EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

21 December 2023

Case Document No. 1

***Associazione Nazionale per l'Industria e il Terziario* (A.N.P.I.T.) and *Confederazione Italiana Sindacati Autonomi Lavoratori* (C.I.S.A.L.) v. Italy**
Complaint No. 232/2023

COMPLAINT

Registered at the Secretariat on 13 November 2023

Secretary General of the Council of Europe

via the

Executive Secretary of the

European Committee of Social Rights

Department of the European Social Charter

Directorate General of Human Rights and Rule of Law

Council of Europe

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Department of the European Social Charter

Directorate General of Human Rights and Rule of Law

Council of Europe

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COLLECTIVE COMPLAINT

pursuant to Article 1(c) of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints

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On behalf of

Associazione Nazionale per l'Industria e il Terziario [National Association for the Industrial and Tertiary Sectors] (hereafter ANPIT), with registered office at Via Giacomo Trevis 88 – 00147 Rome, Italy, Italian tax ID 97730240583, represented for the purpose of these proceedings by its National President and legal representative, Mr Federico Iadicicco (Italian tax ID DCCFRC74S06H501T), as represented by **Counsel (Prof.) Flavio Vincenzo Ponte** of the Castrovillari bar (Italian tax ID PNTFVV77D15F205E), certified email address avvflavioponte@pec.teamcare.it – who is advised by Prof. Claudio Di Turi – in accordance with the mandate annexed to/affixed at the foot of this complaint, with chosen service address at the following email address avvflavioponte@pec.teamcare.it

and

Confederazione Italiana Sindacati Autonomi Lavoratori [Italian Confederation of Independent Workers' Unions] (hereafter CISAL), with registered office at Via Salita di San Nicola da Tolentino, 1/B, 00187 Rome, Italy, Italian tax ID 80418520583, represented for the purpose of these proceedings by its current legal representative, Mr Francesco Cavallaro (Italian tax ID CVLFNC64H01D303G), as represented by **Counsel (Prof.) Flavio Vincenzo Ponte** of the Castrovillari bar (Italian tax ID PNTFVV77D15F205E), certified email address avvflavioponte@pec.teamcare.it – who is advised by Prof. Claudio Di Turi – in accordance with the mandate annexed to/affixed at the foot of this complaint, with chosen service address at the following email address avvflavioponte@pec.teamcare.it

versus

Italy, represented by the President of the Republic, Sergio Mattarella, as represented before the Council of Europe by the President of the Council of Ministers, Giorgia Meloni, as the party that has violated Articles 5, 6 and 12 of the European Social Charter;

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on the grounds of

the violation and inadequate application by the party of Article 5 (The right to organise), Article 6 (The right to bargain collectively) and Article 12 (The right to social security) of Part II of the "Revised" European Social Charter (hereafter, the Charter), request that Article 22 of Decree-Law No. 18 of 17 March 2020, converted with amendments into Law No. 27 of 24 April 2020, as well as any executive act, whether known or unknown, related to, associated with or resulting from the foregoing be declared as not compliant with the above-mentioned Articles of the Charter

and

consequently, that the Italian State bring its legislation into line with the Charter.

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A) GROUNDS FOR THE ADMISSIBILITY OF THE COLLECTIVE COMPLAINT.

The organisation filing the collective complaint

1) The ANPIT is an employers' association established in 2012, with national headquarters in Rome and Milan, which is present on a broad scale throughout the country (with 19 regional

offices, 85 provincial offices and numerous local offices) as well as in various commercial sectors, including specifically: integrated auxiliary services, trade, businesses open to the public, advanced tertiary sector, operational marketing, private security, training, nursing homes, mechanical engineering, climate control, etc.

