EUROPEAN COMMITTEE OF SOCIAL RIGHTS COMITE EUROPEEN DES DROITS SOCIAUX

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***Associazione Sindacale Militar*i (ASSO.MIL.) v. Italy**
Complaint No. 213/2022

COMPLAINT
(Original in Italian)

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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX
COMITATO EUROPEO DEI DIRITTI SOCIALI

Department of the European Social Charter and
the European Code of Social Security
Directorate General of Human Rights and Rule of Law

Conseil de l'Europe - *Council of Europe - Consiglio d'Europa*
F-67075 Strasbourg Cedex

COLLECTIVE COMPLAINT

Associazione Sindacale Militari (ASSO.MIL.) v.
Italy

Associazione Sindacale Militari, abbreviated to ASSO.MIL., represented by its current legal representative, App. Sc. Q.S. [lance corporal] (Carabinieri Forestry Division) Federico MENICHINI, represented by Counsel Egidio Lizza and with service address for the purposes of this Complaint at his offices at Via Valadier 43, Rome, asks the European Committee of Social Rights to rule that the failure by the public administration of the Italian State to establish a supplementary pension fund for public sector employees from the militarised armed forces, as provided for under Legislative Decree no. 124/1993, violates Article 12 of the Revised European Social Charter, specifically Article E.

THE FACTS OF THE CASE

The complainant is a trade union association that represents military personnel from the armed forces, the Tax Police and the Corps of the Port Captaincies – Coast Guard, and its register of members includes both serving and auxiliary personnel. The military personnel represented by ASSO.MIL. are therefore employed by the Ministry of Defence, the Ministry for the Economy and Finance and the Ministry of Infrastructure and Sustainable Mobility. All belong to the "State Security and Defence" segment. Many of them originate from the now dissolved State Forestry Corps, from which they were transferred with effect from 1 January 2017 to the other administrations mentioned above (in addition to others as well) following the implementation of Legislative Decree no. 177 of 2016, laying down "*Provisions on the rationalisation of police functions and the absorption of the State Forestry Corps, issued pursuant to Article 8(1)(a) of Law no. 124 of 7 August 2015 on the reorganisation of the public administrations*".

As regards their pension position, once they fulfil the statutory prerequisites, the military personnel for whom ASSO.MIL provides trade union representation will acquire the right to a defined contribution pension (or, as the case may be, a mixed defined benefits/defined contribution pension) as provided for under Law no. 335 of 1995, which amended the pension system. This legislation provides that pensions are to be calculated according to the defined contribution system, which replaced the defined benefits system, including for personnel from the armed forces and the police forces, as well as for public sector employees working under contracts governed by private law ["*impiego contrattualizzato*"]. Before the reform, defined benefit pensions were calculated as a percentage of the worker's salary and the amount due was based on the contribution history and the remuneration received over the last few years of

employment; under the defined contribution system on the other hand, the amount of the pension is calculated on the basis of the total contributions paid by the worker throughout his or her working life. Under the amendment made to the Italian pension system, the legislation provided for a gradual shift from the defined benefit scheme to the defined contribution scheme, which resulted in the creation of three different categories of worker depending upon the relevant applicable pension system: workers with at least 18 years of contribution history in 1995 remained under the defined benefit scheme, workers with fewer than 18 years of contribution history at the time the law came into force were subject to a mixed scheme (i.e. defined benefit scheme until 1995 and defined contribution scheme for subsequent years), and, lastly, workers appointed after 1995 fell under the defined contribution scheme. In contrast to the defined benefit scheme, this calculation method resulted in a significant reduction in the actual pension received as a proportion of the final salary. In fact, specifically in order to mitigate the financial effects of the application of the defined contribution pension scheme (which exposed workers to a considerable difference in terms of disposable income compared to what they had received as a salary), when reforming the pension system, the Italian legislature provided for the creation of supplementary pensions. Contributions were to be made in part by the State and in part by the worker, with the aim of offsetting the disparity created by the pension reform between the income earned whilst in work and the income earned during retirement.

The military personnel for whom ASSO.MIL is a trade union representative fall within the category of those who, at the time the law came into force, had a contribution history shorter than 18 years, as well as those hired after 1995; they thus have had the right to the establishment of supplementary pension provision since the time when the law established the obligation to put in place procedures in order to achieve this outcome (or at the very least following expiry of a reasonable period within which the respective procedures should have been concluded), thereby improving their pension entitlement, having regard to the aspects highlighted above as well as the points set out in this submission.

Unfortunately, in contrast to the position for employees from the public administrations falling under Article 1(2) of Legislative Decree no. 165 of 2001 – namely those in public sector employment working under contracts governed by private law, for whom the respective administrations have made provision for supplementary pensions – no supplementary pension arrangements have been adopted for personnel serving in the armed forces and the civilian and militarised police forces. This form of pension provision could have offset the imbalance created by the pension reform for workers from the security and defence segment who, like the

complainants, had a contribution history shorter than 18 years on 31 December 1995.

In particular, it should be noted that Legislative Decree no. 124 of 1993 makes provision for "*pension schemes providing for pensions to supplement the mandatory public system, in order to ensure higher levels of pension cover*" (see Article 1), which must be provided to "*both public sector and private sector employees*" without any distinction. These workers must be guaranteed "*supplementary defined contribution pension schemes, i.e. schemes that ensure a guaranteed growth rate*" (see Article 2), and provision is made for the arrangements applicable to their establishment (see Article 3).

As regards, in particular, personnel serving in police forces and the armed forces, Legislative Decree no. 195 of 1995 provided that supplementary pension schemes should be established through collective bargaining (for civilian police forces, cf. Article 3) and, as is of interest for our present purposes, consultation procedures (for militarised police forces, cf. Article 4, and for the armed forces, cf. Article 5).

Article 26(20) of Law no. 448 of 1998 provided that: "*For the purposes of harmonising the general scheme applicable to the end-of-service lump-sum payment and of establishing supplementary pension schemes for public sector employees, the bargaining and consultation procedures provided for under Legislative Decree no. 195 of 12 May 1995 may establish, for the personnel covered thereunder, rules governing the end-of-service lump-sum payment pursuant to Article 2(5) to (8) of Law no. 335 of 8 August 1995, as amended, as well as the establishment of supplementary pension schemes pursuant to Article 3 of Legislative Decree no. 124 of 21 April 1993, as amended. For the purposes of the initial application of the previous sentence, bargaining and consultation procedures shall be launched notwithstanding the provisions of Article 7(1) of Legislative Decree no. 195 of 1995*".

