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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

22 November 2021

Case Document No. 6

Sindacato autonomo Pensionati Or.S.A. v. Italy
Complaint No. 187/2019

**RESPONSE FROM S.A.PENS. OR.S.A.
TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS**

Registered at the Secretariat on 15 March 2021

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COMPLAINT No. 187/2019

Subject: Collective Complaint by S.A.Pens. Or.S.A. concerning the violation of Articles 4, 12, 16, 20 and 23 of the Revised European Social Charter by the Italian Republic in relation to the provisions contained in Article 1(41) of Law No. 335 of 8 August 1995.

By this written statement, the trade union, Sa.Pens. Or.S.A., with registered office at Via Magenta 13, Rome, acting through its General Secretary, Mr Daniele Gorfer, responds to the observations made by the Italian Government in the written statement of 17 January 2021, requesting that the Italian language be used – alongside English – for all purposes in relation to these proceedings. And to that effect, it states as follows.

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When addressing the merits of the case registered as No. 187/2019 before the European Committee of Social Rights, the Italian Government has limited itself to providing a lengthy description that merely reiterates the Italian legislation on survivors' pensions. However, it does not effectively engage – using relevant and adequate arguments – with the arguments that it is unlawful on the grounds that it violates the right to fair remuneration as well as the fundamental rights laid down by Articles 4, 12, 16 and 23 of the European Social Charter, and above all the fundamental prohibition on discrimination on the grounds of sex, as broadly set out in the collective complaint (Article 20 of the Charter). Indeed, a plain reading of those observations does not establish any assertion that is effectively capable of refuting in a detailed and substantiated manner the objections raised against the Italian legislation in the collective complaint.

As the principles governing adversarial proceedings must apply within this dispute, including, in particular, the procedural principle of *nihil dicit*, it may in fact be concluded that, in failing to adopt a detailed position concerning the individual grounds for the collective complaint at issue, the Italian Government has conceded that it is well-founded. At any rate, in order to avoid needlessly expanding the scope of the discussion, whilst reiterating the broad arguments set out in the complaint (and later in the written statement of 1 April 2020), which are incorporated herein expressly and in their entirety, it is appropriate to submit this summary response at this stage concerning two issues: 1) it is first necessary to discuss in general terms the violation of the fundamental right of the survivor to adequate social protection, as established in accordance with the combined provisions of Articles 4, 12, 16 and 23 of the Charter; 2) it is also necessary to illustrate, again with reference to up-to-date statistics, the violation of the right to equal opportunities and equal treatment at work and in professional life without any discrimination on the grounds of sex, as recognised *inter alia* in relation to pension regimes by Article 20 ESC.

(1)

As regards the former aspect, the observations submitted by the Italian Government regarding the violation of Articles 4, 12, 16 and 23 ESC are essentially based on the following arguments:

1. the reduction in reversionary pensions for surviving family members provided for under Law No. 335/1995 does not constitute an excessive and unjustified expropriation, as it is determined with reference to the beneficiary's financial wellbeing, and thus does not unreasonably impair his or her standard of living. Accordingly, it argues that the legislation restricting reversionary pensions does not violate those articles of the Charter that enshrine the right to fair remuneration and to social security and social protection;

2. the reduction in reversionary pensions is necessary in order to comply with the public finance constraints that Italy is obliged to abide by as a result of its adherence to the European treaties. That fact is claimed to require inevitable sacrifices, which also affect pension benefits: these sacrifices have been imposed under Italian legislation in a manner that is not unreasonable and that is determined with reference to individuals' financial wellbeing.

These observations lack any substance.

a) First and foremost, the reduction in reversionary pensions has reached exorbitant levels even for people with medium to low incomes, who certainly cannot be defined either as rich or as wealthy. It is sufficient to consider that the reversionary pension of a person with an income of only 2 000 euros per month gross (around 1 400-1 500 euros net, according to current tax levels in Italy) with a dependent spouse and no children is reduced, under the terms of Law No. 335/1995, to 35% of the total pension received by the deceased person. It should be noted that children are only considered to be dependent if younger than 26 years of age: therefore, a father or a mother with one or more children who are older, but not in employment, will receive the same benefits in the event of the death of the spouse.

It should also be considered that a significant reduction is applied even in respect of very low incomes or in situations in which no income is earned; where the sole beneficiary is the spouse, the reduction amounts to 40% of the total pension received by the deceased prior to his or her death (in other words, the survivor only receives 60% of the pension). It should be noted – once again – that these circumstances are very distant from a situation of financial wellbeing, and yet the amount of the benefit is significantly reduced (as explained in detail in the complaint).

