police units and sections*" provides that: "*1. Criminal police functions shall be carried out under the supervision and direction of the judicial authorities by: a) criminal police units as established by law; b) criminal police departments established at each Office of the Public Prosecutor of the Republic and made up of personnel from criminal police units; c) criminal police officials and officers belonging to other bodies required by law to carry out investigations after receiving a notification that a crime has been committed*". Article 57 entitled "*Criminal police officials and officers*" provides that: "*1. Without prejudice to the provisions of special laws, the following have the status of criminal police officials: a) directors, commissioners, inspectors, superintendents, and other persons belonging to the State Police who are recognised as having such status under the regulations on the administration of public security; b) higher-ranking and lower-ranking officers and non-commissioned officers of the Carabinieri Force, the Guardia di Finanza, the Prison Police Corps and the State Forestry Corps as well as other persons belonging to the aforementioned police forces who are recognised as having such status under the regulations of the respective administrations;*
c) the mayors of the municipalities where there is no State Police office or command of the Carabinieri Force or Guardia di Finanza. 2. The following have the status of criminal police officers: a) the personnel of the State Police who are recognised as having such status under the regulations on the administration of public security; b) officers of the Carabinieri Force, the Guardia di Finanza, the Prison Police Corps and the State Forestry Corps and, within

the territory of the institution of affiliation, the province or municipality guards when on duty. 3. Persons to whom laws and regulations assign the functions set in Article 55 also have the status of criminal police officials and officers within the limits of the unit to which they are assigned and according to their respective duties".

1.14. It is worthwhile pointing out that the protection of public order has over time been taken on constitutional importance in the Italian legal system. According to Constitutional Court judgment no. 218/1998, public order is a concept which "*results from the fundamental legal rights or overriding public interests upon which the Constitution and ordinary laws base the ordered and civil co-existence of the members of the national community. The protection of these interests – which include the physical and psychological integrity of the individual, the sanctity of private property and respect for or the guarantee of any other legal right of fundamental importance for the existence and operation of the legal system – constitutes the core of the functions of the police responsible for ensuring public safety which, as recognised by this Court (judgment no. 77 of 1987), pursuant to Article 4 of Decree of the President of the Republic no. 616 of 1977 is vested exclusively in the State*".

2. The changes in status brought about by Legislative Decree no. 177/2016: the attribution of military status and restrictions on the exercise of fundamental rights and freedoms; the different configuration of the employment relationship.

2.1. As stated in the Complaint, Legislative Decree no. 177/2016 essentially provided for the dispersal of the functions previously performed on a unitary basis by the CFS and their assignment to various public administrations, making provision for the transfer of staff to those administrations without the prior consent of the employees, essentially in order to carry out the functions previously performed by the CFS, in order to comply with the principle that the personnel should follow the functions transferred.

2.2. Accordingly, Article 7(1) of Legislative Decree no. 177 of 2016 provided that: "*The State Forestry Corps shall be absorbed into the Carabinieri Force, which shall perform the functions previously performed by the above-mentioned Service as provided for under the legislation applicable upon the entry into force of this Decree, without prejudice to the provisions of Article 2(1), and with the exception of powers in relation to the active tackling and extinguishing of forest fires by aerial means, which are assigned to the National Fire Service in accordance with Article 9, the functions assigned to the State Police and the Guardia di Finanza Corps pursuant to Article 10 and the activities that are to be carried out by the Ministry for Agriculture, Food and Forestry Policy pursuant to Article 11".* Consequently, Article 7(2) reclassified the functions vested in the Carabinieri Force to include most of those of the dissolved Service with the exception of the following: a) the powers vested in the National Fire Service pursuant to Article 9 (tackling and extinguishing forest fires by aerial means); b) the powers vested in the State Police (public order and safety and combating organised crime on an inter-force basis); and c) the powers vested in the Guardia di Finanza Corps under Article 10 (mountain rescue, monitoring of the seas adjacent to protected natural areas and the combating, within customs areas, of violations relating to the illegal trade in endangered flora and fauna); d) the activities that are to be carried out directly by the Ministry for Agriculture, Food and Forestry Policy (representation and protection of national forestry interests at EU and international level and the link with regional forestry policies, certifications provided for under the Washington Convention and compliance in relation to monumental trees) pursuant to Article 11.

2.3. Article 12 therefore redefined the increase in the staffing levels of the receiving forces and bodies on a scale corresponding to the personnel assigned to the functions transferred to them. That Article also governs the arrangements applicable to the transfer of CFS personnel to the Carabinieri Force, the National Fire Service, the State Police, the Guardia di Finanza and the Ministry for Agriculture, Food and Forestry Policy as well as, upon request, to any other administrations that should be *"identified preferably from amongst those performing functions relevant to the professional skills of the personnel to be redeployed"*. Essentially, according to Article 12 of Legislative Decree no. 177 of 2016, primarily the staffing bodies of the Carabinieri Force, the National Fire Service, the State Police, the Guardia di Finanza and the Ministry for Agriculture, Food and Forestry Policy were recalculated on a scale corresponding to the personnel assigned to the transferred functions; the legislation also provided that the Head of the State Forestry Corps must adopt a measure within 60 days of the date of entry into force of the Legislative Decree stipulating the administration – out of the Carabinieri Force, the National Fire Service, the State Police, the Guardia di Finanza and the Ministry for Agriculture, Food and Forestry Policy – to which each staff member is to be assigned on the basis of the service performed and the functions carried out at the time of entry into force. Article 12(4) then provides that personnel from the dissolved State Forestry Corps would be permitted to file a transfer request within 20 days of the publication of the Decree of the President of the Council of Ministers identifying the state administrations (preferably from amongst those performing functions relevant to the expertise of the personnel to be reassigned) other than the Carabinieri Force, the National Fire Service, the State Police, the Guardia di Finanza and the Ministry for Agriculture, Food and Forestry Policy towards which such transfer is permitted. The individual transfer orders were issued by the Head of the CFS on 7 November 2016 in accordance with the above-mentioned legislative provisions.

2.4. Accordingly, by virtue of an unequivocal choice made by the State, employees of the CFS were transferred either to the military administration of the Carabinieri Force (that was the destination designated for 7,177 former members of the CFS out of a total of 9,360, see Table A appended to Legislative Decree no. 177/2016) or to the Guardia di Finanza (also a military administration), the State Police, the Fire Services or the Ministry for Agriculture, Food and Forestry Policy. The only alternative for those who did not wish to be assigned to those bodies was to opt for mobility entailing withdrawal from the security/safety sector and the loss of the status associated with membership of a civilian police force (the administrations identified under the Degree of the President of the Council of Ministers of 23 November 2016 on mobility do not provide for any position within the security/safety sector). Therefore, with the exception of a few employees (126 in number) who transferred to the State Police, all others suffered a substantial change to their legal and employment status when, as civilian police officers and officials, they were given the alternative between acquiring military status (Carabinieri Force, Guardia di Finanza) or relinquishing their criminal police and public security functions by leaving the security/safety sector (fire services, Ministry for Agriculture, Food and Forestry Policy, persons opting for mobility).

2.5. First and foremost, it is necessary to note the effect of a change in status from civilian to military within the domestic legal order. It is therefore appropriate, following the above presentation of employment within the CFS and its members, to perform a similar task for the Carabinieri Force and its members (which is substantially equivalent to that applicable to the

Guardia di Finanza), in order to assess the substantial consequences that joining that body entails for the persons represented by the complainants.

2.6. First of all, as regards membership of the Carabinieri Force, Legislative Decree no. 177/2016 introduced a series of changes to Legislative Decree no. 66/2010, which were necessary for the creation of forestry agent roles within the Carabinieri Force and for the transfer of the corresponding forestry personnel: this involved the enactment both of permanent provisions (to regulate recruitment, legal status and career progression for the forestry personnel incorporated into the Carabinieri Force within the initial classification of roles) as well as transitory provisions (concerning the incorporation, status and career progression of personnel originally in service with the CFS).

2.7. On the other hand, as regards the legal status of personnel transferred to the Carabinieri Force, the new Article 2214-*bis,* comprising various paragraphs, lays down the general principle that the above-mentioned personnel shall acquire the legal status of military personnel (paragraph 2 of the new Article 2214-*bis*). The transfer will be made according to the scheme establishing the equivalence of military ranks laid down by Article 632 of Legislative Decree no. 66/2010 based on the length of service in the grade held and maintaining the ranking order of eligibility for promotion acquired within the grade of origin (paragraph 1 of the new Article 2214-*bis)*. Paragraph 20 of Article 2214-*bis* provides that, upon transfer, CFS personnel must complete a special military training course.

2.8. We refer to the Complaint as regards the general powers of the Carabinieri Force. However, in order to understand precisely what acquisition of military status entails it must be considered first that, according to Article 621 of Legislative Decree 66/2010, "*any citizen who bears arms in defence of the country shall have military status, … in accordance with the provisions set forth in this Code*" (see paragraph 1), "*military status shall entail compliance with the duties and obligations relating to military discipline laid down by this Code and by regulations*" (see paragraph 5) and "*military personnel shall be required to swear an oath at the start of their period of service*" (see paragraph 6). Under the regulations on military discipline (Decree of the President of the Republic no. 545/1986), pursuant to the combined provisions of Articles 6 and 9 military personnel must swear a solemn oath undertaking to carry out the institutional tasks of the armed forces, acting with absolute loyalty towards the institutions of the Republic, with discipline and honour, with a sense of responsibility and conscious involvement, and without sparing any physical, moral and intellectual effort, facing if necessary even the risk of sacrificing their own lives.

2.9. First of all, it can be seen that one of the most significant changes brought about by the absorption described above to the rights and duties of members of the CFS is that the state may now require them to defend the country with arms.

2.10. It should also be considered that, within the CFS, the functions of criminal police were carried out under the direction and control of the judicial authorities (Article 56 of the Code of Criminal Procedure) whereas Carabinieri Force command centres that are competent to refer reports of criminal offences to the judiciary are obliged, notwithstanding the obligations laid down by the Code of Criminal Procedure, to transmit the report up the hierarchy in accordance with the arrangements laid down by dedicated instructions issued by the Commander General of the Carabinieri Force (Article 237 of Decree of the President of the Republic no. 90 of 15 March

2010), and then comply with the statutory obligations towards the judiciary that are incumbent upon them once the provisions governing internal relations with hierarchically superior bodies have been complied with (Article 178 of Legislative Decree 66/2010). Legislative Decree no. 177/2016 however was so bold as to extend that rule to all police forces, and the question was immediately referred by the Bari Office of the Public Prosecutor to the Constitutional Court as a jurisdictional dispute between branches of state on the grounds that it involved an encroachment by the executive on the prerogatives of the judiciary; that dispute was ruled admissible by the Constitutional Court by order no. 273/2017 and the case is now waiting to be scheduled for discussion in a public hearing.

2.11. Military personnel, in contrast to almost any other civilian employee (including members of civilian police forces) are also subject to so-called officially ordered transfers, which seriously limit the rights of the personnel who are subject to them, and which the CS has described as having the following characteristics: "*it is clear within the case law of this Council that transfers officially ordered by the military administration constitute orders (cf., inter alia, Division IV, judgment no. 3693 of 5 July 2002; judgment no. 1677 of 20 March 2001; judgment no. 2641 of 8 May 2000). … the inevitable consequences of the organisation, internal cohesion and maximum operational readiness of the armed forces require such measures to be included under the category of orders from a hierarchical superior, which essentially relate to the simple manner in which service is performed on the ground …. Significant consequences in terms of the identification of the applicable substantive provisions follow from the legal status of the transfer order. First of all, such orders do not fall under the general legislation laid down by Law no. 241 of 1990 (cf., inter alia, decision no. 3693/02 cited above; no. 2641/00 cited above) and do not require any reasons to be provided as they concern matters within which the specific public interest prevails immediately and directly over any other interest. In addition, no expectations of ius in officio may be established in relation to military appointments, as military personnel cannot be deemed to have a legally protected individual interest relating to the base for service, in relation to which a requirement arises to state reasons for the requirements justifying the order (cf. no. 2641/00 cited above; no. 3693/02 cited above)*" (see CS judgment no. 3695/2010).

2.12. A particular distinctive feature that emerges from the comparison between the requirements applicable to members of the CFS with those in place for members of the Carabinieri Force concerns the application of military criminal law, in accordance with the provisions of the Peacetime Military Criminal Code (hereafter, PMCC) and the Wartime Military Criminal Code (hereafter, WMCC), both applicable pursuant to Royal Decree no. 303/1941, along with being subject to military jurisdiction.

2.13. Taking into account the immediate effect which the change in the law in question entails, it is appropriate to set out in summary form certain aspects of peacetime military criminal law, which routinely apply to all persons who acquire the special status of members of the military. The aspects that are typical of this special status may be listed as follows:

- aggravated penalties for offences, which are similar to civilian offences but classified as military offences;

- application of the peacetime military criminal law by special courts separate from the ordinary judiciary;

- criminal proceedings for failure to fulfil disciplinary and duty obligations, including very specific obligations not requested of any other citizen, such as courage, honour and loyalty;

- its application - in a manner contrary to ordinary criminal law - also beyond the borders of the state;

- provision for a special procedure with its own specific characteristics distinct from ordinary criminal procedure;

- establishment of a set of rules established in order to provide criminal protection for military discipline: these offences involve the protection of interests relating to military discipline construed as a "*fundamental rule of citizens under arms*" (Article 1346(1) of Legislative Decree no. 66/2010);

- obligations of loyalty, obedience, professional secrecy and exclusivity of employment, which are specific to a public service relationship, assume greater and particular seriousness, reflected in the severity of the response in terms of both disciplinary and criminal sanctions.

2.14. Article 1 PMCC, which specifies the "*persons subject to military criminal law*", proclaims that this law "*applies to military personnel in service under arms and those deemed to be such*". The Code construes the term "military personnel" in general as any person who serves in that capacity in any of the armed forces or armed state bodies, and therefore includes the Carabinieri Force. The PMCC does not contain its own self-standing definition of military personnel, but rather refers to laws that attribute such status by virtue of membership of an organisational structure that is or may be classified as part of the "armed forces". At present the armed forces in the broad sense include, in addition to those considered to be such having always been tasked with the defence of the state (army, navy and air force), also the Carabinieri Force (which was previously incorporated into the army and now has the status as one of the armed forces under Law no. 78/2000) and the Guardia di Finanza, but certainly not the dissolved CFS, the State Police or the Prison Police Corps following their demilitarisation (Legislative Decree no. 804/1948, Law no. 121/1981 and Law no. 395/1990). The subjection of former members of the CFS to that body of rules is a direct result of their transfer to the Carabinieri Force along with the express provisions of Legislative Decree no. 66/2010, mentioned above, which explicitly provides for the acquisition of military legal status.

2.15. The concept of military offence – which represents an objective constitutional limit on the jurisdiction of military courts by virtue of Article 103(3) of the Constitution – is contained in Article 37 PMCC, which provides that "*any violation of military criminal law*" constitutes a military offence, clarifying in paragraph 2 that "*any offence consisting in conduct, the material constituent elements of which do not constitute offences, either collectively or individually, under ordinary criminal law shall be an exclusively military offence",* whilst Article 263 PMCC provides that "*dealing with military offences committed by persons to whom military criminal law is applicable*" is a matter for the military courts. Article 38 PMCC then provides that "*violations of the duty to serve and of military discipline that do not constitute an offence shall be regulated by law or by military regulations … and shall be punished by the sanctions provided for thereunder*", which therefore has the unequivocal effect of accepting that violations of the duty to serve and of discipline may constitute offences (in which case they are governed by the PMCC, whereas those that do not have such characteristics are governed by other provisions), in contrast to the position for civilian employees.

2.16. Turning now to some examples of military discipline, which did not apply to the individuals represented by the complainant organisations at the time they joined the CFS, and which are now applied exclusively by virtue of the mandatory transfer to the Carabinieri Force, we see that, having regard to the nature of the duty violated, a distinction is drawn between offences concerning (*i*) faithfulness to the oath sworn and military defence, offences against (*ii*) military service and against (*iii*) military discipline and special offences against (*iv*) the military administration, public confidence, a person or property.