Subsequently, Article 67 of Decree of the President of the Republic no. 254 of 1999 reiterated that the bargaining and consultation procedures launched in relation to the initial application of Law no. 448 of 1998 under the terms of Article 26(20) should stipulate (without prejudice to the voluntary nature of the decision over whether to join the respective pension fund): *"a) the establishment of one or more national supplementary pension funds for personnel serving in the armed forces and the civilian or militarised police forces pursuant to Legislative Decree no. 124 of 1993, Law no. 335 of 1995 and Law no. 449 of 1997, as amended and supplemented, also verifying the option of amalgamating such funds with similar funds established under the terms of the legislation referred to for public sector workers; b) the percentage of the contribution due by the administrations and the contribution due by the worker, as well as the relevant remuneration for determining those percentages; c) arrangements for transforming the end-of-service allowance into the end-of-service lump-sum payment, the remuneration items relevant for imputing amounts to the end-of-service lump-sum payment, as well as the portion of the end-of-service lump-sum payment to be allocated to*

a supplementary pension scheme". The pension funds are open to any staff who voluntarily decide to join them.

Lastly, Legislative Decree no. 252 of 2005 makes provision in relation to supplementary pension schemes, including those managed by private sector bodies pursuant to Legislative Decrees no. 509 of 1994 and no. 103 of 1996 with the aim of ensuring higher levels of pension cover. Article 3(2) of Legislative Decree 252 of 2005 provides, in particular, for military and police personnel that supplementary pension schemes may be established in accordance with the provisions applicable to the respective systems or, in the absence thereof, by agreements concluded between employees as endorsed by their associations.

Effectively summarising the position in relation to supplementary pension schemes, the Court of Cassation has held that: "*It is the 'second pillar' of the pension system, and its purpose is to supplement basic mandatory pension provision, which forms the 'first pillar'. Its objective is to guarantee to workers in future 'higher levels of pension cover' (see the parent statute, Law no. 421 of 1992, Article 3(1)(v)), along with the benefits guaranteed by the basic public system, and it is regulated in detail by Legislative Decree no. 252 of 5 December 2005"* (see judgment no. 22807/2020 of the Joint Divisions of the Court of Cassation).

Supplementary pension provision is therefore a form of pension cover that supplements, but does not replace, mandatory pension provision and is a system financed through capital growth (funded system). In particular, according to the regulations applicable to schemes of this type, an individual account is created for each member, into which payments made by the worker and by the employer administration are paid. These are then invested on the financial market by specialist managers (in shares, government bonds, corporate bonds, units in mutual investment funds etc.) and, over time, generate variable returns depending upon market performance and management choices. The body charged with conducting oversight and guaranteeing transparent and proper operations by supplementary pension schemes is the Supervisory Commission for Pension Funds (*Commissione di vigilanza sui fondi pensione*, Covip). At the time of retirement, the member is paid an annuity in addition to the [basic, "pillar 1"] pension; this additional annuity is calculated on the basis of the contributions paid in, along with earnings gained through performance. Mandatory pension provision and supplementary pension provision differ in terms of the concept of "allocation": whereas under mandatory pension provision the contributions paid by all workers are used to pay the pensions of all pensioners, supplementary pension provision is subject to a system of "capital growth", where the payments made by each workers are invested independently by the pension fund in order to generate a

return [for that specific pensioner]. The recipients of supplementary pensions are public sector employees for whom the reform has been completed and pension funds have been established, in addition to private sector workers, self-employed workers, co-operative members, persons in receipt of non-employment income and family members dependent on workers. On the other hand, personnel from the Security and Defence Segment are unjustifiably denied the ability to exercise this right. Although the law provides for the establishment of supplementary pension schemes in a similar manner to the position for all other public sector employees, as yet no form of supplementary pension scheme has been set up. Accordingly, members of the armed forces and the militarised police forces, including also those represented by the complainant as a trade union body, still cannot benefit from supplementary pension schemes, and in particular have not benefited from any regular payments made into those schemes by the employer administration.

It is therefore clear that the unlawful conduct of the State administrations has caused unfair harm to the members of the Italian armed forces and police forces, consisting first and foremost in the failure to pay into the fund the portion due from the employer administration since the time when the funds should have been set up (which amount should thus have been made available for the benefit of workers, and which they should have received – along with any returns earned from it – at the end of their working career). Harm has also been caused, secondly, in terms of the inability to qualify for relief from income tax on the payments made into the fund by the employee, and, lastly, from the economic loss resulting from the inability to transfer to the fund all or part of the end-of-service lump-sum payment or the end-of-service allowance, thereby also achieving a return.

The conduct of the Italian State administrations has also caused an equally evident and unjustifiable difference in treatment between two classes of worker, namely workers employed under contracts governed by private law and workers from the Security and Defence segment. This disparity has persisted over time, undermining both the legitimate expectations with regard to pensions of public sector workers and also the actual amounts of pensions.

This breach is unlawful and unfair, and the members of the armed forces and police forces have accordingly brought actions before the competent regional administrative courts seeking compensation for the resulting losses. However, the national courts have found the claims brought to be inadmissible and unfounded, which has given rise to an established position within the case law, according to which the workers in question are unable to claim

compensation in respect of any amounts not received due to any failure to act by a public administration, based on the argument that the claimants lacked standing to sue. According to the national administrative courts, *"public sector employees covered by collective bargaining arrangements and the presidential decree giving effect to the results of the consultation procedure have a 'final' and entirely indirect and consequential interest, and not a tangible, current and directly protectable interest, in the launch and conclusion of negotiation procedures pursuant to Article 67 of Decree of the President of the Republic no. 254 of 16 March 1999. This interest is vested exclusively in the most representative trade union organisations (as regards civilian police forces) and in the central representation committees, again as bodies representing collective interests (as regards the militarised police forces and personnel from the armed forces), which are called upon to participate in these procedures.*

…. At any rate, engaging in consultation in relation to supplementary pension provision is not an obligation, but rather a right of the administration, […] and the claimants are not vested with any entitlement to this effect, as the procedure only involves the parties that are called upon to participate in the respective procedure" (a procedure which was moreover launched, although did not result in a consensus position between the parties involved) (see inter alia, Regional Administrative Court of Catania, judgments no. 855/2022 and no. 3749/2021; Regional Administrative Court of Rome, judgment no. 1292/2021).

In the light of this position under national case law, the violation of the pension rights of the military personnel represented by the complainant trade union has not been censured under national law.

ADMISSIBILITY

The standing of ASSO.MIL. to file this complaint.

ASSO.MIL. has its registered office in Rome and responsibility for its legal representation has been assigned on a temporary basis to its President, who embodies the organisational unity of the members and is the legal representative of the trade union. Mr Federico Menichini currently holds that position (see the Memorandum of Association, doc. 2, and the minutes of the meeting, doc. 4), and in that capacity instructed Counsel Egidio Lizza to launch this complaint, which therefore complies with Article 23.2 of the Rules of the European Committee of Social Rights.