Secondly, it is evident that the financial crisis caused by the Covid-19 pandemic, which has considerably worsened an economic recession that had *de facto* been ongoing in Italy since 2008, has only heightened the social unsustainability of the reduction in survivors' pensions. This is because it has an extremely heavy impact on those families that are in greatest difficulty, which often survive thanks to the contribution made by one particular income, which is then unexpectedly lost in the event of the death of one of the couple, giving rise to severe hardship.

b) Secondly, in its arguments, the Italian Government does not take any account of the rigorous logic inherent in the defined-contribution pension system. As has been asserted for years by reformers who have promoted the move from a defined-benefit system to a defined-contribution system, under the latter calculation system (which has been extended to all pensioners with effect from 1 January 2012), the prevailing logic, albeit in a residual perspective of intergenerational solidarity, is the accumulation of individual (albeit virtual) savings: under this logic, there is an extremely close link between the amount of the benefit due and the amount accumulated in contributions by the individual with reference to the retirement age. Therefore, the rationale of the defined-contribution system implies that there must be a general balance between the amount paid by the saver and the amount received.

It is evident that this logic is completely upended by the provisions on the reduction in reversionary benefits, which not only break the link with the criterion that benefits must be calculated on the basis of contributions, but *de facto* convert it into a kind of welfare benefit linked to the income level of the beneficiary. In this sense, the significant reductions in reversionary pensions provided for under Law No. 335/1995 are not only socially unfair but are also at odds with the very structure of that general reform, the core aim of which was to reinforce the link between the contributions paid and the benefits received: this link is entirely negated as regards the protection provided to survivors.

c) Finally, it is necessary to respond briefly here to the reiterated (and predictable) observations made by the Italian Government, asserting that the cuts to reversionary benefits were necessary in order to respect public finance constraints, with reference to two considerations.

First of all, it must be noted that every public and social policy choice is, and must always be, the result of a specific and detailed balancing operation between countervailing interests, which must be carried out in accordance with fundamental principles and the criteria of reasonableness, substantive equity and proportionality, and cannot seek dogmatically solely to save public spending. Public finance constraints – which in

themselves never justify the violation of fundamental social rights, such as those at issue here – are not an objective “ontological” fact. As the result of clear economic policy choices made at European and national level, these constraints may and must be called into question where – as is the case here – strict compliance with them does not enable social rights to be satisfactorily guaranteed for the general public, and in particular for the most disadvantaged. Moreover, to sacrifice social rights on the altar of public finance constraints not only has unfair and pernicious social consequences, but can also seriously jeopardise the system’s overall macroeconomic structure. In fact, over the long term, impoverishing the poorest and the middle classes only serves to aggravate the chronic shortfall in aggregate demand for consumption and investment, which has been afflicting western economies, in particular in Europe, for several decades. Each fiscal and social policy choice must therefore be assessed carefully in terms of its socio-economic and macroeconomic effects over both the short and the long term.

However, even if we were forced to reason from the perspective of a balanced budget, any initiative to restrict access to and the level of reversionary pension benefits must in any case be adequately justified with reference to specific public finance considerations, which the national legislator must explain and justify: it is entirely evident that this requirement has not in any way been fulfilled in this case by the counsel for the Italian Government, who has not offered any tangible arguments.

Moreover, Italian spending on pensions – where correctly computed, after deducting the welfare component (cf. e.g. A. Del Boca, A. Mundo, *L’inganno generazionale. Il falso mito del conflitto per il lavoro*, Milan, 2017; A. Brambilla, *Scomode verità su tasse, pensioni, sanità, lavoro*, Milan, 2020) – is certainly in line with the European average; indeed, the financial figures for the National Institute for Social Security [INPS] show that, after accounting for outgoing benefits, its pension accounts are substantially in equilibrium. Consequently, assuming for the sake of argument that it really is an economic policy priority, there is no reason why the burden of adjusting the public accounts should fall so unfairly and disproportionately on spending on pensions, in particular reversionary pensions, given that it does not have a negative impact on the equilibrium of those accounts. It is thus clear that the invocation of the spectre of public finance constraints – *without corroborating those assertions with precise financial data* – is nothing other than a rhetorical contrivance seeking to conceal the actual distributive reasons standing behind particular choices that run contrary to the principles enshrined in the European Social Charter.

(2)

1. As has been broadly argued in the complaint, the mechanism for reducing the benefit payable in the event of the death of the spouse provided for in Italy under Law No. 335 of 1995 results in treatment that is significantly worse for women: since in statistical terms in the vast majority of cases it is the wife who survives the husband, the twin-track system for reducing the reversionary pension (based, on the one hand, on the degree of kinship, taking account of the existence of multiple surviving family members, and on the other hand, on cumulation with other income) predominantly – and overwhelmingly – disadvantages women, thereby resulting in an indirect form of discrimination between workers and pensioners on the grounds of sex without any objective justification, not even due to any alleged need to limit spending on pensions. Moreover, this blatant discrimination on the grounds of sex is not – as is incredibly asserted in the written statement of the Italian Government (in paragraph 48) – the “natural” result of the higher life expectancy of women, who “biologically” survive their male companions by virtue of a law of nature, which the Italian legislator has simply taken note of; on the contrary, it is entirely clear that it is a consequence of a deliberate policy choice, which was made by Law No. 335/1995 with the aim of drastically reducing the amount of reversionary pensions and indirect pensions to the detriment of women, using the need to contain social spending merely as a pretext.