2.17. As regards the first type, whilst it features certain analogies with ordinary offences, it has been observed that "*any military personnel who carry out acts of treason, spying or the disclosure of secrets violates not only a common duty towards every citizen but also a greater duty … the defence of the institutions charged with ensuring the internal security of the state and the defence of the country through external security*" (see the Report of the Royal Committee on the Preliminary Drafts of the PMCC and the WMCC, page 96). The violation of the special duty that is inherent in military status therefore establishes a particular structure to the offence, which is reflected by the intensity of the penalty imposed on military personnel as compared with civilians. That part of the PMCC does not in any case lack offences that are exclusively military in nature, or that otherwise do not correspond to offences against the state under ordinary criminal law (e.g. Article 85). In particular, as regards offences involving a breach of the duty of loyalty, whilst that duty is also particularly severe for any citizens "*vested with public functions*" who swear an oath under the circumstances provided for by law (Article 54(2) of the Constitution), the law applicable to such persons has certainly not provided, as it has for military personnel, that "*absolute loyalty towards republican institutions constitutes the foundation of the duties of military personnel*" (Article 4 of Law no. 382/1978), and that notion is moreover reflected also in the wording of the oath sworn pursuant to Article 2 of Law no. 382/1978. Naturally, the fact that a more intense legal duty of loyalty is stipulated for military personnel compared with any other citizen, including those tasked with performing public functions, is justified by the fact that such persons must, acting in accordance with a constitutional obligation, ensure on an institutional level "*the defence of the State*" and contribute "*to the safeguarding of free institutions*".

2.18. The violation of the duty of loyalty by military personnel, in conjunction also with the particular individual and functional position of such a person, results in an evident intensification of ordinary penalties provided for in relation to offences against the state. In fact, pursuant to Article 77 PMCC, "*Any military personnel who commit any of the offences against the state provided for under Articles 241, 276, 277, 283, 285, 288, 289 and 290bis of the Criminal Code… shall be punished in accordance with the relevant provisions of that Code, subject to an increase of the custodial sentence by one third*"; on the other hand, pursuant to Article 78, any military personnel found guilty of incitement or conspiracy to commit any of the offences of high treason, or any military personnel who, with a view to committing them, promotes, establishes or organises an armed group, shall be punished in accordance with the corresponding provisions of the Criminal Code, subject to an increase of the custodial sentence by one third. Articles 79 to 83 of the PMCC again provide for the punishment of ordinary offences (offence to the honour and prestige of the President of the Republic, denigration of the Republic, the constitutional institutions, the armed forces etc.), whilst increasing the sentences that are imposed on ordinary citizens and extending also the criminal offences [for military personnel] (see in particular Article 81 PMCC). Moreover, it must be pointed out that Law no. 85/2006 broadly decriminalised these types of offence for ordinary citizens.

Accordingly, Article 84 PMCC makes provision for an offence that is substantially absent from the Criminal Code, providing for the punishment of the provision of intelligence to a foreign state not only in the event that a state of war exists with that state, but also if war remains only merely hypothetical. Again, the offences provided for under Article 97 PMCC are associated with more severe punishment compared to the equivalent offences under the Criminal Code.

2.19. Turning to the category of offences falling under the category of offences against military service, the Code includes within that class, for example, the failure to perform service without authorisation and the failure to return from an authorised absence without justified reason. The two cases (Articles 147 and 148 PMCC) involve either the classic offence of desertion (punished by imprisonment of between 6 months and 2 years) or the less serious offence of absence without leave. Both offences are typical of military status, and therefore apply to the former members of the CFS who have transited into the Carabinieri Force precisely by virtue of the acquisition of that new legal status. This is also the case for offences that share the common feature of fraudulently altering one's own physical or psychological condition, whether actually caused or falsely represented (Articles 157 - 163 PMCC).

2.20. Similarly, within that category of offence, those relating to abandonment of one's post (Articles 118 - 124 PMCC) now apply to former members of the CFS who have transited into the Carabinieri Force. Within a context in which the duty to perform military service is associated with specific and strict requirements, the offence of abandonment of one's post lays the foundation for the criminalisation of any violation of service orders. That criminal provision operates in parallel with the offence against military discipline committed by a person who fails to comply with orders imparted by superiors (so-called disobedience: Article 173 PMCC), although in this case not so much due to the failure to comply or inadequate compliance as rather the ramifications that such conduct has on the hierarchy, which is construed as being a value in itself.

2.21. There are also offences against specific services such as negligently allowing the escape of prisoners (Article 126 PMCC) as well as offences against military communications (Articles 128 et seq. PMCC), which are also now applicable to former members of the CFS.

2.22. In addition, the highly singular rule laid down by Article 137 also now applies, which makes detailed provision in relation to cowardice. The law links the violation of the duty to refrain from acts of cowardice, that is the duty to display courage, to the provision on military discipline (Article 9(1)), which requires that institutional duties be performed [by military personnel] "*without sparing any physical, moral and intellectual energies, facing if necessary even the risk of sacrificing their own lives*".

2.23. Finally, it is not possible within this context to overlook Article 140 PMCC, which punishes any military personnel who "*in any way forces other military personnel to abandon their post*" (imprisonment of between six months and two years), which as is known does not necessarily require the use of violence, but simply action in contrast with that which military personnel have been requested to do, or not to do.

2.24. We shall now consider in greater detail the further drastic change which requires particularly rigorous action by persons who have acquired military status, who are no longer ordinary citizens or public sector employees, that is the relevance under criminal law of breaches of discipline, which is the subject of Part II of Book II of the PMCC. The literature identifies military

discipline as that body of rules of conduct - establishing both rights and duties - with which military personnel must comply when performing their service, and under certain circumstances also when off duty (Garino, *Disciplina militare*, 5), which protect *military public order* construed as the body of minimum conditions for the existence of a military system of rules, that is the organisation of the armed forces, along with its internal structures and organisational relations (Brunelli - Mazzi, *Diritto penale militare*, 325). Amongst these conditions, the hierarchical chain of command is a fundamental aspect and is protected in two senses: first, the protection of natural persons insofar as they are invested with hierarchically superior status or are wronged by anyone with a hierarchically superior status and secondly protection of the mechanism through which that relationship manifests itself: the order. This means that the system incorporates offences that are normally included also within the ordinary Criminal Code, which protect life, bodily integrity and moral freedom, as well as offences involving the failure to comply with a hierarchical order issued by a superior to a subordinate (disobedience). Therefore, starting with insubordination involving violence, we see that the characteristic feature compared to the ordinary law equivalent consists in a more serious penalty for less serious offences, and the application of an aggravating circumstance for more serious offences (Articles 186 - 195 PMCC). If the case law is considered, with a greater effort at understanding it will be noted that, the greater the prestige of the superior, the more serious punishment becomes: accordingly, even an arrogant tone – in contrast to the position under ordinary law – may result in a criminally relevant offence (cf. Court of Cassation judgment of 19 July 1989, and for a broad consideration of the case law: Santoro, *Codici penali militari*, 690 et seq.).

2.25. A striking example of the absolutely novel nature of the changes made by the reform to the legal position of persons who have been transferred into the Carabinieri Force concerns the offence of insulting behaviour, which has been decriminalised under civilian law (Legislative Decree no. 7/2016). Under military criminal law, it is governed as follows as regards relations between military personnel with regard to insubordination: "*1. Any member of the military personnel who threatens unjust harm to a superior in his or her presence shall be punished by a term of military imprisonment of between six months and three years. 2. Any member of the military personnel who offends the prestige, honour or dignity of a superior in his or her presence shall be punished by a term of military imprisonment of up to two years*" (see Article 189 PMCC).

2.26. The offence of disobedience (Article 173 PMCC) provides for a term of military imprisonment of up to one year for any military personnel who "*fail or refuse to obey or delay in obeying an order relating to service or discipline intimated by a superior"*, which alters the working conditions of former members of the CFS, now Forestry Carabinieri Force, becoming a key provision of the system by which they will now be governed, without any voluntary and unconditional choice by them, and which will be very broadly applicable.

2.27. Within that context, offences relating to rebellion against military authority, seen as the very foundation of the military system of rules, will take on particular importance: rebellion (Article 174 PMCC) punishable by imprisonment of between 3 and 15 years and discharge, and mutiny (Article 175 PMCC) punished by between 6 months and three years and discharge, which - for example - covers the scenario provided for under Article 175(1), which punishes persons who persist "*in submitting a question, statement or complaint either orally or in writing*". There are also offences

that may be brought together under the concept of sedition, arising out of the need to punish conduct that could "*depress troop morale*" and that could give rise to a "*contagious phenomenon, which must be kept away from the armed forces"* (see *Report of the Royal Committee on the Preliminary Drafts of the PMCC and the WMCC*, page 143). Whilst it has not failed to note their authoritative characteristics, the Constitutional Court has never held that they are unconstitutional, other than in relation to situations involving a collective complaint falling under Article 180(1) PMCC (which punished any initiative whereby 10 or more military personnel submitted the same question or the same statement or complaint, either collectively or separately but with prior agreement), whilst however leaving intact the second paragraph, which continues to punish any question, statement or complaint presented by 4 or more military personnel in public.

2.28. As regards the type of offence mentioned above, those that are characterised as offences against military administration, public faith, persons and property are less significant, and it is sufficient to make a generic reference to them as the description provided above (albeit with reference to examples) is without doubt significant in order to establish the abnormal nature of the legislation that subjected to that system public sector employees who did not at any time state their unconditional adherence to it as part of the process for transiting to the military system of rules.

2.29. The differences may also be appreciated as regards the penalties imposed for military offences (see PMCC, Articles 22 et seq.) since: military incarceration occurs in a military prison, and is associated with an obligation to perform unpaid work; the prisons are therefore different from ordinary prisons, also because military personnel remain subject to military discipline even whilst serving their sentences; it is also stipulated that any officials who have not been demoted as a result of their conviction must serve their sentence in a prison different from that used for other military personnel. Incidental military penalties pursuant to Article 24 PMCC include: a) demotion; b) discharge; c) suspension from duties; d) suspension from rank; e) publication of the conviction. In this last case in particular, which is provided for only in cases involving the imposition of a life sentence, a conviction may be published by public display in the municipality in which it was issued, in the municipality in which the offence was committed, and finally in the municipality in which the corps to which the convicted member of military personnel belonged is based.

2.30. On the other hand, the abnormal nature of the legislative measure is more clearly underscored by the resulting subjection to military jurisdiction from 1 January 2017. From that date, former members of the CFS have become subject to military criminal jurisdiction instead of ordinary jurisdiction by virtue of their transfer into military roles.

2.31. The incorporation of the CFS into the Carabinieri Force has also resulted in the immediate cession of the existence of trade unions and trade union protection for individuals, as will be noted in section II of these Observations.

2.32. It is important to point out that no distinction made between the CFS personnel who transited into the Carabinieri Force and other members of that force. There is no substantial difference for CFS personnel in terms of their obligations, duties and tasks.

2.33. However, whilst the decree does not result in any significant change as regards the functions of criminal police and public security as a result of the acquisition of military legal status,

the changes resulting for the individual legal status of former members of the CFS are undoubtedly significant.

2.34. The references made above to some of the provisions that did not apply to such persons before the contested decree, and which by virtue of that illegitimate act have become binding are symbolic of this.

2.35. The question arises with particular significance for those serving in technical roles who carried out scientific, instrumental and administrative technical activity (specifically surveyors, auditors, operators and general staff members). It must be considered that this role was created by Legislative Decree no. 201/1995, and was initially occupied by personnel originating from the Ministry for Agriculture, Food and Forestry Policies, and subsequently by persons deemed to be unsuitable for service in uniform who, after reaching a certain length of service, could ask to transfer to this role from service in uniform. These are essentially personnel who were not even issued with their own weapon and did not wear uniforms, which therefore clearly set them apart even from uniformed CFS personnel. Such roles are so strictly technical in nature as to be profoundly different also from technical roles within the State Police, as by contrast the latter are issued with an individual weapon and wear uniforms. Nevertheless, such personnel were nonetheless vested with the status, as the case may be, of an officer or official from the criminal police with respect to the functions performed by them (see Law no. 81/2006 converting Decree-Law no. 2/2006). Also such persons have transited, without any differentiation, to the Carabinieri Force.

2.36. The series of restrictions and conditions brought about by military status is therefore so far-reaching that its acquisition is openly at odds with every democratic principle and with Article 1 of the European Social Charter as it did not result from a free choice but was forced. The above is in fact considered to seriously violate the right of CFS personnel to maintain their professional status acquired, after having passed a public competitive examination, and which has matured during their years of service, and is the outcome of a professional choice, which did not entail armed service in defence of the state and did not involve being subject to the duties and obligations specific to members of the armed forces.

3. The changes in status brought about by Legislative Decree no. 177/2016: removal from the security branch, loss of status as criminal police and public security officers, the change in remuneration resulting from the loss of career advancement.

3.1. It must also be observed that those who have not transited into military roles have also suffered a significant change in status and an equally significant change in their employment relationship, in terms of their powers as granted under law, remuneration and career progression, and also the performance of their duties. It would be worthwhile considering these matters in greater detail as this fate has been shared by all those whose final destination has not been the Carabinieri Force or the Guardia di Finanza: both those who were assigned from the outset outside the security branch (fire services and Ministry for Agriculture, Food and Forestry Policy), and those who suffered this fate having chosen mobility as the only alternative to the acquisition of military status, with the sole exception of the 123 people who transferred to the State Police.

3.2. In fact, the status mentioned in sections 1.13. and 2.35 has been entirely lost as a result of departure from the security branch. This means that those who have followed this pathway, either as ordered by the state or having made a mobility request (the only option possible in order to avoid the acquisition of military status) have not only been forced to carry out a different activity but have also been practically deprived of the functions that they performed within the CFS and the status held.

3.3. It must be stressed in this regard that Article 52 of Legislative Decree 165/2001 enshrines the right of public sector employees to be allocated to the duties for which they were employed or to duties that are deemed to be equivalent according to the professional classification provided for under collective agreements. In consequence, as has been confirmed within case law, Article 52 refers to a concept of "formal" equivalence, which is rooted in an evaluation made under collective agreements and is not amenable to review by the courts. Therefore, in order to avoid a violation of Article 52, a necessary and sufficient condition in order for the tasks to be considered to be equivalent is the mere provision to that effect under collective bargaining, irrespective of the specific expertise that the worker may have acquired during a previous stage of the employment relationship with the public administration. However, in the case involving the transfer of former members of the CFS, it is not possible to make such a comparison since they performed tasks within the abolished police force that were of a special and specific nature that was inherently related to the status acquired and the special criminal police and public security functions performed.

3.4. In other words, it is evident that the duties cannot be regarded as even hypothetically equivalent, and that the case by contrast involves the actual stripping of all functions to be performed, which moreover according to the established case law, including of the national courts (cf. Court of Cassation, judgments no. 11835 of 2009, no. 11405 of 2010 and no. 687 of 2014) is prohibited within public sector employment.

3.5. The duties to which police officers may be allocated are not even defined under contract for members of the security branch; these are by contrast strictly related to the rank held and the role performed and strictly related to criminal police functions, which these public sector employees are recognised as having without any limitation in space or time: in fact, the former members of the CFS had permanent status of – as the case may be – criminal police officers or officials and public security officers or officials.

3.6. Essentially, for members of the security branch, tasks are strictly related to status. This observation is confirmed in the case law, where it has been correctly held that: *"As regards the police forces (to which the State Forestry Corps belongs), the predominant case law has reiterated that within public sector employment it is status (and not the activity actually carried out) that is the parameter on which remuneration is without exception based.*" (see Lazio Regional Administrative Court – Rome, Division II, judgment no. 6167/2014).

3.7. The primary requirements of protecting the worker's interest in professionalism have therefore clearly been violated, in a context in which they should have priority significance, by the inadmissible revocation of status of judicial police and public security officers and the removal of the functions previously allocated, moreover in a context in which the case law had not failed to stress their importance: the equivalence of duties must be established on the basis of expertise and

experience comprising the professional resources of the worker, with formal equivalence having no relevance (Court of Cassation judgments no. 13173/2009 and 1916/2015), and on this basis the new duties must have the same professional status or lie within the same professional area as the previous ones (see *inter alia* Court of Cassation judgment no. 2328 of 15 February 2003).