Following judgment no. 120 of 13 June 2018 of the Italian Constitutional Court, which held

that Article 1475(2) of the Military Code (Legislative Decree 66/2010) was in part unconstitutional insofar as it provides that "*Military personnel may not establish professional trade union associations or join other trade union associations*", members of the armed forces and militarised police forces in Italy have started to form associations of this type. ASSO.MIL. is one of these. In fact, following an administrative procedure that lasted for 15 months, on 22 March 2021 the Ministry of Defence issued a decree (see doc. 2) consenting to the establishment of a professional trade union association of military personnel under the name "Associazione Sindacale Militari" [Trade Union Association of Military Personnel] – ASSO.MIL.

ASSOMIL is a non-profit, apolitical trade union organisation not affiliated with any party and is comprised of personnel in service, who voluntarily decide to join, from each of the armed forces, the Tax Police and the Corps of the Port Captaincies. It is a general organisation of military workers and is inspired entirely by democratic principles, having full respect for the universal values of human dignity, with the aim of defending the rights and legitimate expectations of workers from the categories represented, who – within the association – are guaranteed equal dignity irrespective of rank and the administration in which they serve, and without any discrimination on the grounds of political opinion, ideological belief, religious faith or ethnic origin (see Articles 1 and 2 of the Statute). Article 6 of the Statute provides that ASSO.MIL. must treat its trade union and organisational freedom of initiative as "*an asset to be defended and exploited*", and that it must be independent from [trade union] confederations, parties, political groupings, the Government, the Chiefs of Staff, the General Command Units and equivalent bodies, and shall be financed exclusively through membership fees, to be deducted from salaries in accordance with the authorisation granted by each individual member. The characteristics described above of ASSO.MIL. thus appear to be perfectly aligned with the general principles applicable to professional trade unions for military personnel, as provided for under Article 2 of the recent national legislation on the exercise of trade union freedom for personnel from the armed forces and the militarised armed forces under the terms of Law no. 46/2022.

The purposes and tasks of ASSO.MIL. are also fully compliant with that domestic legislation, and are fully aligned with the competences set out in Articles 5 and 11 of Law no. 46/2022 and comply with the limits laid down by Article 4. Article 3 of the Statute provides in fact that the complainant trade union association shall, amongst other things, *"- ensure the full exercise of the constitutional, civil, political and trade union rights of military workers;*

- ensure protection for its own members, representing their legitimate expectations and the varied and multiple needs and shall endeavour, in general, to achieve an enhanced professional qualification for all military workers;
- stimulate and propose the promotion, at all levels, of any initiative deemed conducive to the creation and adoption of legislative, regulatory and contractual provisions, in line with trade union policies and the interests of members;
- represent member personnel in all appropriate forums and using any instrument deemed appropriate, in accordance with applicable provisions;
- search for and pursue the most appropriate solutions for solving legal and economic problems and for improving the working and living conditions of military personnel, endeavouring at all times to achieve the highest level of protection for the rights of the category of worker and more effective purchasing power;
- raise public awareness using any means deemed lawful and appropriate, excluding strikes, which are expressly prohibited, in relation to the work-related problems of military personnel;
- develop information relating to trade union activities carried out both inside and outside the administration, through regular publications printed and disseminated in the traditional manner and/or electronically;
- promote those social and recreational activities that are deemed most appropriate and/or commercial and business agreements that are favourable for its members and/or military personnel in general…".

By virtue of the above, the complaint submitted in these proceedings must be deemed to be admissible, having been filed by a genuine trade union organisation with representative status at national level, in accordance with the requirements set forth in Article 1 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. This Article provides as follows: *"The Contracting Parties to this Protocol recognise the right of the following organisations to submit complaints alleging unsatisfactory application of the Charter: […] c) representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint."* First and foremost, ASSO.MIL. has been recognised as such under national law, having obtained consent to its establishment by a ministerial decree, as provided for under the national legislation on military trade unions, and is subject to the provisions of Law no. 46/2022, laying down "Provisions on the exercise of trade union freedom by personnel from the armed forces and the militarised armed forces, and delegation of authority to the Government to ensure co-ordination of the law".
In actual fact, ASSO.MIL. must be considered as such irrespective of its classification under national law and in view of its effective representative capacity.
Regarding this matter, the Committee has reiterated on various occasions that it applies an autonomous concept of representativeness, which is detached from any definitions or concepts

employed within national legal systems (see further: *Confédération de française de l'Encadrement "CFE-CGC"* v. *France*, Complaint no. 9/2000, Decision on admissibility of 6 November 2000, para. 6; *Syndicat national des professions du tourisme* v. *France*, Complaint no. 28/2004, Admissibility, 13 June 2005, para. 5; *Syndicat national des professions du tourisme* v. *France*, Complaint no. 6/1999, Decision on admissibility of 10 February 2000, para. 6).

In the previous decisions on admissibility concerning complaints filed by Italian organisations, the Committee has observed that, under Italian law trade, trade unions are not registered, do not have legal personality, and therefore only have the status of non-recognised associations under the Civil Code: *"Italian law recognises freedom of association and imposes no particular organisational model for trade unions, non-recognised associations, governed by Articles 36 to 38 of the Civil Code, being allowed to negotiate and conclude collective agreements, to take collective action and to bring legal proceedings"* (*Movimento per la libertà della psicanalisi-associazione culturale italiana* v. *Italy*, Complaint no. 122/2016, Decision on admissibility, 24 March 2017, para. 9).

Consequently, their ability to take on the status of *"representative national organisations of employers and trade unions*" pursuant to Article 1(1)(c) of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints must be established according to an overall assessment by the Committee that takes account of the purposes of the association and of the activities carried out by it (*Fellesforbundet for Sjøfolk (FFFS)* v. *Norway*, Decision on admissibility of 23 May 2012 Complaint no. 74/2011, para. 20). In that assessment, particular importance is given to the objectives and activities of the organisation. The position stated above has been clarified, *inter alia*, in the case of *Syndicat de Défense des Fonctionnaires* v. *France*: *"[t]he Committee examines representativeness in particular with regard to the field covered by the complaint, to the aim of the trade union and the activities which it carries out"* (*Syndicat de Défense des Fonctionnaires* v. *France*, Decision on admissibility of 7 December 2011, Complaint no. 73/2011, para. 6).

In fact, if the Charter and previous activities of ASSO.MIL. are examined, its representativeness is clearly apparent. As regards its objectives, those that are most significant, as set out in Article 3 of the Statute, have already been illustrated. These include securing protection for its members, representing their legitimate expectations and multiple needs, and ensuring enhanced professional qualification for all military workers; proposing legislative, regulatory and contractual initiatives, as well as economic initiatives and initiatives aimed at improving the working and living conditions of military personnel; and representing member personnel before the appropriate bodies, including in relation to collective bargaining.

These objectives are entirely consistent with those of a national organisation that is representative of a category of worker, and is committed to the defence of their interests.