This policy choice therefore violates Article 20 of the Charter, as it is not justified by any overriding legitimate social policy reason other than the mere reduction – in a discriminatory manner – of public spending on survivors’ pensions.

Since female survivors – with reference to all forms of pensions – make up more than 80 percent of the recipients of indirect or reversionary pensions, as has already been demonstrated by the tables contained in the body of the complaint, to which reference is made and which must be deemed to constitute an integral part of this submission, it can indeed be asserted without any need for emphasis that Law No. 335/1995 has brought about a massive reduction in pension protection for Italian women. Having already been structurally disadvantaged by the labour market and, by extension, in terms of direct pension benefits, these women are further penalised as a result of this discriminatory choice by the national legislator also in terms of reversionary pension benefits, moreover at the time when they are in most need of social protection from the State.

2. In order to provide new data and statistics for the serious and systematic violations of the Charter caused by Italian law on survivors' pensions, some updated figures are provided below on changes in Italian public spending on the benefits at issue, in order to supplement those previously set out in the complaint.

SURVIVORS' PENSIONS FOR MEN AND WOMEN AS AT 31/12/2019 ACCORDING TO PENSION INCOME CLASS (income/12) WITH REDUCED REVERSIONARY RATE (Figures valid on 1 March 2021)

INPS Register of Pensioners: Recipients of survivors' pensions

Sex: MALE AND FEMALE

Year: 31/12/2019

Income class (income/12)	Number of pensioners	Total annual amount of survivors' pensions (millions of euros)	Total annual amount of other types of pension (millions of euros)	Total annual pension income (millions of euros)	Average annual pension income (euros)	Average reversionary rate reduced according to income prerequisites
Less than 249	180 066	247	12	259	1 437.47	Reversionary rate approx. 60%
250 - 499	140 604	583	47	630	4 480.24	
500 - 749	505 171	3 728	203	3 931	7 782.35	
750 - 999	429 672	3 153	1 446	4 600	10 705.12	
1000 - 1249	562 796	5 006	2 705	7 711	13 702.05	
1250 - 1499	622 407	5 647	4 636	10 283	16 522.12	
1500 - 1749	504 645	5 272	4 557	9 829	19 476.25	
1750 - 1999	384 288	4 150	4 465	8 615	22 417.95	Reversionary rate approx. 45%
2000 - 2249	281 176	3 280	3 873	7 153	25 440.93	
2500 - 2499	180 335	2 173	2 953	5 125	28 421.69	Reversionary rate approx. 36%
2500 - 2999	231 176	3 008	4 547	7 555	32 679.92	
3000 - 3499	131 327	2 045	3 041	5 086	38 726.00	Reversionary rate 30%
3500 - 3999	74 742	1 414	1 927	3 342	44 708.97	
4000 - 4499	40 868	928	1 142	2 070	50 661.32	
4500 - 4999	22 059	595	657	1 251	56 728.66	
5000 and above	49 965	1 752	2 268	4 020	80 455.53	
Total	4 341 297	42 983	38 478	81 461	18 764.24	49.8

As is clearly apparent from the table provided, in 2019 the total amount of survivors' benefits under the INPS mandatory pension system, professional schemes and complementary schemes amounted to 4 664 827 pensions, accounting to 20.5% of total pension benefits (22 805 765 according to the register of pensioners: source Italian National Statistics Institute [ISTAT] and INPS). Overall private and public spending (the monthly amount on 31 December 2019 multiplied by 13) totalled 42 983 million euros, which is equal to 14.3% of the overall total of private and public pensions (300 907 million euros). The average annual amount of each survivor's pension is 9 214 euros, equal to 709 euros per month. The Index Number is 69.8%, taking 100 as the average total amount for the pension system as a whole (13 194 euros).

There are 4 341 297 recipients of survivors' pensions, of which only 607 959 are men (14% of the total) and 3 733 338 are women (86% of the total), accounting for 27.1% of the total number of Italian pensioners (equal to 16 035 165). The average monthly amount paid to men is around 505 euros gross, whilst that paid to women is 803 euros gross. Amongst recipients of survivors' pensions, 1 409 332 receive only the survivor's pension whilst 2 931 965 cumulate the survivor's pension with other types of pension. Women predominate both amongst the recipients of multiple pensions (2 438 702), and also amongst those receiving only a survivor's pension, who number 1 294 636.