3.8. The classification of one's own duties is in fact an individual right of the worker as it is strictly related to professionalism, which cannot be impaired for any reason because, as has been asserted on various occasions by the Constitutional Court, such harm would breach the worker's expectations, causing harm to him or her as an individual and to his or her dignity. It is only in this way that work is appreciated in its essence as activity that contributes to achieving the material and spiritual progress of society, for which the prohibition on downgrading acts as guarantor.

3.9. In addition, it is not of secondary importance to note that, since as mentioned those affected include persons who were transferred to the National Fire Service, the departure from the security branch entails financial losses and the negation of career advancement previously acquired, which for systematic reasons will be considered in sections 4.7, 4.8, 4.9 and 4.10.

4. The alternatives granted to CFS employees covered by transfer orders: mobility pursuant to Article 12(4) of Legislative Decree no. 177/2016.

4.1. As regards the violation of Article 1 of the European Social Charter, the representatives of the Italian Government have focused on the only aspect that can theoretically be invoked: the existence of mobility as an alternative to the acquisition of military status resulting from the incorporation of personnel into the Carabinieri Force. It is therefore necessary to consider the argument in detail in order to stress its absolute inconsistency and to highlight how the alternative theoretically granted is not capable of making up for the violation objected to. The considerations set out below are evidently relevant also as regards the position of those who by contrast have been withdrawn from the security branch.

4.2. It is appropriate to point out in this regard - identifying them as an effective response to the arguments made by the Italian Government - certain concurring observations made in two orders by which, in the context of a national dispute arising as a result of a challenge to transfer decrees, the regional administrative courts for Abruzzo (Pescara) and Veneto (Venice) decided to refer to the Constitutional Court a question concerning the constitutionality of the delegation of authority contained in Article 8 of Law 124/2015 (so-called *Madia Law*) and Legislative Decree no. 177/2016 on various grounds.

4.3. After summarising the provisions on mobility introduced by Article 12(4) of Legislative Decree no. 177/2016, the first court argued as follows in relation to this matter: "*In essence, if the personnel assigned to the Carabinieri Force (or to another police force, or to the Ministry for Agricultural Policy) refuse to accept that assignment they become subject to mobility procedures and become available for reassignment, which consequently entails a deterioration in the legal and financial terms of the employment relationship and its possible termination after a period of 24 months following availability for reassignment. This does not consider the fact that the uncertainty and the resulting risk of being exposed to such a procedure (circumstances which appear to be sufficient in order to discourage most from following that route) also lie in the low*

number of positions available in other administrations (as the claimant points out, the most recent version of Legislative Decree no. 177 of 2016 has removed the provision for a general possibility to transit into the State Police, thereby maintaining status as a civilian employee in the security branch). Whilst that low number of positions available in other civilian state administrations appears to be justified by the need to avoid dispersing Forestry Corps personnel, and therefore to maintain the same levels of efficiency required under the parent statute (as was held also by the Council of State in opinion no. 1183 of 2016), on the other hand it has the effect of rendering the possibility of making alternative choices to 'acquisition of military status' merely theoretical and abstract (according to an assessment which must necessarily be carried out ex ante and not ex post, as the low number of personnel who chose to transfer to another administration is a result of the low number of positions available and the uncertainty as to the outcome) for those who fall under this category by virtue of the functions previously carried out. Moreover, as is apparent from the claimant's written statement (page 3), which has not been disputed, under the terms of the Decree of the President of the Council of Ministers of 21 November 2016 issued in order to regulate mobility towards other administrations entirely separate from the security branch, the claimant himself would only have been able to seek positions outside his own region, taking account of his status and rank. Therefore, based on a close reading of the wording of Article 12 of Legislative Decree no. 177 of 2016, the position stated by the Council of State in opinion no. 1183 of 2016 does not appear to be confirmed, namely that the choice not to accept assignment to the Carabinieri Force (or to another police force governed by a military system of rules) would not entail any risk of the deterioration of the legal and financial terms of the employment relationship (even though the very same opinion goes on to stress the risk and uncertainty in financial terms for whomever chooses not to accept a transfer to the Carabinieri Force or another police force, including those governed by a military system of rules: "It is therefore evident that there is very broad scope for the members of the Forestry Corps to refuse a transfer to the Carabinieri Force and to be transferred to another civilian administration since those who opt for the subjection of the employment relationship to private law are designated as available for reassignment, which will have effects on their remuneration as they will no longer be able to receive any discretionary personal salary supplement in the event that they are not assigned to another state administration within the class identified by decree of the President of the Council of Ministers (Article 12(3)) or within the 'not clearly defined' scope of other forms of assignment, to be identified following a joint examination with the trade unions, by 31 December 2016"). It is therefore clear why only a few decided in the end not to 'accept' the transfer to the police force designated for them, and in cases involving the Carabinieri Force and the Guardia di Finanza also the change in their status from civilian to military. The 'choice' made by most personnel not to embark upon the uncertain path of mobility does not therefore appear to be the result of an unconstrained free choice, but rather most likely (considering also the parallel dissemination of litigation similar to this case throughout Italy along with the protests made by trade unions, as is moreover confirmed in section 3.4.2. of opinion no. 1183 of 2016 of the Council of State) of the desire not to put at risk their own professionalism (reassignment to another administration of a different type and with tasks different from those in the security branch), in addition in general to their working and financial conditions, and therefore indirectly also their family circumstances. In this regard, in the opinion of the referring court, the data presented by the administration in its own report placed on the case file contain arguments that run contrary to its own defence: "The option to engage the mobility procedure provided for under Article 12, which was concluded on 13 December, was chosen by only 236 personnel out of a total of around 7,781 in view of the provision of 607 positions within state administrations throughout the country; this accounts for less than 3% of the entire staffing body and, out of this negligible contingent, only 52 persons did not state the so-called fall-back option, which could result in further forms of availability for reassignment, acting in consultation with trade union organisations". For the reasons illustrated above, in the opinion of the referring court, Articles 2 and 4 of the Constitution therefore appear to have been violated, in particular

Article 2 insofar as the principle of self-determination has not been respected for staff from the Forestry Corps in allowing for limitations to be imposed on the exercise of certain constitutional rights resulting from their not fully voluntary acquisition of military status (cf. Article 1465(1) of Legislative Decree no. 66 of 2010, which moreover appears to downgrade the regulation of those limits from legislative status, in contrast to the provision made under Article 1(2) of Legislative Decree no. 545 of 1986; and Article 1475(2) of Legislative Decree no. 66 of 2010 with specific reference to trade union rights); there would also seem to be a violation of Article 4, as the employment and service relationship appears to have been radically changed by the acquisition of military status, notwithstanding the absence of a fully free and voluntary choice by the Forestry Corps personnel" (Regional Administrative Court for Abruzzo(Pescara), order no. 235 of 17 August 2017).

4.4. The second court fully endorsed these considerations which, in actual fact, appear to be undeniable, and observed first and foremost when considering the question of mobility as part of its review of the relevance of the question of constitutionality raised that: "*Moreover, the relevance of the question is not altered, based on the involuntary acquisition of military status, by the fact that the claimants had the opportunity to ask to be assigned to other state administrations identified by decree of the President of the Council of Ministers: that possibility does not in fact entail any real freedom of choice for them as the imbalance between the two alternatives forces them to opt for the acquisition of military status; in fact, as will also be mentioned below when considering the aspect of non-manifest unfoundedness, other state administrations aside from the Carabinieri Force that may be chosen instead of it are not equivalent to the Forestry Corps, as they are not civilian police forces; in addition, provision has been made for an extremely limited quota of available positions (600) compared to the number of forestry workers (around 8,000), as confirmation of the fact that the alternative option is conceptualised from the outset as being limited if not exceptional; finally, in the event that their requests for transfer to other administrations are not accepted, the interested parties will be exposed to penalising consequences, which may also entail their classification as available for reassignment and consequently the termination of the employment relationship; therefore, the alternative path to the acquisition of military status risks turning out to be a blind alley without any exits*" (Regional Administrative Court for Veneto (Venice), order no. 210 of 22 February 2018). When considering whether or not the questions of constitutionality raised were manifestly unfounded, the Regional Administrative Court for Veneto then considered *ex professo* the issue as to whether employees have any valid alternative to the choices imposed by the Government: "*6. The absence of any free choice in relation to the transfer in question is apparent from the provision made by Article 12 of Legislative Decree no. 177 of 2016 described above: in essence, if the personnel assigned to the Carabinieri Force (or to another police force, or to the Ministry for Agricultural Policy) refuse to accept that assignment they become subject to mobility procedures and become availability for reassignment, which consequently entails a deterioration in the legal and financial terms of the employment relationship and its possible termination after a period of 24 months following availability for reassignment. This is without considering the fact that the uncertainty and the resulting risk of being exposed to such a procedure (circumstances which appear to be sufficient to dissuade most from pursuing this option) result, as mentioned above, also from the low number of available positions for the personnel transferring to other administrations (around 600 positions as against around 8,000 Forestry Corps workers). Whilst that low number of positions available in other civilian state administrations appears to be justified by the need to avoid dispersing Forestry Corps personnel, and therefore to maintain the same levels of efficiency required under the parent statute (as was held also by the Council of State in opinion no. 1183 of 2016), on the other hand it has the effect of rendering the possibility of making alternative choices to 'acquisition of military status' merely theoretical and abstract (according to an assessment which must necessarily be carried out ex ante and not ex post, as the low number of personnel who chose to transfer to another administration is a result of the low number of*

positions available and the uncertainty as to the outcome) for those who fall under this category by virtue of the functions previously carried out; no guarantee whatsoever is provided as to the presence of available positions in other administrations with the same status and rank for the potentially interested party and within his or her region of residence. On the other hand, the need for a generally complete transfer to the Carabinieri Force is assured by the Legislative Decree precisely by virtue of its implementation of the criteria set out in the parent statute, which provides that the current levels of monitoring of the environment, the territory and the sea for which the dissolved Forestry Corps was responsible must be maintained. It is therefore clear that the claimants were destined for the Carabinieri Force, acquiring military legal status through the law and not on the basis of a free choice" (Regional Administrative Court for Veneto (Venice), order no. 210 of 22 February 2018, cited above).

4.5. It is important to stress that these reflections have not been rejected by any court in any of the court cases that have been brought before all regional administrative courts throughout the country involving several thousand employees.

4.6. And in effect the argumentation can be fully endorsed. Indeed, as has been asserted in national litigation in which the arguments have been fully accepted, it is clear from a joint reading of the provisions that the alternative possibility granted to those to whom the transfer orders apply is of such a nature as to be incompatible with the concept of free choice. First and foremost, those who chose another administration amongst those listed in the decree of the President of the Council of Ministers would have been required at the same time to relinquish their grades, as the case may be, of criminal police officer, substitute public security official, criminal police officer or public security employee. Secondly, as noted above, any choice to transfer to another state administration could simply have been refused by the public administration. Therefore, from this standpoint, the choice cannot be said to have been free and unconditional, since the final decision regarding the transfer to another civilian state administration was always left to the public administration. In this latter eventuality, the further choice available to the individual becomes relevant, namely to indicate whether or not he or she intended to continue to be assigned to the target administrative department specified by the decree of the head of the service; if not, the consequences provided for under paragraph 6 applied, namely the activation of the redeployment procedure, which had to be concluded by 31 December 2016, and thereafter assignment to non-active service pursuant to Article 33(8) of Legislative Decree no. 165/01. It is therefore evident in two respects that the former members of the CFS have in any case been confronted with an excessively restrictive choice in terms of their rights, while still being subject to the obligation to join the ranks of the Carabinieri Force (or any other destination imposed). First, they would have to relinquish their status and functions, which is the first indication that the provision is manifestly irrational and unlawful under international treaty law; this is because the requirement imposed on a member of a civilian police force to relinquish his or her own status and functions must be regarded as incompatible with the European Social Charter, specifically Article 1. Secondly, the choice would have exposed the individual, in the event that it was rejected, to classification after 31 December 2016 as assignment to non-active service which, as is clearly indicated in the two referral orders mentioned above, entails the suspension of the employment relationship and the risk of its termination, along with serious financial limitations.

4.7. The transfer to another state administration would moreover have resulted in exclusion from the security branch and the loss of related financial benefits, a difference in the

substantive content of the employment relationship, the loss of career advancement and the application of a different pension regime. Indeed, the employment relationship of staff from the security/safety branch is regulated differently to that of public sector employees. Legislative Decree 195/1995 stipulated a variety of aspects inherent to that specific public sector relationship, which were subsequently rendered more specific by individual legislative measures.

4.8. The most important distinguishing feature that sets apart that employment relationship from those of all other public sector workers relates to the salary and the pension scheme. Regarding the former, it should be considered that Decree of the President of the Republic no. 51/2009 contemplates as remuneration, for example, pensionable allowances, the payment of overtime, divided into working days, night work, non-working days and night work on non-working days, the functional allowance, the efficiency fund, the application of special allowances, such as for example allowances for air navigation, flying and assignment to special units and/or activities, mission allowances and transfer allowances, which therefore result in a significant financial loss for any person who withdraws from the security branch, as no corresponding allowances exist for public sector employment under private law arrangements.

4.9. Another significant aspect is the different pension regime for members of the CFS compared to civilian employees. This is confirmed by Article 18(11) of Legislative Decree 177/2016 which provides for the possibility, exclusively for CFS transferring to the administrations falling under Article 12(1) of the Decree, of remaining under the pension scheme of the system of origin, whilst excluding the option for those who transfer to another state administration pursuant to the decree of the President of the Council of Ministers of 23 November 2016. To that effect, the statutory limits for the old-age pension are stipulated for personnel belonging to the CFS: 60 years of age for officers, assistant superintendents and inspectors, 65 years of age for operators, general staff members, auditors and surveyors. The limit of 65 years of age also applies to managers and directors. The direct application of the limit of 60 years of age to the positions listed above is guaranteed to members of the CFS under Article of Legislative Decree 165/1997 as a civilian police force.

4.10. Once again, specific more favourable terms compared to the regime of public sector employment are also present in terms of career advancement, which entails progression to a more senior position, along with the related salary increase, in line with seniority points. In particular, it was previously stipulated that, for each role within the CFS, promotion from one position to another was to be obtained according to an open procedure involving an examination of absolute merit, for which any person who at the time of the examination had completed a particular period of actual service in the lower position was eligible (see Legislative Decree 201/1995, as amended by Legislative Decree 87/2001). The same criterion as mentioned above applied to the positions of chief commissioner as regards career advancement to the role of deputy assistant forestry service chiefs of police [*questori*] (see Article 6 of Legislative Decree 155/2001). Two routes were available for the passage from deputy assistant forestry service chiefs of police to first director: either by comparative examination based on merit and completion of a 3-month training course, for up to 80% of available positions on 31 December of each year, of by competition based on qualifications and examinations for the remaining 20% of available positions on 31 December of each year. On the other hand, within public sector employment, the position of director could only be attained by

competition. In addition, promotion to the status of superior director was obtained, subject to available positions on 31 December of each year, by comparative examination based on merit, for which any personnel with the status of first director who had completed three years of actual service in that role were eligible. This obviously entailed a different and significantly improved salary. In addition, it was also possible for officers and assistants, superintendents and inspectors to obtain promotion from one position to another based on so-called extraordinary merit where, during the performance of their duties, they had rendered exceptional service or distinguished themselves by demonstrating exceptional capacity (see Article 22 of Legislative Decree 201/1995). This clearly entailed the award of a higher salary.

4.11. However, the failure to make a choice in favour of another state administration resulted first of all from a desire not to relinquish the functions associated with each person's relevant position, which had been achieved by passing a public competitive examination and throughout a career, which was naturally associated with indirect sacrifices of various types, including first and foremost in relation to private and family life.