As regards the activities hitherto carried out, it is important to note the numerous memoranda submitted to the General Command Unit for the Carabinieri, Trade Union Relations and Military Representation Office, calling for action to be taken in order to improve the working conditions of members (such as the note concerning organisational problems in relation to the incorporation of groups of Carabinieri from the Forestry Corps or managing mobility requests made by military officials from the Carabinieri Forestry, Environmental and Agrifood Command Unit (*Comando unità forestali, ambientali e agroalimentari*, CUFAA) or in order to protect the economic rights of members (such as the trade union note concerning the payment of the daily deployment allowance (*compenso forfettario di impiego*, CFI) for personnel from the Forestry Corps or as compensation for overtime). Moreover, initiatives have also been pursued with a view to establishing working groups on the adoption of rules for the contractual mechanism of flexible working hours, along with initiatives aimed at protecting the health of workers, such as those relating to vaccine mandates (see doc. 6). The activities mentioned above are referred to here by way of example and, as their numbers are large, reference is made to the documentation for details of all other activities (see doc. 7).
The association has also adhered to joint initiatives along with other military trade union organisations representing the Security, Defence and Public Assistance segment in order to increase the efficacy of requests submitted to employer administrations with a view to protecting the interests of members (see doc. 8).

As can be observed, these are typical activities of trade union organisations. On the other hand, the fact that matters relating to the military system of rules, training, operations, the logistical-operational sector, hierarchical and functional relations and the deployment of personnel are excluded from the matters open to collective bargaining does not affect the trade union's representative status.
These are excluded under Article 5 of Law no. 46/2022 for all professional trade unions within the military, although this is without prejudice to bargaining powers in all other areas.
Besides, the Committee's interpretation of the notion of *"representative national organisations of employers and trade unions"* pursuant to Article 1(c) of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints is broad and flexible. It should

be considered, for example, that the members of the Committee have recognised as having standing to file a collective complaint any organisation that carries out "*activities in defence of the material and moral interests of personnel in a given sector, of which it represents a considerable number, and is in total independence from the employing authorities"* (*Syndicat occitan de l'Education* v. *France*, Complaint no. 23/2003, Decision on admissibility of 13 February 2004, §5), and ASSO.MIL. falls squarely within this definition.

In any case, the Committee has made it clear that even a trade union that is not considered to be representative at national level for the purposes of collective bargaining may be considered to be representative for the purposes of the collective complaints procedure (*Associazione Professionale e Sindacale (ANIEF)* v. *Italy*, Complaint no. 146/2017, Decision on admissibility of 12 September 2017, para. 6). The decisive element for the recognition of standing to act before the Committee is therefore the type of interest protected and the type of activity carried out, whilst the degree to which the organisation's social base extends throughout the country and its active involvement in collective bargaining are of secondary importance.

In particular, as regards the number of members and workers represented, it should be pointed out that they currently total 194, as attested by the current legal representative (see doc. 1), and are distributed evenly throughout the country. Whilst this number might appear to be low, it is important to stress that this aspect is only one of the various inputs that are referred to for the purpose of establishing the representative status of an organisation, as greater importance must be ascribed to its goals and activities. In the case of *Fellesforbundet for Sjøfolk (FFFS)* v. *Norway*, cited above, the Committee stressed that, whilst the number of members and the role performed within national collective bargaining are referred to in the Explanatory Report to the Additional Protocol to the Charter, they are simply mentioned by way of illustration and not as conditions of an exclusive nature. The assessment of representativeness for the purposes of the admissibility of a collective complaint must be an overall assessment (para. 20) and the application of the criteria identified within the case law should not under any circumstances lead to automatic exclusion of small trade unions or those not long formed, to the advantage of larger and longer-established trade unions, thereby prejudicing the effectiveness of the right to bring a complaint, which must by contrast to recognised to *"all trade unions"*) (para. 21).

In the light of the above, there is no doubt that the complainant Association has taken steps to defend the material and moral interests of a specific class of worker. The launch of these

proceedings, is moreover an irrefutable indication of the genuine existence and vitality of ASSO.MIL., as well as its commitment to protecting the rights of the workers represented.

In conclusion, in the light of the significance that the Committee has given within its rulings to the objectives and activities of national organisations, it is argued that the complainant Association has standing to act as a party to these proceedings, as it complies in full with the prerequisites laid down by Article 1(1)(c) of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, as interpreted by the Committee.

The standing as a respondent of the Italian State, against which the collective complaint is directed.

As is known, Italy (as the respondent in this complaint) ratified the European Social Charter by Law no. 30 of 9 February 1999, "Ratification and implementation of the Revised European Social Charter, with annex, done in Strasbourg on 3 May 1996". Moreover by Law no. 298 of 28 August 1997, it also ratified and implemented the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

POINTS OF LAW

I. Violation of Article 12 of the Revised European Social Charter, read in conjunction with Article E of the Charter.

The omissions on the part of the Italian employer administration, consisting in the failure to establish supplementary pension funds, as provided for under Legislative Decree no. 124/1993, appears to violate the provisions of the **Revised European Social Charter** (hereafter, ESC), including, in particular, Article 12 in conjunction with Article E.

Article 12, entitled "*The right to social security*", provides that "*With a view to ensuring the effective exercise of the right to social security, the Parties undertake: 1. to establish or maintain a system of social security; 2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security; 3. to endeavour to raise progressively the system of social security to a higher level;*".

Article E, entitled "*Non-discrimination*", provides that "*The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion,*

political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status".

In fact, as will be argued below, it appears clear that the legislation on the establishment of supplementary pension systems within the public sector furthers the goal of offsetting the economic effects of the application of the defined contribution pension scheme. This scheme exposes workers to a significant difference in income [during retirement] vis-a-vis the salary they earned [prior to retirement] as compared to the position under the previous defined benefit scheme. As such, they constitute measures that, for the purposes of Article 12 of the European Social Charter, aim "*to maintain a system of social security"* and to *"raise progressively the system of social security to a higher level"*. In view of the above, it is clear that the approach taken by the public administrations in implementing these measures only for some public sector employees, and not also for those working in the State Security and Defence segment, results in discrimination against these employees that effectively violates Article 12 of the Charter in conjunction with Article E.