Out of those pensions paid by the INPS, 4 310 768 pensions are paid to survivors with an average amount of 712 euros gross per month (486 euros per month for 550 318 men and 746 euros per month for 3 760 450 women), amounting to a total of 39 924 million euros on 1 January 2020. During the course of 2019 alone, the Institute paid out 196 696 new pensions to survivors averaging 667 euros gross per month.

As a result of the various pension reforms adopted over the last few decades, significant cuts to public social spending have thus affected survivors' benefits systematically and to an increasing extent. It should be noted that mandatory contributions are payable by employees and employers for old-age, invalidity and survivors' benefits, although out of these only survivors' benefits have been repeatedly subject to such deep cuts (8.4 billion euros per year), which are suffered by women, who statistically live longer than men. It is thus clear that the Italian system has been imposing a genuine "tax" on old-age, longevity, and surviving spouses. This clearly unlawful measure violates the fundamental principles referred to above, including first and foremost the prohibition on discrimination on the grounds of sex and the obligation to treat men and women equally.

3. As is known, under EU law and in the ECHR system, supranational lawmakers have adopted strict rules on the allocation of the burden of proof in cases involving (indirect)

discrimination, which can be summarised as follows: the complainant must provide information, which may also be statistical, that points to the existence of discrimination, and allege such discrimination; once this has occurred, as in this case, the burden of proof (regarding the justification, adequacy and proportionality of national measures) then passes to the respondent.

As the European Court of Human Rights has clarified on various occasions, a difference in treatment between persons whose circumstances are relatively comparable “*is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised*” (ECtHR, judgment of 29 April 2008, *Burden v. United Kingdom* [GC], case No. 13378/05, para. 60 of the decision). In order to justify the legitimacy of any difference in treatment, the Italian Government should therefore have demonstrated that:

- the legislation in question here pursued a legitimate aim;
- the means chosen to achieve that legitimate aim (i.e. the measure that caused the difference in treatment) is proportionate and necessary in order to achieve it; moreover, in this regard it is important to clarify that:
 - the criterion that the measures adopted must be “necessary” entails a requirement to demonstrate that there are no reasonable alternatives that interfere less with the principle of equal treatment (Court of Justice, judgment of 13 May 1986 in Case C-170/84, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*);
 - in order to establish whether the difference in treatment is proportionate, it is necessary to demonstrate and establish that no other means are available in order to achieve the goal pursued that interfere less with the right to equal treatment (in other words, that the adverse consequences suffered constitute the minimum level of adverse consequences necessary in order to achieve that goal) and the fact that the goal pursued is sufficiently important to justify that level of adverse consequences.

Accordingly, on the basis of European law rules on the burden of proof, whereas the undersigned trade union has incontrovertibly demonstrated through the documentation on the case file that the national legislation on survivors’ pensions constitutes indirect discrimination on the grounds of sex, the Italian Republic has not offered any rebuttal evidence: as it is evidently impossible to demonstrate that the contested legislation is not discriminatory, it should at the very least have invoked objective reasons in the general interest, other than mere requirements to contain public spending, that are capable of

justifying the difference in treatment objected to, explaining also how they comply with the principles of adequacy and proportionality.

None of this is apparent from the submissions made on behalf of the Italian Government, which incredibly has referred, as justification for the legislative framework introduced in 1995, to the “naturally” greater longevity of women; on the contrary, however, it is precisely this social factor that gives rise to discrimination, entailing the difference in treatment described consisting in the drastic reduction in pension benefits, which are payable in the vast majority of cases to women. When considering cases involving potential discrimination on the grounds of sex, European supreme courts have been categorical not only in refusing to accept justifications that are based solely on financial considerations (expenditure or financial management), but also in requiring strict compliance with the principles of adequacy and proportionality. It is clear that all of these principles can be applied within the context of the European Social Charter in accordance with Article 20 of the Charter, and all have been patently violated in this case.

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For these reasons, disputing in their entirety the observations filed by the Italian Government concerning the merits of the complaint, the undersigned Daniele Gorfer, acting in his capacity as Secretary General of the complainant trade union – expressly reserving the right, where necessary, to elaborate further on the arguments set out above at a later stage of the proceedings, and again exercising the right to use the Italian language – once again requests the Committee to accept this complaint, ruling that the objections made are well-founded on the merits, and as a result declare that the Italian Republic has violated Articles 4, 12, 16, 20 and 23 of the European Social Charter for the reasons set out in detail.

Rome and Strasbourg, 9 March 2021

S.A. Pens. Or.S.A.

(The Secretary General)

A handwritten signature in blue ink, appearing to read 'Daniele Gorfer', is written over a light blue horizontal line.