4.12. The choice to transfer to another civilian state administration would then have exposed them, in the event of refusal and of the failure to allocate them to the original destination desired by the public administration (the only condition on the basis of which a "choice" may be deemed to have been made, as it is not by contrast possible to state that there was a "choice" when the public administration was granted the option of refusing the transfer to another administration and imposing the destination which it stipulated), to withdrawal from the security branch and availability for reassignment pursuant to Article 33(8) of Legislative Decree no. 165/2001, along with the application of the remuneration provided for under Article 30(2-quinquies) of Legislative Decree no. 165 of 2001. Article 33 provides that "*as of the date of availability for reassignment, all obligations relating to the employment relationship shall be suspended and the worker shall be entitled to an allowance equal to 80% of the salary and the special supplementary allowance, excluding any other remunerative emolument irrespective of its designation, for a maximum period of 24 months*…" and Article 30(2-quinquies) provides that employees in mobility shall be subject "*exclusively to the legal and financial arrangements, including ancillary remuneration, provided for under the collective agreements in force within the branch of the administration*" of destination. Moreover, no provision is even made for those covered by the procedures provided for under Article 12(6) to the effect that they are to receive any personal salary supplement, which by contrast occurs for any individuals transferring to other civilian state administrations. It is therefore evident that the choice in favour of any civilian administration other than those indicated in the decree of the President of the Council of Ministers adopted pursuant to Article 12 of Legislative Decree no. 177/2016 would have entailed a risk (a tangible risk, considering the extremely limited number of positions made available by that measure, around 600) for the individual CFS employee finding himself or herself in a situation that was so much worse (withdrawal from the security branch, suspension of the employment relationship and allowance equal to 80% of the salary, legal and financial terms as applicable within the sector of destination – in this regard it should be considered that career advancement and remuneration in the security branch are better than in all other administrative branches) as to accept, under duress, and hence not on the basis of a free and unconditioned choice, the acquisition of military legal status.

4.13. To argue, as the Government seeks to do, that Article 1 of the European Social Charter has not been violated due to the fact that the employees had a broad alternative choice associated with the personal supplement, subject to maintenance of the salary received, therefore clearly appears to be insufficient.

5. The structuring of the legislative measure in order to limit any scope for making an alternative choice as a prerequisite for the successful incorporation of the CFS into the Carabinieri Force.

5.1. Again in terms of the indisputable lack of a free choice in relation to the transfer concerned, it must not be overlooked that Legislative Decree no. 177/2016 is only compliant with the criteria laid down in the parent statute insofar as it ensures a generally complete transfer of the members of the CFS to the Carabinieri Force, as the latter administration has inherited almost all functions previously performed by the former service, and it is therefore necessary for these functions to continue to be carried out by an appropriate number of officials. In this respect, it would quite simply not have been possible to recognise a general freedom of choice for transferring personnel. In other words, the need to negate the freedom of choice on the part of the addressees of the transfer orders is already rooted in the rationale of the law, in the inherent reasonableness of the legislative measure, within its need for compliance with the criteria laid down in the parent statute.

5.2. Moreover, it is already apparent from consultative opinion no. 1183/2016, cited above, given by the Council of State on the first draft of the legislative decree implementing the delegation of authority under Article 8(1)(a) of Law no. 124/2015 that the reform in question could not allow a general freedom of choice to members of the CFS. When giving that opinion in relation to the draft legislative decree, in an earlier version to that subsequently published, the Council of State in fact stressed that the "*very broad margin for members of the Forestry Corps to refuse their transfer to the Carabinieri Force*" entails "*a degree of flexibility that does not appear to be reflected by the criteria contained in the parent statute*", as the parent statute had provided that the reorganisation was to occur "*whilst maintaining the guarantee of current levels of monitoring of the environment, the territory and the sea"* and that transfer to other public administrations was to be permitted only for a limited quota, stating that it would therefore be appropriate to fix "*a limit not too far from 200 … for transfers to other public administrations*".

5.3. Essentially, as was highlighted by the Council of State, the *flexibility* and margin for choice allowed to members of the CFS would render the legislative decree unlawful on the grounds that it violated the criteria laid down in the parent statute. Either the legislative decree was to provide for a requirement of incorporation into the Carabinieri Force for members of the CFS, or it would end up being at odds with the parent statute. Expressed in more tangible terms, either the legislative decree entailed the compulsory acquisition of military status for members of the CFS, or it violated the parent statute and hence Articles 76 and 77 of the Constitution.

5.4. In this respect, the legislative choice made in the light of that opinion was to operate strictly within the limits of the criteria contained in the parent statute referred to by the Council of State. Indeed, the previous version of the legislative decree implementing the parent statute had provided that the members of the CFS were entitled (pursuant to Article 12(4) of the draft decree

transmitted to the CS for its opinion) "*a) to submit a request for transfer to another administration referred to in paragraph 1, indicating it specifically with reference to the criteria laid down in paragraph 2. Transfers shall be permitted subject to compliance with the quotas specified in table A, pursuant to paragraph 1, insofar as compatible with proper operational requirements; b) to make a choice, including by way of alternative to the request pursuant to letter a), in favour of the privatisation of the employment relationship and transfer to another state administration among those identified by the decree of the President of the Council of Ministers, referred to in the first sentence of paragraph 3, in accordance with the procedures specified therein*". It was therefore permitted, *inter alia*, to choose to transfer to another civilian police force, specifically the State Police, which would certainly have maintained the individual rights of the claimants that were subsequently violated through the induced acquisition of military status.

5.5. It is therefore clear, having regard also to the need to comply with certain criteria laid down in the parent statute, that, by virtue of Legislative Decree no. 177/2016, members of the CFS should not essentially be permitted – except for a very limited quota, and irrespective of their wishes to remain members of a civilian police force (thereby maintaining the functions characteristic of a force of that type) – to transfer to another civilian police force (or otherwise to another administration that enabled them to retain their prerogatives); otherwise, the delegated measure would not have complied with the criteria laid down in the parent statute, and would have ended up being unlawful in itself. In other words, the measure remains legitimate if, by limiting transfers to another administration to a limited quota, and hence disregarding the freedom of choice of members of the CFS, it establishes a requirement to transfer to the Carabinieri Force.

5.6. The legislative measure ultimately adopted was therefore altered compared with the initial drafts and set out provisions that – it is repeated – required transfer to the Carabinieri Force or otherwise laid down alternative conditions that were so detrimental for the rights of former members of the CFS as to entail for them a choice that was certainly not free.

5.7. Furthermore, in attempting to provide plausible justifications for the passing of legislation entailing the compulsory acquisition of military status by members of the CFS, even the delegated legislation stressed that the effective success of the reform could be enabled precisely by conditioning the free will of the personnel transferred.

5.8. In fact, in the *Regulatory Impact Analysis* (hereafter, RIA) accompanying the draft legislative decree, when considering this issue the author of the document states at the outset that it is necessary to take account "*of the need to ensure in any case the voluntary nature of the transfer as it is associated with the acquisition of military status"* (see page 17 of the RIA). It is therefore clearly evident, first and foremost, that the governmental document confirms the position set out in this submission: military status cannot be acquired by an involuntary transfer, failing which the transfer will be unlawful. Having thereby framed the problem, the RIA proposes a solution in accordance with an empirical method, anticipating the effect that the legislation, which was still under consideration at that time, would have on the conduct of members of the CFS. According to that technical report, "*the measure introduces mechanisms that seek to 'direct' the passage to the Carabinieri Force by ensuring continuing membership of the security and defence branch, along with the maintenance of more favourable financial terms and the ability to continue to work at the same place of service, taking account of the widespread dissemination of the Carabinieri Force throughout the country".* The report therefore on the one hand lays bare the unlawful nature of the involuntary change in legal status, whilst on the other reveals the

methods that are to be used in order to induce those who it is intended should transfer to the Carabinieri Force not to resist that option. It is considered that the satisfactory result may be guaranteed by the stringent conditions imposed upon members of the CFS, as set out above in this submission: obliging any person who does not wish to assume military status to relinquish the status previously acquired by virtue of having passed a public competitive examination along with career objectives legitimately achieved as a result of loyal service over the years of employment.

5.9. However, whilst we do not consider here the ultimate efficacy of the empirical solution proposed by the technical experts in the RIA, for the purposes of assessing the compatibility of the choices made in the delegated legislation with the principles contained in the European Social Charter, it must be stressed that the view that the evident violation of the law (which, we repeat, lies in the involuntary nature of transfer to a military regime) is resolved through a dissuasive ploy is confirmed, and that the legislative option chosen consequently lacks any legal legitimacy.

5.10. It may therefore be asserted, definitively dismissing the argument to the contrary submitted by the representative of the Italian Government, that the former members of the CFS were destined for the Carabinieri Force, thereby acquiring military status through the law, namely in accordance with an imperative requirement imposed by the state.

6. The unreasonableness of the reform from the point of view of selecting the only alternative, which harms the rights of personnel. The reversal of the process of evolution within the national legal order and the violation of the legislative tradition.

6.1. The Government asserts in its defence in these proceedings – again referring to opinion no. 1183/2016 of the Council of State, mentioned above – that the Carabinieri Force was the administration most suitable to absorb the CFS. Leaving aside the relevance of that defence argument for the type of violations objected to, which the Committee will have the opportunity to assess, it is in any case necessary to establish them as unfounded.

6.2. In order to do so, we may start from the eminently concurring findings of the Venice Regional Administrative Court in order no. 210/2018 referring a question of constitutionality to the Constitutional Court. The court held that the choice of incorporating the CFS into the Carabinieri Force, with the result that its functions acquired military status, was entirely irrational both in itself as "*the Carabinieri Force … [is] the police force, out of those existing, that is least suitable for the Forestry Corps, and even incompatible in terms of the system regulating the latter*", as well as in relation to the sacrifice required of individuals: "*in order to avoid interference with the fundamental freedoms mentioned above, alternative organisational solutions should have been found that were nonetheless compatible with the proper operation of the reform, such as for example the transfer of the functions - and hence of the personnel - of the Forestry Corps to the State Police, stipulating as an option the transfer to other police forces governed by a military system of rules different from the absorbing force (Guardia di Finanza and Carabinieri Force). That solution, which would have chosen a civilian police force with functions and professionalism compatible with the CFS, would have avoided the adverse consequences associated with the involuntary acquisition of military status by the personnel transferred*" (see Regional Administrative Court for Veneto, (Venice), order no. 210/2018, cited above).

6.3. The overall irrationality of the reform was incidentally considered by the Regional Administrative Court for Abruzzo, which held that: "*as regards this specific aspect therefore, the choice made by the Government is not even rational, resulting in a violation of Article 3(1) and (2) of the Constitution, since, having regard to the significant sacrifice required of personnel, the choice in favour of the acquisition of military status is not proportionate to the purpose (cf. Constitutional Court, judgment no. 223 of 2012) of maintaining the efficiency which the Corps has always been recognised as having (cf. the report on Bill no. 1535 of the 14th Legislature of the Chamber of Deputies, which subsequently became Law no. 36 of 2004). Besides, had this been the case, it would have resulted over time in the acquisition of military status by all civilian police forces, including in particular those most functionally equivalent to others governed by a military system of rules, and therefore principally the State Police*". The Court also stressed that "*Precisely because both the Forestry Corps and the Carabinieri Force were disseminated throughout the country, it is not in fact clear what the incorporation of one police force into the other achieved; in addition, when justified in these terms, the choice to establish military status features aspects that are unreasonable or in any case disproportionate to and inadequate for the purpose pursued also with reference to this aspect, thereby resulting in a violation of Article 3(1) and (2) of the Constitution. Moreover, as is known, the fight against organised crime (and therefore also the fight against environmental offences) is not the exclusive prerogative of the Carabinieri Force amongst the other police forces; therefore, also this further reason, which is nonetheless considered in the opinion of the Council of State as a factor mitigating in favour of the reasonableness of the Government's choice, is not capable of rendering the choice to vest the Forestry Corps with military status adequate and proportionate*". It then concluded with an absolutely severe conclusion regarding the choice inherent within the reform: "*Precisely because the objective of the delegation of legislative authority was to maintain current levels of monitoring of the environment and to safeguard existing professionalism, it implicitly acknowledged that the Forestry Corps had guaranteed adequate levels of professionalism and operation (on the recognition of the merits of the dissolved Forestry Corps, cf. the report on Bill no. 1535 of the 14th Legislature of the Chamber of Deputies, which subsequently became Law no. 36 of 2004). Therefore, the only objective of the incorporation which may be inferred from the parent statute is the requirement of 'cost rationalisation', which essentially means in business terms implementing cost savings, whilst maintaining the same levels of efficiency and productivity. In view of the above, it appears to be entirely contradictory to seek to rationalise costs - that is to pursue cost savings whilst maintaining the current levels of monitoring of the environment and safeguarding existing professionalism, expertise and unitary functions – by breaking up a police force with specialist powers, which does not have any significant overlap in terms of functions and professionalism with other existing police forces (so much so that, in order to maintain the same functional and professional levels it is necessary to transfer all resources and functions to the other police force). This is unless it is considered that the simple numerical reduction of the police forces could result in a cost saving, assuming equal levels of resources and personnel, even without eliminating significant overlaps in terms of functions (which did not exist between the Forestry Corps and the Carabinieri Force), but by contrast dispersing specialist cultural heritage through complex reorganisations, and therefore not by streamlining a tried and tested system for environmental protection but breaking it up into its various constituent parts. This if anything gave rise to new problems related to reorganisation and the consolidation of operational and training mechanisms and dynamics built up over the years, which will evidently require time in order to establish a new equilibrium within the everyday conduct of operations*" (see Regional Administrative Court for Abruzzo (Pescara), order no. 235/2017, cited above).

6.4. Moreover, it is important not to omit at this stage the consideration – as a factor that can only reinforce the argument alleging the violation, whilst also establishing the inconsistency in

the Government's arguments – that the nature of the change in the law is absolutely contrary to the evolution of the national legal system.

6.5. In this regard, a comparison may be drawn with both the opposite choice made by the law in relation to all other police forces (including the CFS), the military status of which has been removed over time, and the *modus operandi* used by the legislature on such occasions, such as when – during the 1980s – it enacted the reform that led to the demilitarisation of the then Public Security Corps (which had military status at that time) and the establishment of the Public Security Administration as a civilian police force. Further to the reform enacted by Law no. 121/81, provision was made on that occasion for the possibility, first, for military personnel to transfer to other military police forces (Carabinieri Force, Guardia di Finanza and Prison Police Corps) and, second, for civilian personnel (including the roles of public security officers and the Female Public Security Corps) to transfer to another civilian administration of the State.

6.6. Article 107 of Law 121/81 authorised the executive to issue within three months a decree or decrees having the force of ordinary law that took account of the criteria mentioned below: *"To enable the members of the public security administration who previously performed the abolished role of public security officers or Female Public Security Corps officers, whilst maintaining the legal and financial entitlements acquired, to transfer to the civilian administration of the interior and other state administrations, whilst safeguarding the rights and interests of personnel holding positions within the receiving administration; to enable the members of the public security administration originating from the abolished Public Security Corps, including officials holding auxiliary and reserve positions, with such persons remaining in the same positions, to transfer, maintaining the legal and financial entitlements acquired, to other police forces to be identified according to arrangements and criteria established in concert between the ministries concerned, safeguarding under all circumstances the rights and interests of personnel holding positions within the receiving administration;. Officials serving in auxiliary and reserve positions shall be permitted to transfer to the same position that was held also within the corps of origin".*

6.7. The legislature at the time then implemented the delegation of authority, adopting Decree of the President of the Republic no. 551/1981 which, in consideration of the different roles, both civilian and military, within the dissolved public security corps (the role of civilian public security officials, answerable exclusively to the Ministry of the Interior, the Public Security Corps, organised as a military force and answerable to the Ministry of the Interior, and the Female Public Security Corps, a civilian force with powers in limited areas, and exclusively answerable to the Ministry of the Interior) granted them a free and voluntary choice, providing either for transfer to civilian administrations or transfer to police forces under military organisation. In fact, the law provided for the possibility for personnel who previously performed the abolished role of public security officers or Female Public Security Corps officers (both civilian forces) to request a transfer to roles in the civilian administration of the interior or other state administrations (see Article 1 of Decree of the President of the Republic no. 551/1981), and the possibility for members of the Public Security Corps to transfer to the Carabinieri Force, the Guardia di Finanza or the Prison Police Corps, all organised as military forces (see Article 3 Decree of the President of the Republic no. 551/1981). This occurred without subjecting the choice to any numerically predetermined quota.

6.8. Although the reform implemented by Law 121/81 sought to achieve the demilitarisation of the then Public Security Corps, thereby enabling workers to acquire new rights

(such as for example the right to a real form of trade union representation), that legislation was passed in full compliance with the regime of origin for each role, and ensured the maintenance of the legal status associated with each role, both for those previously subject to the regime of civilian state employment and for those who had been members of a police force organised as a military force, therefore allowing all members to make a free choice.