As noted above, in enacting Article 26(20) of Law no. 448 of 1998, the legislature made provision – including for personnel from the Security and Defence segment who, in the same manner as other public sector employees, were affected by the change in the method for calculating pensions from the defined benefit system to the defined contribution system – for the creation of one or more pension funds, which was set to occur for workers from the Security and Defence segment following the launch of the consultation procedures provided for under Legislative Decree no. 195 of 1995 and Article 67 of Decree of the President of the Republic no. 254 of 1999. According to the complex procedure governed by the provisions referred to, the issue of the establishment of supplementary pension schemes for employees from the Security and Defence segment was incorporated into those matters that are subject, as the case may be, to collective bargaining or consultation procedures. According to the legislation, this was to be achieved according to the complex procedure put in place by Legislative Decree no. 195 of 1995 which, in implementing Article 2 of Law no. 216 of 6 March 1992, established procedures to regulate the terms of the employment relationships of personnel from the police forces and the armed forces. As a result, with the entry into force of Law no. 448 of 1998, and, in particular, in accordance with Article 26(20) in conjunction with Article 3(1)(b) of Legislative Decree no. 195 of 1995, the employer administrations of ASSO.MIL. members were required to launch negotiations for personnel from the Security and Defence segment with a view to

establishing the supplementary pension schemes provided for by law. Thus, **with effect from 1998, the administrations from the Security and Defence segment were under an obligation to launch negotiations concerning the establishment of funds intended to provide supplementary pension provision**.

For personnel from the militarised police forces (and thus also members of the Carabinieri, the Tax Police and the Corps of the Port Captaincies – Coast Guard) as well as civilian police force personnel (i.e. the State Police and the now dissolved State Forestry Corps), the administrative procedure in question entailed: a) the launch – by the Minister for the Civil Service (now the Office of the President of the Council of Ministers) – of procedures for the purpose of adopting the decrees of the President of the Republic provided for under Article 7(1) of Legislative Decree no. 195 of 1995; b) the preparation of a jointly approved framework measure (including dedicated annexes on costs) or a signed agreement; c) the approval of the above-mentioned framework measure by the Council of Ministers; and d) the issue of a decree of the President of the Republic, an act that is in formal terms presidential but in substantive terms legislative.

In fact, under the terms of Legislative Decree no. 195 of 1995, "*the procedures governing the terms of the contracts of employment for personnel from the police forces, including militarised police forces, and personnel from the armed forces*" … "*shall conclude with the issue of separate decrees of the President of the Republic concerning respectively personnel from the polices forces, including militarised police forces, and personnel from the armed forces*". Moreover, Article 2 goes on to set out the applicable procedural mechanism, establishing an obligation for the public entity to launch and conclude the respective procedure. In fact, Article 7 of the Legislative Decree expressly provides that "*1. The procedures applicable to the issue of the decrees of the President of the Republic provided for under Article 2 shall be launched by the Minister for the Civil Service … the trade union organisations for personnel from civilian police forces may submit proposals and requests relating to … The inter-force COCER [Central Military Representative Council] may submit… the respective proposals and requests to the Minister for the Civil Service, to the Minister of Defence… through the Defence Chiefs of Staff or the respective general command unit. 1-bis. The procedures provided for under Article 2 shall be launched at the same time and shall be pursued in parallel in subsequent phrases, including that involving the signature of the prospective trade union agreement as regards civilian police forces, and the signature of the related framework measures for military police forces and the armed forces. 2. For the purposes of ensuring substantially homogeneous conditions, the Minister for the Civil Service, acting in the capacity of head of the delegations of public bodies under the procedures provided for under paragraphs 3, 5 and 7, may convene – either jointly or individually – the delegations of public bodies, representatives of the Defence Chiefs of Staff, the general command units of the Carabinieri and the Tax Police and the COCER [Central Military Representative*

Council] provided for under Article 2, as well as national representative trade unions of civilian police forces pursuant to Article 2. 3. Negotiations concerning the conclusion of the trade union agreement concerning civilian police forces provided for under Article 2, paragraph 1, sub-paragraph a), shall be conducted in meetings which shall be attended by representatives of the trade union organisations entitled to participate under the provision mentioned and shall conclude with the signature of a single prospective trade union agreement. 4. Any trade unions that do not accept the proposed agreement provided for under paragraph 3 may submit their observations to the President of the Council of Ministers and to the ministers making up the public sector delegation within five days of signature of the agreement. 5. Work on the preparation of the framework measure concerning military police forces provided for under Article 2, paragraph 1, sub-paragraph B), shall be conducted in meetings which shall be attended by delegates from the general command units of the Carabinieri and the Tax Police and representatives of the respective Central Military Representative Council sections and shall conclude with the signature of the framework measure agreed upon. 6. Where they do not accept it, the Carabinieri and Tax Police sections of the Central Military Representative Council may submit their observations concerning the above-mentioned framework measure to the President of the Council of Ministers and the competent ministers, via their respective general command units, within five days of receipt of the framework measure provided for under paragraph 5. 7. Work on the formulation of the framework measure concerning the armed forces shall be conducted in meetings attended by delegates from the Defence Chiefs of Staff and representatives of the COCER [Central Military Representative Council] (Army, Navy and Airforce sections) and shall conclude with the signature of the framework measure agreed upon. 8. […] 9. […] 10. The prospective trade union agreement referred to under paragraph 3 and the framework measures referred to under paragraphs 5 and 7 shall be supplemented by dedicated annexes […] 11. The Council of Ministers shall, within fifteen days of signature and after having ascertained financial compatibility and examined any observations submitted in accordance with paragraphs 4, 6 and 8, approve the prospective trade union agreement for the civilian police forces and the framework measures concerning respectively the militarised police forces and the armed forces, the terms of which shall be adopted by decrees of the President of the Republic pursuant to Article 1(2), for which the Council of State need not issue an opinion. 11-bis. In the event that, when conducting its ex-ante review of the legitimacy of the decrees adopted pursuant to paragraph 11, the Court of Auditors should request any clarification or additional information […] the counter-arguments must be submitted to it within fifteen days. 12. The provisions adopted by decrees of the President of the Republic in accordance with paragraph 11 shall remain valid for three years […] 13. In the event that the agreement and the consultation provided for under this decree are not completed within one hundred and fifty days of the launch of the respective procedures, the Government shall report to the Chamber of Deputies and the Senate of the Republic in the manner and according to the arrangements established under the respective regulations".

Accordingly, it is entirely clear that, under the terms of the applicable legislation, the public administration must play a pre-eminent role in promoting, conducting and concluding the procedure, without which the goals provided for by law will not be achieved.

The protected inaction by the administrations involved thus constitutes manifestly unlawful conduct in breach of Article 97 of the Italian Constitution, violating the principle of good administration, as also required under Article 41 of the Charter of Fundamental Rights of the European Union; it is also important to point out that, under the terms of the general legislation on administrative procedures, and in particular under Article 2 of Law no. 241 of 1990, the procedure concerning the establishment of supplementary pension provision must be launched *ex officio*.

The question has been considered on various occasions in the case law.