6.9. In view of the above, it must be concluded that the reform that has now been implemented for the members of the CFS by Legislative Decree no. 177/2016 has not only followed a diametrically opposite trajectory to the process of democratic evolution pursued by the legal order (the demilitarisation of the police forces), but also has not taken account of any of the individual rights significant under constitutional law of the persons affected by the reform (right to choose). It therefore appears to be anachronistic if compared to a reform such as that implemented by Law no. 121 of 1981, an important and fundamental aspect of which was that the personnel should express their own wishes, in the context of a reform that sought to satisfy not only financial claims but also and above all those relating to organisational aspects, resulting in a real form of trade union representation. It is not by chance that the primary objectives set by the legislature in 1981 included "*democracy"*, which was implemented by granting members of the dissolved Public Security Corps a series of rights that rendered them "*workers like any others*" to all intents and purposes (see Luigi Mone, *L'Amministrazione della Pubblica Sicurezza e l'Ordinamento del Personale,* page 31 et seq.). Also in view of that observation, it must be pointed out that, today, the principles that inspired the most recent reforms within the security branch have been dramatically betrayed for those former members of the CFS who have been transferred either to the Carabinieri Force or to other bodies and corps; moreover, these persons are members of a corps which had previously completed its process of demilitarisation in 1948.

6.10. Once again, both of the orders referring a question concerning the constitutionality of the reform to the Constitutional Court - both no. 235/2017 of the Regional Administrative Court for Abruzzo and no. 210/2018 of the Regional Administrative Court for Veneto, cited above - are in agreement regarding this point. The former Court held regarding this issue that "*as has been stressed by the claimant, the failure to provide for a right to choose, in the sense of being able to maintain previous status (whether military or civilian) without having to relinquish previous police functions, and hence the failure to provide for the option of choosing to transfer to another civilian police force, is at odds with the legislative tradition followed by the legislature in similar reforms. This constitutes a further reason why the delegated decree is unconstitutional since, when interpreting the principles and directional criteria, the government did not choose to implement them in a manner consistent with that legislative tradition (cf. Constitutional Court, judgment no. 340 of 2007), but chose the mandatory rather than merely optional imposition of military status for personnel from the Forestry Corps (where they transfer to the Guardia di Finanza or the Carabinieri Force), unless they relinquished their functions as criminal police officers, and moreover subject to very limited quotas for transfers to other civilian administrations. In fact, when the State Police was demilitarised, Article 107 of Law no. 121 of 1981 provided for the option for personnel to transfer to another military corps or to another civilian state administration, and that option was regulated under Legislative Decree no. 551 of 1981"*; moreover "*Violation of Article 3(1) and (2) of the Constitution insofar as the choice made by the Government to vest personnel from the dissolved Forestry Corps with military status, having regard to the significant sacrifice required of personnel, does not appear to be proportionate to the purpose of maintaining the efficiency which the Corps has always been recognised as having; and violation of Articles 76 and 77(1) of the Constitution on the grounds that the choice of 'remilitarising' the Forestry*

Corps is at odds with the previous legislative tradition concerning both other police forces and the Forestry Corps itself. … The 'militarisation' of a police force (or the absorption of the personnel of a civilian police force into a military police force, which is analogous in nature) also runs clearly in the opposite direction to the general principles of our legal order and its evolution over time. Since, as mentioned above, this amounts to a profound change from the previous system, this provision should have been set out explicitly in the parent statute, or should in any case have been justifiable, at least implicitly, with reference to the principles and directional criteria laid down by the parent statute"; "*as the administration itself concedes, our legal system has historically witnessed by contrast a demilitarisation of all organisations from the so-called security branch in the broad sense, except the Guardia di Finanza (for which in actual fact various pieces of draft legislation to that effect have been tabled; cf. for example during the 14th legislature Bill no. 2734 before the Senate; during the 15th legislature Bill no. 2846 before the Chamber of Deputies, etc…) and the Carabinieri Force: the State Police, the Prison Police Corps, the Fire Service - 'demilitarised' by Law no. 469 of 13 May 1961 – and even the State Forestry Corps*" (see Regional Administrative Court for Abruzzo (Pescara), order no. 235/2017, cited above). The Regional Administrative Court for Veneto takes the same view, holding that "*were the parent statute to be upheld as constitutional, then the interpretation by the Government of the criteria laid down in the parent statute would be unconstitutional, insofar as it provided for the militarisation of personnel from the Forestry Corps, and consequently in a manner inconsistent with the constitutional and legislative reference framework for the reasons set out above*" (see Regional Administrative Court for Veneto, (Venice), order no. 210/2018, cited above).

7. The violation of Article 1 of the European Social Charter

7.1. It inevitably follows from the arguments set out above that Article 1 of the European Social Charter has been clearly violated. As stated by the Government in its submissions, the Committee had held in its previous decisions in this area that "*discriminatory acts prohibited by Article 1§2 are those that may occur in connection with employment conditions in general (in particular with regard to remuneration, training, promotion, transfer and dismissal or other detrimental action)"* (decision of the Committee published on 11 April 2016 on complaint no. 91/2013 *Confederazione Generale Italiana del Lavoro – CGIL v. Italy*). Accordingly, if, for example the provision was considered to have been violated by legislative amendments providing for different and less favourable treatment for a certain category of worker "*in particular with regard to remuneration, training, promotion, transfer and dismissal"*, it would not be possible to conclude that no violation has occurred in a case involving a reform - such as that described here - that even went so far as to impinge upon the legal status of the employees concerned, reducing the scope of the fundamental rights and freedoms guaranteed and altering the very essence of the employment relationship with the state to the point of establishing an enforceable duty (previously not present) to bear arms against an enemy in the event of armed conflict. It is therefore difficult to consider logical the Government's assertion that, based on previous rulings by the Committee, the question at issue here falls outside the scope of Article 1 of the European Social Charter.

7.2. This having been established, it is necessary to make the following observations regarding the alleged violation. The catalogue of inviolable rights, within a broader sense incorporating the concept of modern citizenship, without doubt includes the right to work, the essential content of which must therefore be deemed to be intangible. The Italian Constitutional Court itself has stressed that the "*'right to work' has been 'classified on various occasions by this Court, in*

relation to public appointments, as a 'fundamental freedom right of the individual'" (Constitutional Court, judgment no. 108/1994). The Court of Cassation has also asserted that, depending upon the type of work associated with its classification, the right to engage in work forms part of the fundamental right to the free expression of the worker's personality (Court of Cassation, judgment no. 4975/2006).

7.3. It is therefore clearly evident that the forced acquisition of military status entails such a restriction on rights pertaining to public sector employment as a result of an unequivocal determination by the state as to result in an evident violation of Article 1 of the European Social Charter, along with Article 2 of the Italian Constitution.

7.4. The change in legal status entails an evident impairment of the legal rights of the individuals affected, not only as a result of the clear restriction of the right to work as a constituent element of the fundamental right to freedom of the individual and as an aspect of his or her dignity, but precisely because the change in status gives rise to a major limitation on the fundamental rights and freedoms of the individual.

7.5. The changes brought about by the alteration in status in terms of the scope of the rights and freedoms of the individuals affected by the transfer have been set out in detail above. It has also been highlighted how they impinge upon various aspects pertaining to the right to life, personal security, freedom of expression, freedom of association and personal freedom, expanding the scope of the obligations to which such individuals are subject, and resulting in an increase in the types of conduct that may be of criminal significance, along with an increase in the penalties normally applicable to other citizens. It has been pointed out that the absence of a free choice within that context has implications for the very dignity of the individual, insofar as it is given no consideration in relation to the legal order.

7.6. Consequently, all the restrictions brought about by military status, imposed without any expression of willingness to acquire such status, can be regarded as constituting a direct violation of Article 1 of the Social Charter in depriving the individual of his or her dignity and of the prerogatives typically recognised to other citizens.

7.7. It is important to point out in this regard once again judgment no. 13/1994 of the Constitutional Court in which it was stressed that Article 2 of the Constitution recognises and guarantees the right to personal identity amongst the rights that comprise the inalienable patrimony of the individual. This is the right to be oneself, along with the related ideological, religious, moral and social heritage that distinguishes and at the same time defines the individual. Personal identity therefore amounts to a legal interest in itself irrespective of – or indeed precisely because of – the "*merits and defects*" that clearly characterise each individual: each person is therefore recognised as having the right to maintain his or her individuality, irrespective of the prevailing social and financial circumstances. It is apparent from the judgment that human dignity, as a founding value of the constitutional pact, can be directly translated into the so-called "*personalist principle*", which seeks precisely to preserve and protect the individual.

7.8. It is clear that the very essence of individuality in dealings with the legal order is afforded meaningful significance precisely in consideration of the individual's civilian or military status, which fundamentally alters his or her relationship with other citizens and with the legal

order itself. It is therefore beyond doubt that any change in legal status that does not result from a free choice results in a denial of an individual's typical attributes. In other words, it is possible to assert the existence of a fundamental right of the individual to act autonomously in his or her dealings with the state, choosing whether to be a civilian or to take on the burden of military service, at least as long as the state is not at war, or otherwise exposed to serious risks as to its security. Inevitably therefore one cannot but conclude that Article 1 of the European Social Charter acts as a guarantor for this.

7.9. The encroachment on the inviolable rights of the individual is even more significant in this case as it impinges upon one of the fundamental rights, namely the right to work, which as has been observed (C. Salzar, *I principi in materia di libertà*, in *Principi costituzionali*, 2015, p. 211), has primary status, as the personalist principle is wedded in the Constitution to the principle of work as a core value. Moreover, even if significance were to be afforded to the countervailing interest in the reorganisation of the public administration with the aim of improving its functioning (if this were actually a specific objective that could be demonstrated and not merely proclaimed), this must however be granted reduced weight in the balancing of interests compared to the protection of the social rights and fundamental freedoms of individuals.

7.10. In the case under examination the principle of non-discrimination (enshrined within Article E of the European Social Charter) also appears to have been violated insofar as the members of the CFS, and hence the party represented here in these proceedings, are treated differently and less favourably under the amended legislation (*i.e.* Legislative Decree no. 177/2016) compared to all other fellow citizens as their acquisition of military legal status does not result from a free choice (as for all others) but is imposed in the manner explained above. It is necessary to point out in this regard that, in the national legal order, military status can result only from a free choice made through participating in a competitive examination to enter one of the armed forces. In fact, by Law no. 331/2000 on the process of professionalising the armed forces (subsequently incorporated into Legislative Decree no. 66/2010), Italian law abandoned conscription, which has been suspended (see Article 1929 Legislative Decree no. 66/10). More specifically, following that change, resorting to compulsory conscription has been "suspended" and will be applied only in exceptional circumstances, such as a state of war declared pursuant to Article 78 of the Constitution or the outbreak of a serious international crisis in which Italy is involved either directly or by virtue of its membership of an international organisation that justifies an increase in the numerical size of the armed forces. In addition, it cannot be argued in this regard that, as members of a civilian police force, the status of the individuals represented in these proceedings by the complainant organisations was any different from that of all other citizens so as to justify the difference in their treatment. This is because their position is considered by law to be diametrically opposed to the provision made under Legislative Decree no. 177/2016 as regards specifically the acquisition of military legal status: Article 1929(3) of Legislative Decree no. 66/2010 provides that, precisely by virtue of that status [as a civilian police force], they may not acquire military status, even in exceptional cases (*i.e.* during wartime) where it is provided that this should occur for all other male citizens (Article 1929(1) of Legislative Decree no. 66/2010). Indeed, if that special status were to be considered, they would here too be subjected to different and less favourable treatment under the new legislation compared with their compatriots, assuming that no change occurs to the legislation (i.e. Article 1929(3) of Legislative Decree no. 66/2010) that prevents

military legal status from being acquired, even following a declaration of a state of war, by members of other civilian police forces (such as for example the State Police). In addition, female members of the CFS – for whom conscription would not be possible under normal circumstances, even in the event of a declaration of war (see Article 639 Legislative Decree no. 66/2010: "*Female military personnel shall be recruited on a voluntary basis in accordance with the provisions applicable for male personnel, without prejudice to the provisions of regulations concerning the establishment of suitability for service and without prejudice to any entry quota that may be stipulated, on an exceptional basis, by the decree adopted pursuant to paragraph 2*") – are also unlawfully discriminated against in a manner that is relevant under Article E of the European Social Charter as they are subjected to treatment that is not provided for in relation to any other female citizen.

7.11. Accordingly, the employment and service relationship appears to have been radically changed either by the acquisition of military status or by discharge from criminal police and public security status without any fully free and voluntary choice by personnel from the Forestry Corps, which amounts to a violation of Article 1, § 2 of the European Social Charter.

7.12. The violation is particularly significant if it is considered how the right to work has been a factor that has strongly and distinctively characterised modern democratic-social states, including Italy, which seek to realise the conditions for ensuring the effective enjoyment of rights and freedoms by the public at large, irrespective of any financial obstacles (Crisafulli, R. g. lav., 1951, 166).

7.13. Alongside the assertion of substantive equality, the proclamation of the relevance of the right to work has been one of the driving forces for the development of a democratic order, becoming the principal catalyst and a testing ground for the extension of freedom rights to the domain of private relations. At the present time, whilst the consolidated literature and constitutional case law in this area take the view that the Italian Constitution does not establish a full and actionable individual right to obtain a job either from the state or from another public or private body, they establish the principle that the right to work (which is construed under Italian law as a constitutionally protected interest (Crisafulli, Iustitia, 1977, 256)) manifests itself in the first instance as a fundamental freedom right (Mazziotti, Il diritto al lavoro, 1956, 57) of the individual, establishing a further basis for the relevance of the personalist principle (Mortati and Barile): this means that the right to work is not only a manifestation of the dignity of the individual as a "necessary means of asserting one's personality" (Mortati) but also a source of social legitimation for the holding and exercise of any other position.

7.14. This freedom manifests itself, as is clearly apparent from the wording of Article 1 of the European Social Charter, in professional freedom construed in line with the other freedoms that can be brought under the Western constitutional tradition, namely the right to choose work according to one's own capacities and aptitudes (Macini, Costituzione e movimento operaio, 1986, 32), in such a manner that individuals "*are not forced, simply in order to work, to carry out activity that is not consistent with their own qualifications and interests*" (Martines, Diritto Costituzionale, 2010, p. 595). The legal situation set out above (which is moreover recognised under ordinary legislation by Article 2(1) of the State of Workers, which expressly provides that "*every person has the right to perform work or a freely chosen or accepted profession*") is reflected by a duty on the part of the public authorities and the legislature itself to refrain from any interference in the choices relating to work made by citizens

and with the manner in which work is performed (endorsed in the literature by Mortati, Barile, Baldassarre, Perlingieri, Messinetti and D'Antona).

7.15. According to employment law literature, the right to freedom is an aspect of the right to work, which has been "*very much neglected overall because, within actual social relations, it has effectively been rather rare for any situations to arise in which there has been any conflict concerning the right to freely choose a profession*" (Giugni). Something tangible and mandatory may however be inferred "*by juxtaposing the social right with legal freedom*" (Manicini), thereby inferring the right of the citizen "*to choose their work and the manner in which it is performed as a fundamental means for giving effect to the interest of his or her personality*" (Mazziotti).

7.16. The authoritative statements in the literature mentioned above have been reflected in the case law of the Constitutional Court, which has held that: "*as far as the State is concerned, on the one hand the prohibition on creating or retaining in the legal system provisions that require or enable the imposition of discriminatory limits on that freedom, or that directly or indirectly reject it, and on the other hand the obligation – compliance with which is considered to be essential by the Constitution for the effective realisation of the right described – to channel the activity of all public authorities, including the legislature, towards creating economic, social and legal conditions that enable all citizens who are able to do so to work*" (see Constitutional Court, judgment no. 45/1965).

7.17. Accordingly, whilst the constitutional principles set out above are long standing, they must still be considered as being applicable and reinforcing the obligation which the Italian State has taken on explicitly in ratifying the European Social Charter.