The mechanism applicable to the establishment of supplementary pension provision for members of the Security and Defence segment has been approved by the Regional Administrative Court of Lazio. In an action brought by certain employees of the Carabinieri who claimed that they were entitled to have their pensions calculated according to the parameters applicable prior to the "Dini" reform [i.e. according to the old defined benefit system] in view of the failure to make provision for a supplementary pension scheme, the court held that: "*supplementary pension provision may be established according to a complex procedure, concluding with an authoritative measure; as such, the persons interested in obtaining that pension provision may only claim a legitimate interest, consisting in the interest that the administration should exercise its powers in this area"* (see Regional Administrative Court of Lazio, Rome, judgment no. 12867/2009). Subsequently, a case was brought before the Regional Administrative Court of Lazio by a number of employees of the State Police, who challenged the failure/refusal to act on requests made by those employees seeking the launch of negotiations concerning the establishment of supplementary pension schemes. Whilst recognising the legitimate interests of the claimants in obtaining the launch of the complex procedure for putting in place supplementary pension schemes (which involved the Minister for the Civil Service and trade union representatives), the court ruled the application inadmissible, having regard to the initiatives taken by the Minister for the Civil Service. The Regional Administrative Court noted that the ministry involved had launched specific procedures in 1999-2000 in relation to the end-of-service lump-sum payment and supplementary pension provision, and had also convened the trade union and military representatives of personnel working in the segment; however, the parties had been unable to reach a consensus agreement (see Regional Administrative Court of Lazio, Rome, judgment

no. 3995 of 15 March 2010).

By judgment no. 5698/2011, having been apprised of a similar dispute concerning the failure to act in response to requests submitted by individual employees from the Security segment asking that procedures be launched with a view to completing the aspect of the pension reform that had not yet been implemented (i.e. the establishment of supplementary pension funds), the Council of State rejected the action on the grounds that the claimants lacked standing to sue, holding that: *"public sector employees covered by collective bargaining arrangements and the presidential decree giving effect to the results of the consultation procedure have a 'final' and entirely indirect and consequential interest, and not a tangible, current and directly protectable interest, in the launch and conclusion of negotiation procedures in question. If anything, this falls exclusively to the most representative trade union organisations (as regards civilian police forces) and to the central representation committees, again as bodies representing collective interests (as regards the militarised police forces and personnel from the armed forces), both of which are called upon to participate in these procedures."* Essentially, the Council of State asserted the principle according to which only trade union organisations (for civilian police forces) and military representation bodies (for militarised police forces) can pursue court action in order to object to the failure to establish supplementary pension funds.

Following this ruling, the **Regional Administrative Court of Lazio, Rome**, departed from it in the important **judgments no. 9186 and no. 9187 of 2011**, following an application from certain military personnel from the armed forces who, in the face of the administration's failure to act, asked the Regional Administrative Court to rule that those administrations were obliged to adopt an express measure concluding the administrative procedure for the establishment of supplementary pension schemes. The court first acknowledged that employees from the Security and Defence segment had standing to launch an action seeking a ruling that the administration had failed to comply with the obligation incumbent upon it to launch those procedures. Secondly, it held that "*the respondent administrations are under an obligation to act on the requests made by the claimants, given that this obligation has been established directly by the law, which has identified the manner in which the procedure for establishing specific 'supplementary pension provision' should be launched for personnel from the Security – Defence segment*" (see judgments no. no. 9186 and no. 9187 of 23 November 2011 of the Regional Administrative Court of Lazio, Rome). Thus, the judgments of the Regional Administrative Court referred to above **confirmed the statutory obligation for the respondent administrations to conclude the administrative procedures relating to the establishment of supplementary pension schemes, as provided for under**

the applicable pensions legislation, within 180 days of the administrative service of the judgment. Despite these rulings, the public administrations concerned did not take any steps to conclude the administrative procedure, and did not challenge the rulings, thereby **allowing them to become final**. The Regional Administrative Court of Lazio became involved once again in relation to the enforcement of this final judgment, issuing the later judgments no. 2122 and 2123 of 2014. This resulted in the appointment of an ad hoc commissioner, who was accordingly charged with summoning the parties, acting in place of the administration in breach; however, he was unable to conclude his task due to an **obstinate refusal to act by the public body**.

It is therefore important to stress that, although the administrative case law has ordered the administrations to comply with their statutory obligations, these obligations have unbelievably not been complied with. This entirely frustrates the objective of the "Dini" reform, i.e. to enable those workers whose pensions are, according to law, calculated according to the defined contribution system (and who will thus have a lower pension compared to workers receiving a defined benefit pension) [to obtain] **an adequate level of pension cover**. As a result, due to the administrations' failure to act, members of the armed forces and the police forces currently do not have any opportunity to make up for their [lower] pensions through supplementary pension provision – an outcome which violates the requirements put in place by the legislature – and have, moreover, been penalised compared to public sector employees from the segment of "public sector employment governed by private law" [*comparto pubblico privatizzato*], for whom on the contrary supplementary pension funds have been established.

Moreover, since the establishment of a supplementary pension fund directly addresses the need to mitigate the economic effects resulting from the application of the defined contribution pension scheme, it undoubtedly constitutes a measure aiming to maintain, if not to raise, the system of social security that each Party – and hence also the Italian State – is obliged to adopt pursuant to Article 12 of the European Social Charter. It is therefore clear that the failure to establish supplementary pension provision for workers from the Security and Defence segment has resulted in a violation of that provision, considered in conjunction with Article E, giving rise to clear discrimination compared to all other public sector workers, for whom such provision has been made.

It must be added that, having regard to the case law of the national administrative courts referred to above, there is no doubt regarding the principle that the members of civilian police forces

and militarised police forces have standing to act in order to protect their interests in the activation of supplementary pension provision. It therefore follows from this consideration that, given the continuing failure to establish any form of supplementary pension provision, the workers discriminated against are able to claim compensation from their respective administrations for the losses resulting from the violation of the law committed (in the amount not paid that was due by the administrations in respect of the pension fund), the inability to qualify for relief from income tax on the payments made into the fund by the employee (it is possible to deduct from income tax up to EUR 5 164.57 of supplementary pension contributions each year, including those paid by the employer) and, lastly, the economic loss resulting from the inability to transfer into the fund all or part of the end-of-service lump-sum payment or the end-of-service allowance, thereby also achieving a return.

Whereas the administrative courts have gone so far as to appoint an ad hoc commissioner to act in place of the respondent administrations, thus recognising the standing of workers from the Security and Defence segment to invoke that right, when faced with similar cases the Court of Auditors has endorsed a similar position.