7.18. Therefore, as has been amply demonstrated, although the Legislative Decree provided for the ability of CFS personnel to choose, this choice may be considered to be substantially conditioned, and hence not free, thereby resulting in a serious violation of Article 1 of the European Social Charter as a result of the assignment to work which severely limits the legal interests of those affected.

7.19. In fact, for the claimants, who became members of a civilian police force as a result of a free choice, having successfully completed a public competitive examination, and for whom no provision had been made, even potentially, for the acquisition of military legal status, there were – it is important to reiterate – essentially two alternatives under the transfer measure adopted as implementation of the Legislative Decree, both of which excessively limited their own rights. On the one hand, they could choose another administration out of those listed by the Decree of the President of the Council of Ministers, relinquishing their own status acquired with passion and dedication, provided that the choice was not rejected by the public administration, with the risk of being subjected to a procedure which, as noted above, entails serious financial restrictions and a change in their public sector employment relationship. On the other, they could accept their transfer to the Carabinieri Force, acquiring military status by operation of law – and not it is reiterated pursuant to a voluntary choice – which is characterised by serious limitations and conditions on their fundamental freedoms.

7.20. In other words, the freedom to continue to engage in work along with functions freely chosen and acquired has been subjected to illegitimate and disproportionate state

interference, which for the reasons set out above is incompatible with Article 1 of the European Social Charter.

7.21. For the reasons mentioned, the violation committed affects not only personnel who have acquired military status but also those who have withdrawn from the security branch, therefore being allocated, as the case may be, to the National Fire Service or the Ministry for Agriculture, Food and Forestry Policy, and also those who have withdrawn as a result of mobility procedures. The undersigned in fact assert that the legislation is illegitimate, as are accordingly the resulting administrative measures, insofar as they have provided for the transfer of former members of the CFS to other state administrations outside the security branch also due to the violation of Article 1 of the European Social Charter, which recognises and protects the inviolable right to respect for worker professionalism, and consequently prohibits any outcome in which his or her right to choose and to maintain his or her professionalism is disregarded entirely in the event of a change in organisational requirements. That provision in fact constitutes an obstacle for any legislation purporting to remove the functions of employees, or otherwise to downgrade their status significantly as part of an administrative reorganisation.

7.22. In particular, the state must be deemed to be under a positive obligation to oversee the training and professional advancement of workers, with the aim of offering satisfaction to the legitimate aspiration of each to achieve, and put into practice, the preparation and competence necessary in order to carry out activity that is consistent with his or her own possibilities and aspirations.

7.23. In other words, it must be concluded that the protection provided by Article 1 of the European Social Charter includes the specific right to the maintenance of status and professionalism achieved, especially within public sector employment. As a result, both demotion and downgrading must be deemed to be prohibited without the express and unconditional acceptance of the worker.

7.24. In the light of the above examination concerning the substantive nature of the prohibition resulting from Article 1 of the European Social Charter – and in contrast to that proposed by the Italian Government in its submissions – it must be concluded that the legislature is prevented, even in the event of a change in organisational requirements, from adopting any provisions that entail the demotion and/or downgrading of members of a dissolved police force, specifically the State Forestry Corps, as part of a complex reorganisation of state administrations.

7.25. The transfer to another public administration (including the National Fire Service or the Ministry for Agriculture, Food and Forestry Policy) moreover resulted in exclusion from the security branch and the loss of related financial benefits, a difference in the substantive content of the employment relationship, the loss of career advancement and the application of a different pension regime. In this respect, the allocation of the personal allowance provided for by law cannot be considered to be sufficient in order to offset the adverse financial consequences set out above. This is specifically because it has the effect of equalising the remuneration received upon transfer, but does not in any way make up for the loss of career advancement and hence salary increases under the contract for the security branch.

7.26. It must be borne in mind that the Committee has stated on various occasions that "*Article 1§2 requires the states having accepted it to effectively protect the right of workers to earn their living in an*

occupation freely entered upon. The obligation consists of, firstly, the elimination of all forms of discrimination in employment, whatever the legal nature of the professional relationship (Syndicat national des Professions du tourisme v. France, Complaint No. 6/1999, decision on the merits of 10 October 2000, §24; Quaker Council for European Affairs (QCEA) v. Greece, Complaint No. 8/2000, decision on the merits of 25 April 2001, §20). Article 1§2 also covers issues related to the prohibition of forced labour (International Federation of Human Rights Leagues v. Greece; Complaint No. 7/2000, decision on the merits of 5 December 2000, §17), as well as certain other aspects of the right to earn one's living in an occupation freely entered upon (Conclusions XVI-1 volume 1)" (Fellesforbundet for Sjøfolk (FFFS) v. Norway, complaint no. 74/2011, decision on the merits of 2 July 2013, § 104) and that "*with regard to the concept of discrimination, the Committee recalls having held for a difference in treatment between people in comparable situations to constitute discrimination in breach of the Charter if it does not pursue a legitimate aim and is not based on objective and reasonable grounds* (Syndicat national des Professions du tourisme v. France, cited above, §25)" (Fellesforbundet for Sjøfolk (FFFS) v. Norway, § 107). The states party enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law, but it is ultimately for the Committee to decide whether the difference lies within this margin (Confédération Française Démocratique du Travail (CFDT) v. France, complaint no. 50/2008, decision on the merits of 9 September 2009, §39).

8. The relevance of other provisions of international law: Article 15 of the EU Fundamental Charter of Rights, Article 4, §§ 2 and 3 and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

8.1. It must also be pointed out that Legislative Decree no. 177/2016 is incompatible with EU law. The legislation cited at various points above along with the resulting transfer measures adopted must also be considered with regard to their compliance with fundamental rights, specifically the right provided for under Article 15, recognised by the Nice Charter proclaimed in 2000 by the European Parliaments and the national parliaments, as interpreted by the Court of Justice of the EU, and the principles of which have been expressly adopted by Article 6 of the Treaty on European Union.

8.2. As regards the scope of the provisions of the Charter, EU law provides in Article 51 (Chapter VII entitled General Provisions) that "*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties*". Article 52 goes on to provide that "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others…. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention [however] this*

provision shall not prevent Union law providing more extensive protection". Finally, Articles 53 and 54 stress that "*nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions*" and "*as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein*".

8.3. It is important not to disregard the principle asserted by the Court of Justice that the Charter is not an instrument for protecting fundamental rights that applies outside the areas falling under the competence of the European Union. On the contrary, the Court of Justice is competent whenever the matter brought before the national courts is governed by European law "*on the grounds that it relates to acts of the Union, to national acts and measures implementing EU law or the justifications proffered by a Member State for a national matter otherwise incompatible with EU law*" (judgment of 29 May 1997 in the *Kremzow* case, judgment of 17 March 2009 in the *Mariano* case, order of 6 October 2005 in the *Attila Vajnai* case, judgment of 5 October 2010 in the *Me B, L. E.* case and judgment of 15 November 2011 in the *Dereci* case). Nevertheless, it must be acknowledged, first, that the rights and principles recognised by the Charter constitute (as mentioned above) a source of EU law, which means that, according to the principle that EU law takes priority over internal law, national law must be consistent with it. Secondly, Articles 4 (2)(j) and 67 of the Treaty on the Functioning of the European Union expressly include amongst the powers of the Union, albeit not on an exclusive basis, precisely the creation of a common area of freedom, security and justice; as a result, in cases involving the protection of rights and fundamental freedoms (which include professional freedom which is asserted to have been violated in this case), the principles laid down by the EU Court of Justice must also be considered to be applicable.

8.4. Above all, not dissimilar conclusions are also reached if one endorses the view that the protection of fundamental rights and freedoms falls under the competence of the Union given that, according to authoritative literature, the configuration of the Nice Charter is suitable for "*operating as a reference point for human rights also beyond the*" traditional "*reach of Union action. Respect for human dignity, the right to life, etc. do not in fact specifically relate to EU law, the competences of which do not cover those rights, but rather the Member States… the Charter therefore constitutes a kind of synthesis of the common constitutional values to which the Union refers, also beyond the matters falling under its competence*" (Sorrentino, I diritti fondamentali in Europa dopo Lisbona (Considerazioni preliminari), in Corr. Giur., 2010). On the other hand, "*the logic of a strict separation between legal orders (and accordingly of the spheres of competence of the respective courts) no longer makes any sense, if it ever did. It may be true that the legal systems themselves could endorse such a separation; and it is sufficient to consider the enduring applicability of the assignment of competence over matters and functions between the Union and the States or indeed – as regards the safeguarding of rights – the principle that the Charter of Rights itself declares that it can only be valid within substantive areas falling under Union competence. Nevertheless, experience now teaches us that to hack out a separation between areas is a vane endeavour, as relations are rather governed by principles that seek to render their implementation as malleable as possible and the dividing lines between different areas as mobile as possible*" (Ruggeri, Corti Costituzionali e corti europee).

8.5. It therefore follows that the protection of fundamental rights, including professional freedom under Article 15 of the Nice Charter, which is alleged to have been violated, may be considered during the examination of this complaint.

8.6. In fact, Article 15 expressly provides that "*Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation*" and it appears at first sight that the national legislation requiring the mandatory acquisition of military status clearly violates that provision on the grounds that (as has been pointed out above at various points) any of those who are subject to it who wish to continue to perform their policing functions have been conditioned to accept military functions that were never freely chosen. Similarly, in the event of a transfer (if authorised at all) to another public administration - in order to avoid becoming subject to military discipline, not freely chosen - they have been forced to relinquish the performance of those functions, as has occurred for those allocated to the National Fire Service and the Ministry for Agriculture, Food and Forestry Policy.

8.7. The considerations set out above are supported by a ruling of the Court of Justice itself, which held as follows in its judgment in the *Karlsson* case of 13 April 2000: "*it is well-established in the case-law of the Court that restrictions may be imposed on the exercise of those rights … provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights, in accordance with Article 52 of the Charter*". Nevertheless, this is precisely what occurs in the case under examination to the professional freedom of the workers, which has been seriously and disproportionately violated by the implementation of Legislative Decree no. 177/2016, and this restriction does not further any objective of general interest pursued by the Community (which certainly cannot include the enhancement of the military contingents of the Member States through compulsion), but for the reasons set out above violates the essence of that freedom.

8.8. The undersigned point out in this regard that, whilst Article 15 – which recognises a genuine right of freedom of choice in relation to work, which is not conditioned by the existence of the provisions implementing it – may not be recognised as an absolute right within European case law (such as for example the right to life), but may be restricted as a result of the pre-eminence afforded by the legal system to another right or interest, nevertheless any restriction may be considered to be lawful only if it results from a balancing operation carried out in accordance with the proportionality principle, a principle which has been entirely disregarded in this case.

8.9. Regarding this further aspect, it is observed that precisely the fact that the right under examination has not been expressly considered by any ruling of the Court of Justice is an indication not of its minor importance but rather its status as a well-established and uncontroversial principle, which is fundamental in order to guarantee effective and incisive protection for the social rights of workers within the EU area, "*creating a level playing field…*" and addressing "*any grey areas in rights and protections*" (see the Opinion of the European Economic and Social Committee on "*The changing nature of employment relationships and its impact on maintaining a living wage and the impact of technological developments on the social security system and labour law*", 19 August 2016), which impede the creation of a true common European space of freedom governed by the principle of the standard of maximum and uniform protection for rights (S. Amadeo) with the aim of guaranteeing the primacy of the individual over the market by giving effect to the protection

recognised to the individual within the Member States (ECJ judgment of 15 July 1964, *Costa*, ECJ judgment of 13 February 1969 *Wilheim*).

8.10. Once again, a parallel violation of the ECHR is pointed out. According to Article 4(2) and (3) ECHR "*No one shall be required to perform forced or compulsory labour […] For the purpose of this Article the term "forced or compulsory labour" shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.*". The European Court of Human Rights has clarified the scope of this provision on various occasions, stating in particular that the adjective "*compulsory*" cannot refer to any form of constraint or legal obligation. For example, work that is to be performed under the terms of a contract voluntarily concluded cannot be regarded as falling within the scope of Article 4 solely on the grounds that sanctions are provided for in the event of a breach of contract. The Court has therefore clarified that the adjective *"compulsory"* is intended to identify any situation in which work is required or imposed under the threat of any sanction whatsoever and carried out involuntarily by a person who has therefore not chosen it voluntarily (see in this regard the decisions of the ECHR *Van der Mussele v. Belgium* of 23 November 1983, §§ 34-35, Series A no. 70 and *Mihal v. Slovakia* - no. 23360/08, §§ 44-47, 28 June 2011). The Court has also clarified the meaning and scope of the exception to the above prohibition laid down by paragraph 3 for military service, reiterating on various occasions that it relates exclusively to compulsory military service (which explains the reference made in the text of the provision to conscientious objectors). As regards the content and scope of the provision under examination, the case law of the Court is now consolidated in taking the view that whenever access to or the maintenance of particular employment or a particular professional position is conditional upon choices that entail the acceptance of burdens that are excessive or disproportionate having regard to the future benefits that the provision may entail, those burdens cannot be deemed to have been accepted in a manner that was effectively free. This means that cases of this type will involve a violation of the prohibition laid down by Article 4 of the Convention (cf. *Van der Mussele* cited above, § 37). As regards military status in particular, there is moreover a significant (and recent) precedent. In the case of *Georgios Chitos v. Greece*, application no. 51637/12, judgment of 4 June 2015, the Court held that Article 4 had been violated by an obligation imposed on a professional soldier - and hence an individual who had in any case voluntarily chosen to join the armed forces - under legislation enacted after he signed up to the armed forces to remain in service for a period of time longer than that originally envisaged, or alternatively to pay financial compensation. In this case, the Court did not fail to point out that, above all in consideration of the special circumstances under which military personnel are required to operate, any factor that is liable to impinge significantly on the freedom to choose whether to remain or to relinquish military status amounts to a violation of the prohibition imposed by Article 4 of the Convention. It can therefore be concluded that the provision for the compulsory acquisition of military status at issue here constitutes a clear violation also of this provision.

8.11. Finally, the complaints must also consider Article 8, §§ 1 and 2 ECHR. The acquisition of military status (and hence of the full legislation applicable to members of the

Carabinieri Force, including the military system of rules) according to a rigid and absolute automatic mechanism and not following the exercise of a free choice is liable to constitute interference by the state with the exercise of the right to respect for family life and employment laid down by Article 8, §§ 1 and 2 ECHR, which is illegitimate on the grounds that it is not proportionate to the serious restrictions on the right concerned, and is not justified under any of the exceptions provided for under paragraph 2 of that Article.

8.12. First and foremost, it should be pointed out whilst the ECHR does not deal expressly with civil and political rights, the evolutionary interpretation of the Strasbourg Court has enabled rights traditionally defined as social rights to also be recognised as human rights – such as the right of association within a trade union and the right to respect for the professional sphere – as it has been recognised since as early as 1976 that many of the former rights have implications of an economic or social nature such that there is no impermeable barrier between socio-economic rights and the rights covered by the Convention (*Airey v. Ireland* of 9 October 1976).

8.13. Whilst it is not expressly enshrined under Article 8, § 1 of the Convention, this last guarantee in particular falls squarely within its scope, as has been clarified by the Court, in accordance with the rationale underlying it of protecting all areas in which the individual develops his personality (see *Pfeifer v. Austria* of 15 November 2007) and engages in social relations from arbitrary interference by public authorities. In other words, the terms "private life" and "home" have been considered capable of covering also the employment and professional life of the individual (see *Halford v. United Kingdom* of 25 June 1997, *Amann v. Switzerland* of 16 February 2000, *Rotaru v. Romania* of 4 April 2000, *Osterreichischer Rundfunk v. Austria* of 7 December 2006) since, during the present era, most people have the opportunity to develop their own personality also outside of family life (*Comm.edu Bruggemann and Scheuten v. Germany, 12 July 1977*), or their physical and social identity (*ECtHR, judgment 552/2010*).

8.14. In view of the above, there is no doubt that the rights mentioned above have been interfered with since, as a general matter, the automatic change in legal and professional status resulting from transfer to the Carabinieri Force inevitably entails the application of the full range of legislation that is binding on members of that corps, with direct subjection to military discipline, which in turn results in a clear and inevitable violation of peace of mind in one's private life and at work, as it did not result from a free and fully informed choice.

8.15. More specifically, it is noted that, under Carabinieri Force Regulations and the military system of rules – which pursues requirements related to organisation, internal cohesion and the maximum operational readiness, which set apart the armed forces from other state structures (Constitutional Court 449/1999) – personnel are required to take on a number of more far-reaching obligations and duties, including of a moral nature (discussed at length above), which include not only the obligation to wear uniforms and to carry a firearm – an obligation to which, as mentioned above, personnel serving in technical roles within the CFS were not subject and which, for directors, was limited to the potential use of the unit weapon – but most significantly the possibility of being deployed in military operations – with the related obligation to defend the country or even to sacrifice one's own life – being subject to military criminal law and the military courts, to comply with the absolute "*duty of loyalty towards the republican institutions*" (Articles 1051 and 1348 of the Carabinieri Force Regulations) and to exercise a certain "*restraint*" not only when

serving but also within private life (Articles 423 and 424 of the Carabinieri Force Regulations), along with being subject to mandatory transfers, as an expression of the general hierarchical principle.

III. THE VIOLATION OF ARTICLE 5, ARTICLE G AND ARTICLE 6, §§ 1 AND 2 OF THE REVISED EUROPEAN SOCIAL CHARTER

9. The arguments put forward by the Government in relation to the second part of the violations objected to in the Complaint, in relation to trade union rights, may be summarised as follows: (i) the Carabinieri Force is one of the armed forces of the state, (ii) Article 5 of the Charter contemplates limitations on trade union rights for the armed forces, and therefore those imposed by the Italian State are compatible with that provision; (iii) the current organisation of military representation complies with the requirements set out by the Committee when analysing similar cases, and also complies with the requirement of participation in collective bargaining.

10. However, the shortcoming in the Government's arguments lies in the assertion that the requirements currently imposed under national legislation on members of the Carabinieri Force are mere limitations, which are as such admissible under the Charter and may be extended indiscriminately to all members of the Corps irrespective of their functions: it is necessary to view in this light the references made by the Government to the case of *Matelly v. France*, ECHR, application no. 10609/10, judgment of 2 October 2014 in section 6 a) and to the Recommendations of the Committee of Ministers of the Council of Europe in section 6 b).

11. However, this is not the case, and the analysis must take account of the general consistency of the various international rules that deal with such matters, along with their interpretation by the bodies tasked with overseeing their application. In the judgment by the Grand Chamber in *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008, the European Court of Human Rights clarified that the ability to impose any restrictions for members of the armed forces, the police or the state administration under Article 11 must be interpreted narrowly, must be limited to the exercise of those rights and must not extend to the right to organise. In interpreting the national provision narrowly, the Court referred to the most relevant international instruments and to the practice of European states according to a now consolidated approach (*Sigurdur A. Sigurjónsson v. Iceland*, 30 June 1993, § 35, series A no. 264; *Sørensen and Rasmussen v. Denmark* [GC], 52562/99 and 52620/99, § 72-75, ECtHR 2006). The judgment also clarified that it is not necessary for the respondent state to have ratified all relevant instruments within the specific sector. The Court accordingly referred to ILO Convention no. 87 on freedom of association, Article 2 of which provides that workers have the right, without any distinction whatsoever, to establish and to join organisations of their choosing, with the result that workers employed by local administrations may effectively create organisations of their own choosing, and that these organisations should have the full right to promote and defend the interests of the workers whom they represent. The Court noted that texts originating from European organisations also demonstrate that the principle of granting public sector employees the fundamental right to organise has been broadly accepted by the member states. For example, Article 5 of the European Social Charter guarantees the freedom of workers and employers to establish and join local, national or international organisations for the protection of their economic and social interests.

The right of association of public sector employees was also recognised by the Committee of Minsters in Recommendation R(2000) 6 on the status of public officials in Europe, principle 8 of which provides that public officials should enjoy the same rights as all citizens and their trade union rights should be lawfully restricted only in so far as it is necessary for the proper exercise of their public functions. Finally, also at European level, the Charter of Fundamental Rights of the European Union adopts an approach that is open to all trade union rights by asserting in Article 12 that "*everyone*" has the right to join trade unions for the protection of his or her interests. As regards European practice, the Court holds that public sector workers' right to organise is now recognised by all contracting states and that exceptions apply only for certain categories of personnel. The European Court has held that the employees of the public administration cannot be excluded from the scope of Article 11 and that, at most, the national authorities may impose "*lawful restrictions*", subject to the limits laid down by and in accordance with Article 11 § 2. In particular, the European Court has asserted that Article 11 § 1 presents trade union freedom as a special form or aspect of "freedom of association" (*Syndicat national de la police belge v. Belgium*, 27 October 1975, § 38, series A no. 19, and *Syndicat suédois des conducteurs de locomotives*, § 37, series A no. 20, § 39). The European Court has also held that, whilst Article 11 is essentially intended to protect the individual against arbitrary interference by the public authorities in the exercise of the rights enshrined therein, it may also entail a positive obligation to ensure the enjoyment of such rights. In accordance with the wording of Article 11, the state is authorised to interfere with the right protected only if it is *"prescribed by law*", pursues one or more legitimate aims and is "*necessary in a democratic society*" in order to achieve them. The Court has therefore held that the exceptions falling under Article 11 must be interpreted narrowly and that only convincing and compelling reasons can justify restrictions on freedom of association. When assessing whether a restriction is "*necessary*" and accordingly whether there is a *"pressing social need*" pursuant to Article 11 § 2, states have only a limited margin of appreciation, which is always subject to strict European supervision (*Yazar and others v. Turkey*, 22723/93 (cited), 22724/93 and 22725/93, § 51, ECtHR 2002-II). Whilst the state party is in principle free to decide which action it intends to carry out in order to guarantee compliance with Article 11, it is obliged to include the aspects that have been considered to be essential within the case law of the Court.

12. According to the current position under the case law of the European Court, trade union rights are comprised of the following essential elements: the right to form and join a trade union (*Tüm Haber Sen and Çınar v. Turkey*, no. 28602/95, §§ 36-39, ECtHR 2006), the prohibition on trade union monopoly agreements (see for example *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, §§ 72-75, ECtHR 2006), the right of a trade union to seek to convince the employer to listen to what it has to say on behalf of its members (*Wilson, National Union of Journalists et al.*, § 44).

13. When developing its case law and recognising in that GC precedent that, in contrast to the past, the right to negotiate and conclude collective agreements also falls within the essential core of Article 11, the European Court also stressed that the Article 11 principles must not be construed statically, and are destined to evolve in line with developments in the world of work, pointing out that the Convention is a living instrument, which must be interpreted in the light of current conditions, following the evolution of international law, in order to satisfy a growing demand for human rights protection. This implies a more stringent approach in assessing

violations of the fundamental values of democratic societies and at the same time the need to interpret narrowly any limitations on human rights in such a manner as to guarantee their concrete and effective protection (see *mutatis mutandis*, Refah Partisi (The Welfare Party) and others v. Turkey [GC], no. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECtHR 2003-II; *Selmouni v. France* [GC], no. 25803/94, § 101, ECtHR 1999-V).

14. The above principles constituted the basis for the judgments in *Matelly v. France* (application no. 10609/10) and *Adefdromil v. France* (application no. 32191/09), the first of which was also referred to by the Government in its observations, which established – wholly as a result of these – that trade union protection may not be removed entirely, whilst however acknowledging that the specific nature of the activities that the armed forces are necessarily required to perform calls for an adaptation of typical trade union activity which, in line with its objective, may reveal the existence of critical issues in relation to the moral and material conditions of military personnel. It must be stressed in this regard that the Court holds that Article 11 of the Convention allows limits to be placed, within this context, on the manner in which an association of members of the armed forces operates and expresses itself; however, such restrictions must not entail the absolute negation of trade union rights, and the right of association in general, in order to uphold their professional and moral interests (cf. *Matelly v. France*, § 71). The Court therefore concluded that the absolute prohibition on the participation by military personnel in a professional association established in order to uphold their professional and material interests must be considered to violate that provision as it does not entail a mere restriction (as permitted by Article 11) but negates outright the entire freedom guaranteed by the Convention. Evidently due to its seriousness, the interference with that right to freedom did not appear to the Court to be "*necessary in a democratic society*" within the meaning of Article 11 § 2 (cf. *Matelly v. France*, §§ 75 and 76).

15. In its decision of 4 July 2016 on complaint no. 101/2013, case *CESP v. France*, the European Committee of Social Rights ruled incompatible with Article 5 of the Revised European Social Charter an absolute and general prohibition on establishing or joining trade union associations for members of the armed forces and police forces governed by a military system of rules provided for – in terms absolutely analogous to those used by Article 1475(2) of Legislative Decree 66/2010 – under previously applicable French legislation. The Committee held in particular that the restrictions on trade union freedom maintained in France by the 2015 reform, which are currently in force, were in fact compatible with Article 5 of the Revised European Social Charter. However, having found that the national *Gendarmerie* could be functionally equivalent both to a police force and to one of the armed forces, depending upon the tasks assigned to it, it held that those restrictions were legitimate only where the corps operated in functional terms as one of the armed forces. On the other hand, where the military corps operated in functional terms as a police force, those restrictions were considered to be unlawful.

16. Therefore, first and foremost, the Government's argument that internal law allows for those restrictions on trade union rights that are currently imposed under national law on personnel from the Carabinieri Force is entirely unfounded since it is evident in this regard that, in allowing national legislation to determine both the "*principle of the application*" of trade union guarantees to military personnel as well, and the "*scope*" of that application, Article 5, sentence three of the Charter, as interpreted by the Committee, is designed to encompass an essential core

of trade union freedoms which must also be recognised to those categories of worker: it follows that a national provision which, as Article 1475(2) of Legislative Decree 66/2010 fundamentally deprives military personnel of the right to "*establish professional trade union associations or join other trade union associations*" violates that provision of international treaty law. Besides, Article G of the Charter does indeed allow for restrictions on "*rights and principles set forth in Part I*" (including those relating to trade union freedoms) where such are "*prescribed by law and [...] necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*"; however, in referring to "*restrictions*" it implicitly precludes the legality of "*exclusions*", which are by contrast provided for under Article 1475(2) of Legislative Decree 66/2010.

17. Secondly, the Government's remaining argument, referring implicitly to the Committee's precedent of *CESP v. France*, that it would be impractical "*to apply a different legal regime to one and the same member of military personnel depending upon whether he or she performed military police functions, i.e. relating to public order, or served on peacekeeping missions abroad or in an criminal police department*" (see paragraph 14, and in general from paragraph 12 onwards) appears to be clearly devoid of any foundation, in particular in relation to the question that is now before the Committee, in relation to which it is necessary to examine the legal principles under discussion and to examine the opposing party's arguments, which would otherwise remain empty assumptions.

18. This Complaint has in fact been presented by trade union organisations that represent the interests of employees of the Carabinieri Force who did not have that status at the time they started working for the state and who acquired it in the manner described in the Complaint, as considered in greater detail in part I of these observations, losing as a result the full enjoyment of their trade union rights previously held.

19. However, regarding the Government's assertions that it is not possible to differentiate between the level of trade union protection available depending upon the functions actually carried out by military personnel, it is necessary as a matter of principle to start with an assertion that has absolute validity. It must in fact be pointed out that – subject to the limits within which a variation in the level of trade union protection recognised is permitted owing to the need to preserve the unitary status of the armed forces with a view to ensuring the efficacy of the armed defence of the state, and where the imposition of such limits is justified under national law (see Constitutional Court, judgment no. 449/1999) – the argument that those limits must be extended to the entire category comprising all employees to which the state has decided to allocate both civilian and military police functions in a hybrid manner appears, more than a suitable justification, to represent an illogical paradox. If in other words ambiguity is a choice made by the state, which intends to maintain a hybrid police force performing civilian and military functions, that ambiguity cannot then become a rule that unlawfully restricts the rights of those who essentially do not perform such functions, even if they may theoretically be required to do so. If a choice is made to maintain the hybrid arrangement, the consequence of an "*institutional context characterised by the central role of human rights, which are afforded priority by the constitutional system's openness to external sources*" (see Constitutional Court, judgment no. 238/2014) must be to extend – towards all – that very same high level of protection required under international law, since that level of protection is the rule, and its variation merely a residual exception. Otherwise, were the state to choose to impose a rigid

restriction of rights, this must inevitably result in a rigid determination of the functions that are served by the encroachment on fundamental rights and freedoms. On the contrary, by tasking an official military body with growing civilian functions, including through the absorption according to law of personnel who performed those functions with civilian legal status (as occurred under the recent Legislative Decree no. 177/2016), this amounts to nothing other than an unjustified and therefore illegitimate extension to civilians of limits that should apply only to military personnel. In this way therefore, the assertion that those limitations are legitimate on the grounds that they are conducive to the defence of the state loses all logical coherence and, far from supplementing the provision made by Article G of the Charter, remains an empty formal justification.

20. The Government's arguments are focused on the view that different departments of the Carabinieri Force perform hybrid functions and that individual members of military personnel are interchangeable between them. It is necessary in this regard to object to the major ambiguity in the Government's approach when formulating its submissions: the Complaint clearly asserts that the provisions on trade union rights recognised by the European Social Charter have been violated due to the fact that the vast majority of members of the Carabinieri Force perform exclusively civilian police functions: these include, with absolute certainty, the former members of the Forestry Corps, who have now been assigned to the Command Unit for Forestry, Environmental and Agri-food Protection, performing exclusively civilian police functions. In formulating its positions by reference to arguments whereby any person who performs both civilian and military functions must submit to the limits that are imposed on military personnel, far from providing tangible data in order to enable the Committee to assess whether its position is well-founded (i.e. what military tasks have been assigned to the Carabinieri Force and which and how many employees are deployed on those tasks), the Government provides factual information (i.e. the reference to the 13th Regiment, the Second Mobile Brigade) that is entirely marginal, incomplete and useful solely in order to muddy the waters. In the light of the above, it is considered for this reason that this argument by the opposing party cannot be deemed to be admissible as it is not supported by objective facts.

21. That said, it is necessary to apply the Government's argument to the specific reality of the former members of the Forestry Corps, who were obliged to acquire military status, and who as the Government itself has acknowledged were previously fully unionised as members of a civilian police force (see § 30 of the Observations).

22. The assessment of the compatibility of the provisions limiting trade union rights with international law cannot therefore disregard the issue as to whether (leaving aside the mere formal aspect of their applicability to a military system of rules), despite their incompatibility with the dual convention system of protecting social rights and fundamental human rights, they at present effectively satisfy the requirements with reference to which they were adopted, that is to ensure the internal cohesion, neutrality and operational readiness of the armed forces – all of which are necessary and indispensable prerequisites in order to ensure the efficacy of their actions, having been imposed in order to protect an interest of the legal system of overriding and so to speak primary importance, specifically the military defence of the state. In other words, it is of absolutely priority importance to consider whether all persons who are subject to the limitation

imposed by Article 1475(1) of Legislative Decree no. 66/2010 are effectively called upon to defend the state militarily.

23. The constitutional justifications for the provision limiting the rights of military personnel were noted in the single judgment of the Constitutional Court that has considered this issue, namely judgment no. 449 of 17 December 1999. In that judgment, ruling in relation to Article 8 of Law no. 382 of 1978 (which was repealed by Legislative Decree no. 66/2010, which however reiterated the content of Article 1475 of Law no. 382), the Court ruled the question unfounded, noting that Article 52(3) of the Constitution refers to the "*organisation of the armed forces*" not in order to indicate its exclusion from the general organisation of the state (which would be inadmissible), but in order to encapsulate in that wording the absolutely special nature of its function. The Court therefore referred to its own precedents in which it had *"cast light on the functional requirements and special characteristics of the military system of rules (judgment no. 113 of 1997, judgment no. 197 of 1994, judgment no. 17 of 1991, order no. 396 of 1996), whilst reiterating on several occasions that the legislation is not extraneous to the general system of constitutional guarantees"*. The Court observed in judgment no. 278 of 1987 that the republican Constitution marks a radical break with the institutionalist logic of the military system of rules as this system must be brought under the general state legal system, "*which respects and guarantees the substantive and procedural rights of all citizens"*. The Court went on to assert that *"the guarantee of the fundamental rights with which individual 'military citizens' are vested is not therefore set aside by the requirements of the military structure; this means that the collective interests of members of the armed forces are also eligible for protection ….. in order to ensure the consistency of the military system of rules with the democratic spirit"*, whilst however noting that the finding that *"the military structure is not a foreign body of rules, but constitutes an emanation of the state within which it operates, and on whose values it is based", does not mean that the prohibition imposed by the legislature on the establishment of trade union type organisations within the military must be considered unlawful"*. The Court observed that *"it is necessary to take account not only of the employment relationships of military personnel with their own administration, and hence the bundle of rights and duties with which it is associated, along with the guarantees (including judicial) provided by the legal order, as the sole overriding consideration is the service performed in a special field, namely within the military (Article 52(1) and (2) of the Constitution)"*. The Court therefore held that *"a declaration that Article 8 was unconstitutional insofar as challenged would inevitably pave the way for organisations whose activities may not be compatible with the requirements of the internal cohesion and neutrality of the military system of rules"*.