By judgment no. 40 of 2017, the Court of Auditors of Abruzzo referred to the principles enunciated by the Employment Division of the Court of Cassation in judgment no. 9125 of 21 June 2002 according to which the worker is "***holds, within the ambit of the pension relationship, an individual right to the insurance cover he is entitled to by law; that entitlement must be recognised as having the status of a legal interest amenable to autonomous confirmation and protection throughout the duration of the pension relationship, even before the right to benefits has arisen***. *The Court takes the view that the entitlements of the worker making up the content of that right must include the right to certainty as regards the precise amount of the overall contributions paid into his account, and to that effect to obtain information concerning contributions paid throughout his working life and the respective 'consistency' (taken to cover not only the quantity but also the quality of the contribution, that is its 'utility' for pension purposes). The insured worker thus has a genuine right to information, which is moreover reflected by the duty to provide him with certainty concerning the level of the contribution balance accumulated by insured persons over time. This is a specific obligation incumbent upon the insurer body, which is attendant to the legal pension relationship*…". In particular, in referring to these principles, the Court of Auditors held that they could also indeed apply to the case before it, since the circumstances of the claimants (all of whom worked in the Security and Defence segment) were "*characterised by a state of persistent intolerable uncertainty… concerning the specific ability to access sectoral supplementary pension schemes, and hence the level of their own pension entitlement considered*

overall. For them, the removal of this uncertainty is an indispensable prerequisite for making, at the present time, informed choices concerning their future in terms of pension entitlement, according to the spirit of awareness-raising and pension transparency that permeates the entire body of legislation in this area" (see Court of Auditors of Abruzzo, judgment no. 40/2017). In this regard, the court held that the persistent failure to implement the pension reform risked causing the collapse of the entire pension system designed by the legislature, and thus concerned individual legal interests amenable to autonomous confirmation and protection, including in terms of the quantity and quality of the overall contributions paid into the claimants' accounts, applying specifically the position established by the Court of Cassation . In the same judgment, the Court of Auditors acknowledged that, more than twenty years after the 1995 Dini reform, it was only for public sector workers from that segment that the legislative rules on supplementary sectoral pension provision had still not been fully implemented. On the one hand, in this judgment, the Court of Auditors ruled the application admissible due to the tangible nature of the harm suffered by employees from the Security and Defence segment. However, at the same time, it ruled unfounded the claim seeking the recognition of the right for pensions to be calculated according to the defined benefit system, holding that the failure to establish supplementary pension provision did not undermine the legitimacy of the defined contribution system.

The Joint Divisions of the Court of Cassation held in judgment no. 22807/2020 that: "4. ***The dispute in question pertains directly and immediately to the employment relationship, and primarily the employer's obligations in relation to the launch of the necessary procedures for negotiation and consultation concerning the end-of-service allowance and/or end-of-service lump-sum payment, and the resulting establishment of supplementary pension provision, the failure to comply with which – as is argued by the claimant – has given rise to liability under contract*****".**

This judgment therefore establishes the immediate eligibility for protection of the individual legal entitlements of employees who have been harmed by the omission on the part of the public sector employer, giving rise to contractual liability.

Moreover, the principle that an employee does not have any right of action against pension providers in order to force them to recover employer contributions has been well established in the case law of the Court of Cassation; the employee must take action against the employer in order to recover them [see *inter alia* Court of Cassation, judgments Cass. no. 6911 of 26 May 2000 and no. 3491 of 14 February 2014], and the right to compensation claimed in this submission must also comply with this principle.

However, the case law contains one isolated judgment (adopted moreover at first instance, and

later reversed on appeal) accepting compensatory relief, namely **judgment no. 207 of 18 May 2020 of the Court of Auditors of Puglia**: indeed, although the view predominantly taken in the case law to date has been that there is no right to the maintenance of the defined benefit scheme in the event of an established violation of the obligation to establish supplementary pension provision in the State Security and Defence segment, nor any right to compensation for losses (due also to employees' lack of standing to object to such a violation), that compensatory relief was, however, recognised in that judgment.

In its decision, the Court of Auditors of Puglia acknowledged that, as the issue of supplementary pension schemes had still not been resolved after more than 20 years, it held that the claimant was entitled to compensation, based on entirely unobjectionable argumentation. Whilst rejecting the claimant's claim seeking recognition of the right for his pension to be calculated according to the defined benefit system, it by contrast upheld as well-founded the damages claims relating to the failure to establish supplementary pension provision. The court first considered the entire body of sectoral legislation and the case law that had arisen in the meantime in this area, and expressly addressed the *"**problem of protection of the legitimate expectations of those still in service***". It then went on to criticise the fact that, after more than twenty years had passed, the problem concerning the failure to establish supplementary pension provision had still not been resolved. As a result, it recognised a **right to compensation** as a suitable *"instrument for compensating the negative economic repercussions which the claimant objects have been suffered as a result of the failure to establish supplementary pension provision," "**as the legitimate expectation of the extension of the supplementary pension scheme to the public sector constitutes a legal entitlement eligible for protection***". The Court held that *"in substantive terms, the harm resulting from the failure to establish supplementary pension provision consists, in this case, in 'future loss', the consequences of which do not arise immediately, as the claimant is still in service, but rather at the time of retirement; this is because the timely establishment of pension funds would have resulted in a higher pension than that paid as a result of the failure to pursue that option, and would also have enabled income tax to have been saved due to the higher amount deductible... As regards the quantification of the financial loss relating to the amount accumulated to date… the most correct methodology is to compare the amount… [payable] in the event of the timely establishment of the pension fund (assuming a choice to make payments into it) with the amount… [payable] in the event of the failure to establish the fund. In order to establish the amount [payable] to those choosing to invest in the fund, it is necessary to quantify, first, the amount of the contribution that would have been paid into the fund and, secondly, the returns that would have been generated as a result, with reference to the returns achieved by the "Espero" fund … The failure to establish supplementary pension provision is undoubtedly attributable in part – in the amount*

of 25% – to the Ministry of Defence, which will be required to calculate the pecuniary loss suffered by the claimant, applying the criteria set out above, in the percentage indicated above".

In effect, having established the unlawful nature of the omission by the administration (see Regional Administrative Court of Lazio, Rome, judgments no. 9186 and no. 9187 of 23 November 2011, cit.), it is also clear that there is a link between that conduct and the harm given that, had the administration complied with the legislative requirements cited in detail, supplementary pension funds would have been established for workers along with the related obligation to make payments into them, which would have fallen in part on their employer, along with all of the related benefits.

Whilst the right to obtain compensation might appear to be so self-evident, the national case law has, however, adopted an entirely exclusionary approach (aside from the individual positive ruling mentioned above, which was overturned on appeal), justifying the rejection of the damages claims brought by workers before the administrative courts by their lack of standing to sue (as they have *"a 'final' and entirely indirect and consequential interest, and not a tangible, current and directly protectable interest, in the launch and conclusion of negotiation procedures pursuant to Article 67 of Decree of the President of the Republic no. 254 of 16 March 1999. This interest is vested exclusively in the most representative trade union organisations (as regards civilian police forces) and in the central representation committees, again as bodies representing collective interests (as regards the militarised police forces and personnel from the armed forces), which are called upon to participate in these procedures".* See inter alia, Regional Administrative Court of Catania, judgments no. 855/2022 and no. 3749/2021; Regional Administrative Court of Rome, judgment no. 1292/2021), and based on the argumentation that the establishment of supplementary funds is merely an option available to the public administration and not an obligation provided for by law (!) (*At any rate, engaging in consultation in relation to supplementary pension provision is not an obligation, but rather a right of the administration, […] and the claimants do not have any entitlement to this effect, as the procedure only involves the parties that are called upon to participate in the respective procedure".* See, *inter alia*, Regional Administrative Court of Catania, judgments no. 855/2022 and no. 3749/2021; Regional Administrative Court of Rome, judgment no. 1292/2021).