24. It is argued here that this approach should be set aside in consideration of the development of international law, and a restriction of the trade union rights of military personnel analogous to that applicable to the rights of other workers within the security branch would now be more in keeping with the requirement to protect the fundamental rights of and equality between workers in different branches of state employment. Indeed, that solution does not at present entail the risk of any potentially harmful degeneration in the cohesion and functioning of military bodies. Moreover, it must be considered that essentially specialist police such as the Guardia di Finanza, or what at least part of the Carabinieri Force has become over time (especially as a result of the – albeit objectionable – absorption of the State Forestry Service), retain very few strictly military competences, and it is exclusively in relation to such competences that any limitation on trade union rights could be regarded as acceptable in theoretical terms.

25. Having clarified the rationale underlying the provision limiting trade union rights in the national legal system and having established why it is considered to be anti-historical and contrary to international law, it is necessary to establish its unfairness with specific reference to the position of former members of the CFS.

26. As mentioned above, these personnel have been assigned to the Command Unit for Forestry, Environmental and Agri-food Protection. That Command Unit has been vested almost exclusively with civilian police tasks. Moreover, since the personnel assigned to it originate exclusively from the CFS and do not have any military preparation, it would be impossible to task it with any military functions; and indeed, as mentioned above, its technical personnel did not even wear uniforms or carry a firearm until 31 December 2016. Accordingly, no instructions relating to military operations have been issued by the Ministry of Defence or the Defence Chiefs of Staff, and had any been issued, considering the special nature of the personnel it would have been entirely legitimate to conclude that the general who would be required to bear responsibility would be at the very least unsuited to the role.[1]

27. As regards that Command Unit, it has been stipulated that it will pursue exclusively the following objective in 2017 (and consequently also thereafter): "18 – Sustainable development and protection of the territory and the environment", a task that has nothing to do with the military defence of the state.

28. The ruling that the Committee is asked to make is therefore uncontroversial in that it is asked to find that the legislation in question is incompatible with the European Social Charter: national law has not acted upon the external recommendations made over time to review the system, at least with a view to providing for variations in the trade union guarantees in full (and guarantees should be deemed to be full only where they involve the recognition of a general right to join ordinary trade union and professional associations) for particular forces (including formally military forces) and to imposing limits on trade union protection only in extremely limited areas (involving the specific armed protection of the state). From that perspective, the position of those who claim within these proceedings the full and unconditional recognition of all trade union rights, including the right of association (Article 5) and the right of collective bargaining (Article 6) therefore becomes particularly significant. This is because before transferring to the Carabinieri Force they had been members of the State Forestry Corps and had therefore spent most of their careers as state employees, fully enjoying trade union protection, including full freedom of association, whereas they now occupy a position within the Carabinieri Force in which it would be difficult to envisage them being called upon to defend the country militarily – if for no other reason than for the absolute lack of any specific training and aspiration to do so; and it is in order to ensure the efficacy of such action alone that internal cohesion, neutrality and operational readiness is considered necessary, as a matter of principle, which must not suffer from the presence of trade union rights and protection in the strict sense.

29. Finally, it is necessary to respond to a third argument made by the Government and mentioned above, specifically concerning the effective recognition of the guarantees under Article

[1] See https://www.difesa.it/Il_Ministro/Uffici_diretta_collaborazione/OIV/Documents/Direttiva_Generale_per_attivita_amministrativa _e_gestione_2017.pdf

5 of the European Social Charter through military representation bodies. The reasons why the guarantees mentioned above cannot be considered to have been secured in this manner have been set out in detail in this Complaint; nevertheless the following considerations should still be made.

30. Italian law established military representation bodies in 1978 (COBAR [*Consiglio Base di Rappresentanza*, Base Representation Board], COIR [*Consiglio Intermedio di Rappresentanza*, Intermediate Representation Board], COCER [*Consiglio Centrale di Rappresentanza*, Central Representation Board]), conceiving of them as a replacement for trade union freedom, which was denied. That replacement function was openly declared in the majority reports presented to the Chamber of Deputies during the parliamentary debate concerning Law 382/1978.

31. The military representation bodies are governed by Articles 1476 et seq. of Legislative Decree 66/2010 and have predominantly consultative and proposal functions in relation to the protection of collective interests of military personnel, although only in relation to the specific matters mentioned in Article 1478. The provisions set forth therein are supplemented by the regulations incorporated into Decree of the President of the Republic no. 90/2010 (Consolidated Act laying down regulatory provisions pertaining to the military system of rules, issued pursuant to Article 14 of Law no. 246/2005). The three levels of the representation bodies are to all intents and purposes public bodies directly established by state legislation. It should be noted that the bodies meet at military facilities or at locations otherwise designated for service and that members are entitled to a so-called attendance allowance as provided for under Article 1 of Decree of the President of the Republic no. 5/1956, with the result that the performance of representation activity is deemed for all intents and purposes as "service activity".

32. Under the implementing regulations, military representation has been defined as an institute under the military system of rules, which reinforces the negation of the right to a free and independent representative body. The sizes of base units and electoral procedures are determined by the command units of the respective structures. The same applies for intermediate (COIR) and central (COCER) representation bodies. Elections for delegates at the various levels are then called by the respective command units. The commanders also establish organisational criteria for elections and appoint the presidents of the electoral seats. All paperwork and documentation relating to voting must be presented to commanders. The obligation to present documentation, resolutions, agendas and motions to the respective commanders also applies for the duration of representation activity. Relations between the various levels of representation (central, intermediate and base) are not regulated. Therefore, such relations and hearings of military personnel, which must in any case be limited to the provision of information concerning only requests put to them, are possible only if authorised by the respective commanders, who must be provided in each case with a copy of the documentation under discussion.

33. The chairperson of the assembly is unelected, and is the hierarchically ranking officer. The conduct of representation activity, including meetings, assemblies and events, is at all times subject to the consent of the chairperson of the representation body and the corresponding commander. The right to speak at representative assemblies may be exercised solely in relation to matters on the agenda and only if registered as a speaker before the start of the discussion; the possibility to register to speak after business has started is regarded as an exception, to be allowed at the discretion of the chairperson. Agendas, motions, resolutions and documents are not

approved by secret ballot. The performance of representation tasks is treated for all intents and purposes as service activity; the costs relating to representation (accommodation, missions, travel, publicity, miscellaneous services) are borne in full by the military body.

34. The competences of the representation bodies are highly limited; they deal in general with the matters specified under Article 1478 of Legislative Decree 66/2010, including specifically: I) retention of jobs during military service; II) professional qualification; III) entry into the employment market for persons leaving the service; IV) benefits for injuries suffered and for illnesses contracted during service and as a result of service; V) welfare, cultural, recreational and social promotion activities, including for family members; VI) organisation of meeting venues and canteens, health and sanitary conditions, accommodation. In addition to these general competences, the individual representation bodies are tasked at each level with certain specific functions governed by Articles 879 and 880 of Decree of the President of the Republic 90/2010. On the one hand the COCER (the representative body at national level) may formulate opinions, proposals and requests in relation to the matters covered by legislation or regulations concerning the status, treatment and legal, economic, pension, healthcare, cultural and moral protection of military personnel. At any rate, the legislation does not make provision for any real debate between the parties, but rather simple consultation. In fact, the COCER bodies do not have any real bargaining power – in contrast to the position within civilian police forces – and perform only a consultative role. Their approval is not even necessary, so much so that, in the event of the failure to reach agreement, a mere unilateral decision is adopted by the relevant administration rather than a bilateral act.

35. In order to contain the activities of the representative bodies within the military disciplinary framework, delegates are required pursuant to Article 882 of Decree of the President of the Republic 90/2010 to comply with the following prohibitions: a) expressing opinions or proposals or making requests and applications falling outside the matters and areas of interest specified by Article 1478 of the Code; b) issuing communiqués or statements, attending gatherings or carrying out representation activities outside the bodies to which they belong; c) maintaining relations of any type with agencies outside the armed forces, except as provided for under Chapter III of Title IX of Book IV of the Code and the regulations; (…) e) soliciting signatures for the purposes of representational activities. In summary, military representation bodies are entirely precluded from the ability to deal with matters relating to regulations, training, operations, logistics and operations, hierarchical and functional relationships and personnel deployment. In other words, there is no trade union engagement concerning the matters that constitute the very essence of the employment relationship.

36. The failure to comply with the provisions governing representation activity is regarded for all purposes as a serious disciplinary offence. Also when performing their representative functions, the members of the bodies remain strictly subject to military disciplinary regulations, which are not governed by the principle that disciplinary offences must be specifically provided for under applicable rules. This is the fundamental reason why the chairpersons of the bodies are not elected but are the respective hierarchically ranking officers. They must guarantee the proper operation of representation bodies by applying the criteria of military discipline for which they are responsible and are also required to inform their own superiors in the event of any

breaches. The chairperson is vested with disciplinary power of reprimand and censure as well as the power to remove from a meeting any military personnel found to have disrupted order or who have failed to comply with the rules governing the limits and powers of office.

b) The representative term of office may end only due to: a) departure from the service; b) a move to another category or rank; c) transfer; d) the loss of the prerequisites for eligibility; e) being subject to consignment to barracks on two occasions. As will be noted, since no provision is made for a declaration of no confidence on trade union grounds, the term of office is considered to be permanent for a period of four years, which therefore relieves the delegates of any representative responsibility. The Italian Government has on various occasions extended the term of office of military representation bodies, postponing elections for years. Resignation due to a move to another appointment *de facto* deprives the delegate of representative status. This observation is in fact reinforced by the electoral rule that any vote cast for candidates from outside the category of origin is void. A significant fact regarding the lack of any genuine powers of review of the representation bodies is also apparent from Article 887 of Decree of the President of the Republic 90/2010, which provides that military personnel have the duty (and not the right) to participate in representation elections. No delegate may leave the meeting room without the authorisation of the chairperson; this provision deprives military personnel of the right to decline to associate.

37. The failure to grant delegates the rights of representative freedom and autonomy has the effect that military representation bodies do not have personality that is clearly distinct from the institutional military organisation, which results in a dangerous mixture and confusion of roles and functions between military representation and institutions. Therefore, what the Italian Government identifies (§ 34 of the Observations) as a reason for upholding as legitimate the legal limits on the creation of trade union associations for military personnel – namely maintaining the neutrality of the body with the legal monopoly on the use of force within the legal system vis-à-vis the political authorities (supposing that trade union association may act as a vehicle for this) – is in actual fact achieved precisely as a result of a representative structure in which senior positions are occupied by nominees, that are rigidly structured into hierarchies and therefore potentially subordinate to the political authorities which, by indirectly appointing the leading figures, end up also impinging upon their autonomy.

38. In the light of the above it is clearly apparent that there is no compatibility between European law and Italian law, which fundamentally violates the principles of the former. It is entirely clear that the military representation bodies of the Carabinieri Force cannot constitute valid compensation for the absolute deprivation of trade union freedom, as military representation bodies are about as far as it is possible to be from trade union organisations.

39. Finally, the Government asserts that the right provided for under Article 6 of the Charter is guaranteed by the involvement of military representation bodies in bargaining; however, the points made above concerning those representation bodies and their inadequacy with regard to the requirements laid down by international law enables it to be concluded that the argument proposed is unfounded in itself, even if one were to endorse the view that those bodies may exercise the same powers in this regard as trade union representatives operating in civilian police forces. It is sufficient to refer in this respect to the content of the final part of the Complaint.

40. However, it is appropriate to refer also to the conclusions very recently reached by the Committee when ruling on the case *Euromil v. Ireland*, complaint no. 112/2014, decision of 12 February 2018 concerning the rights of Irish military personnel to organise and engage in collective bargaining. The Irish military associations did not enjoy full trade union rights such as the right to organise and engage in collective bargaining as did the ICTU (the Irish Congress of Trade Unions, with which Irish trade unions are usually affiliated). This implied that the military associations were excluded from national collective bargaining conducted by the ICTU on behalf of its members, including negotiations concerning the salaries of public sector employees: the complainant asserted that the exclusion was unjustified and not proportionate to the objective of protecting public security and the interests of society at large. The Irish Government based its position on the nature of the role performed by the military, that is maintaining public order and protecting national security, arguing that the restrictions imposed were perfectly in line with the provisions of the Social Charter. The Government thus asserted that the recognition of those prerogatives was incompatible with the functions of members of the armed forces, as it would involve an evident conflict with military discipline.

41. Regarding this matter the Committee concluded that there had been a violation not only of Article 5 of the Charter by virtue of the prohibition imposed on the military representation associations from affiliating with national employee organisations, but also of Article 6 § 2 – by virtue of the absence of any possibility of participating in negotiations concerning collective agreements (in consideration of the essential role of wage bargaining for the purposes of Article 6).

42. Regarding the former aspect, according to the Committee, the restrictions on trade union rights cannot reach so far as to result in a *de facto* complete suppression of the right of association, as in the event of a general prohibition – imposed on professional trade union associations – on affiliating with national federations or confederations. This approach is rooted in and builds on the case law of the ECtHR (*Matelly v. France*, cited above), as well as the (*CESP v. France*, cited above). Whilst in the cases cited the Court limited itself to providing for a generic obligation to avoid the absolute suppression of trade union rights for military personnel, the Committee reinforced and developed the approach followed, recognising for military associations as well the right to affiliate with national collective organisations, thereby implying also the possibility of participating in negotiations concerning collective agreements. In the opinion of the Committee, it was not clear in what way affiliation by military associations with organisations such as the ICTU could prevent an adequate examination of questions relating to public security during bargaining between the government and military personnel. The Committee declared that the absolute prohibition on affiliation was neither necessary nor proportionate, and in actual fact deprived the representative associations of an effective instrument for negotiating the terms of employment on behalf of their members, considering that the ICTU benefited from considerable negotiating power in national bargaining.

43. As regards the violation of Article 6 §2, it was stressed that the mere opinion of one party concerning the already predetermined outcome of negotiations could not be considered to be compatible with the European Social Charter – the party should in fact have the opportunity to contribute to determining the outcome of negotiations – in particular where trade union rights have been restricted. Referring to the rulings in *EUROCOP v. Ireland* (83/2012) and *CESP v.*

Portugal (11/2002), the Committee noted that military representation associations had not been involved and consulted on a significant scale, in particular in relation to salary issues, within negotiations concerning public service agreements, thereby resulting in a violation of the provision referred to.

44. Since the participation by Italian military representation bodies in confederated trade unions is entirely prohibited in a similar manner, and since participation in discussions concerning the salaries of public sector employees is consequently prohibited, these last indications provided by the Committee in cases entirely similar to the present one should also be taken into account when determining the case brought by the organisations UGL-CFS and SAPAF.

CONCLUSIONS

In the light of the above, the European Committee of Social Rights is asked to rule that Articles 1, 5, 6, E and G of the European Social Charter have been violated and to order the Italian State to bear the costs and fees associated with these proceedings.

Enclosures:

1) Draft version of Legislative Decree no. 177/2016 of 1 February 2016 transmitted to the Council of State for its consultative opinion;
2) Illustrative report on the draft version of the Legislative Decree;
3) Regulatory Impact Analysis;
4) Decrees on 7 November 2016 on the transfer of personnel;
5) Order of the Pescara Regional Administrative Court no. 235/2017;
6) Order of the Venice Regional Administrative Court no. 210/2018;
7) Order scheduling a hearing before the Constitutional Court.

Counsel Marco Lo Giudice **Counsel Egidio Lizza**