The Italian State has therefore not only failed to comply with the obligation arising under Article 12 of the European Social Charter to maintain and even raise the level of social security, but has ended up undermining the only compensatory relief available for the failure to take action to protect social security, specifically the damages claim,

thereby also violating the economic rights of the workers affected. Accordingly, the social and economic rights of military personnel have been violated, firstly, through the failure to establish supplementary pension funds in order to offset the economic effects of the application of the defined contribution pension scheme. This scheme exposes workers to a significant difference in income compared to that which they received whilst earning a salary, as compared to the position under the previous defined benefit scheme. Their economic rights have also been violated due to the failure to compensate the loss thereby caused.

Lastly, it must be stressed that it is clear from the above that the omission on the part of the administration also violates the **"right to protection of property" under Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms** (hereafter ECHR), as well as the prohibition on discrimination laid down by **Article 14 ECHR**. The concept of possessions protected by that provision and expressed through the term "property" must be construed broadly in accordance with the provisions of international law (ECtHR, *Marckx v. Belgium*, judgment of 13 March 1978, § 63), and may not, moreover, be interpreted narrowly by an individual State (ECtHR, *Matos and Silva Lda and others v. Portugal*, 16 September 1996, § 75). As interpreted by the international courts, the concept of possession has also been extended to individual rights such as claims (ECtHR, *Pressos Compania Naviera S.A. and others v. Belgium*, 20 November 1995, § 31; ECtHR, *Buffalo s.r.l. v. Italy*, 3 July 2003): in this regard, the Court has held that future income constitutes a "possession" within the meaning of the ECHR if it has been legitimately earned (ECtHR, *Ambruosi v. Italy*, 19 January 2001, § 20), where it is the object of an enforceable decision or a court order (ECtHR, Stran Greek Refineries and Stratis Andreadis v. Greece, 9 December 1994), or if it is due according to law (ECtHR, Dangeville v. France, 16 April 2003). The Court has also held that in order for a claim to fall within the scope of the provision, the holder must demonstrate that it has a sufficient basis under domestic law (ECtHR, Agrati and others v. Italy, 7 June 2011). Having established that concept, it is now possible to consider the concept of "legitimate expectation" (ECtHR [GC], Maurice v. France, 6 October 2005, § 63). In some cases in fact, the Court has noted, it is possible that a legitimate expectation in relation to a right (or its satisfaction) may be frustrated by the adoption of administrative practice or also by subsequently enacted legislation, and in such cases the expectation in relation to the right may be protected under the Convention provision referred to (see also, ECtHR, Pine Valley

Developments v. Ireland of 9 February 1993). Pension rights have also been brought within the scope of protection under Article 1 of the First Additional Protocol: in the judgment in Gaygusuz v. Austria of 16 September 1996, the ECtHR held that health benefits paid to unemployed persons fell within the scope of protection under that Article, as they gave rise to an economic interest. Other cases in which matters relating to pensions have fallen within the scope of protection include, for example, and in order to provide evidence of the existence of a line of case law in this area: *Maggio v. Italy* of 31 May 2011, *Luczak v. Poland* of 27 November 2007, *Koua Poirrez v. France* of 30 September 2003, *Beian v. Romania* of 6 December 2007, *Andrle v. Czech Republic* of 17 February 2011, *Van Raalte v. Netherlands* of 21 February 1997.

There is therefore no doubt that the right to supplement one's own pension entitlement through supplementary pension funds, to be funded in part by the employer public administration, and the related benefits that the employee may obtain as a result, fall within the scope of the Convention provision. It may thus be concluded that the complainants have a right or interest falling within the scope of its protection. This right of theirs has undoubtedly been violated as a consequence of the omission by the administration consisting in the failure to establish supplementary pension funds, thereby discriminating against them compared to other public sector employees. The failure to establish supplementary pension funds has undoubtedly had negative effects on them, preventing those amounts that were intended to support them during their retirement from being set aside by the employer public administration. It must be concluded that this omission lacks any basis in law, as it is not consistent with the provisions that require them to be established.

However, an essential condition for State interference to be regarded as compatible with Article 1 of the First Additional Protocol is that it is lawful and justified in the public interest and, in any case, proportionate to the aim being pursued (ECtHR, *Jahn and others v. Germany*, [GC], 30 June 2005). This prerequisite will not be deemed to have been fulfilled if the person concerned must bear an individual and excessive burden (ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982; *Agrati v. Italy*, cit., §§ 77 et seq.). It must also be stressed that, under the ECHR, state administrations are subject both to negative obligations, i.e. to refrain from interfering with the rights of an individual, and also to positive obligations (ECtHR, *Whiteside v. United Kingdom*, 7 March 1994).

There is therefore no doubt that, in the case under examination, there is a "legitimate expectation of the establishment of supplementary pension provision because that institution was provided for under precise legislative provisions. It was therefore entirely legitimate to

expect supplementary pension funds to be established, an expectation which was, however, frustrated by the national authorities' failure to act. It is thus clear that the right to protection of property has been violated. There is no basis in law for this violation, which is in any case disproportionate, inter alia as it is evident that the failure to establish supplementary pension provision does not satisfy any public interest that might reasonably require the private interest to be set aside.

In any case, based on the discrimination described in this complaint (resulting from the establishment of the "second pillar" of supplementary pension provision throughout the public sector, but not also for members of the Security and Defence segment), it is clear that Article 14 ECHR laying down the prohibition on discrimination, in conjunction with Article 1 of the First Additional Protocol, has been violated.

CONCLUSIONS

In the light of the complaint, reserving the right to file supplementary written statements, the European Committee of Social Rights is asked to:

- **rule that Article 12 of the European Social Charter, in conjunction with Article E, has been violated in view of the failure by the Italian State to establish supplementary pension funds for public sector employees from the militarised armed forces, as provided for under Legislative Decree no. 124/1993 and the other relevant legislation in this area;**
- **To award against the Italian State the costs and fees relating to these proceedings.**

Use of the Italian language

The complainant party requests that it be able to use the Italian language in any submission relating to these proceedings.

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Schedule of enclosures:

1) Certification
2) Ministerial decree granting authorisation
3) Memorandum of Association
4) Minutes of Members' Meeting
5) Statute
6) Trade union notices
7) Trade union notices
8) Military trade unions co-ordination initiative

The President, Federico Menichini

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Counsel Egidio Lizza