2) The ANPIT, which is inspired by democratic constitutional principles and operates on a non-profit basis, promotes, represents and upholds the moral, legal, economic, social security and professional interests of thousands of member employers, and assists them in dealings with trade unions, including before official bodies (Territorial Labour Office, INPS [National Institute for Social Security], INAIL [Institute for Insurance against Occupational Accidents], chambers of commerce, etc.). It also supports companies in seeking to identify mechanisms for simplifying administrative, tax and accounting formalities to which the entities represented are subject, proposing and preparing programmes intended for local institutions, in particular in the fields of economic policy, representation and solidarity amongst the entities represented. The ANPIT supports businesses in dealing with collective bargaining, productivity at work and welfare, with particular reference to forms of incentivisation and remuneration that enable a new culture of participation and shared success to be promoted (cf. Statute, Enclosure 1).

3) More specifically, the ANPIT has signed 19 national collective labour agreements as an employer party, alongside the Confederazione Italiana Sindacati Autonomi Lavoratori **as the trade union party charged with upholding workers' interests, and as the confederation that has been declared to be comparatively most representative within the private sector by the Decree of the President of the Council of Ministers of 8 August 2013**. These agreements are regularly lodged with the CNEL [National Committee for the Economy and Employment] and the Ministry for Employment, which have recognised their validity, designating them as collective labour agreements applicable throughout the country.

4) In organisational terms, the ANPIT has a clearly defined structure. According to Articles 9 et seq. of its Statute, it is comprised of the following bodies: a) the President; b) the Executive; c) the National Council; d) the National Congress; e) the Secretary General; f) the Auditor; and g) regional, provincial and sectoral associations.

5) The ANPIT has the right to lodge collective complaints with the European Committee of Social Rights in accordance with Article 1 of the Additional Protocol to the European Social Charter. This article provides for a system of collective complaints, according to which *inter alia* "representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint" have the right to submit collective complaints.

6) It is clear that, by virtue of the organisational structure of the ANPIT, its firmly rooted and widespread presence throughout Italy, which substantiates its national vocation, as well as the exercise of the activities and prerogatives illustrated above, the organisation fulfils the prerequisite of representativeness, which is required in order to submit collective complaints.

7) This conclusion is in keeping with previous rulings of the European Committee of Social Rights. Specifically, the Committee has held with regard to the filing of collective complaints that representativity is an autonomous concept, not necessarily identical to the national notion of representativity (see *Confédération française de l'Encadrement (CFE-CGC) v. France*, Complaint No. 9/2000, decision on admissibility of 6 November 2000, para. 6).

8) The European body has also clarified that, as regards representativity, the assessment regarding it must be carried out beyond the ambit of national considerations as well the domestic collective labour relations context (cf. Complaint No. 6/1999, *Syndicat national des professions du tourisme v. France*, decision on admissibility, para. 6).

9) A lack of representativeness as qualified under national law does not affect representativeness within the meaning of Article 1§c of the Protocol, since this constitutes an autonomous concept, not necessarily identical to the national notion of representativity (cf. decision on admissibility, 13 May 2020, *Syndicat CFDT De La Métallurgie De La Meuse v. France*, Complaint No. 182/2019).

10) The activity of the ANPIT is not by any means limited to one single enterprise/production unit, to a specific sector or to a geographical area. If this were the case, it goes without saying that it could not be considered to be representative within the meaning of Article 1§c of the Protocol.

11) The right of ANPIT, as an employers' organisation, to submit collective complaints cannot be called into question considering the number of members; the fact that it fulfils the prerequisites of inter-category and multi-category operations; the breadth and spread of its organisational structure; its involvement in training and the conclusion of national collective labour agreements; and its involvement in the resolution of individual, multiple and collective labour disputes. It is absolutely clear that ANPIT is an employers' organisation performing functions that must be classified as fundamental trade union activities.

12) Were there still any doubt as to its representativeness, it is also important to note the fact – which cannot be overlooked – that the only national collective labour agreement (NCLA) for the "operational marketing" sector (CNEL code: H682), which has now been renewed until 30 April 2024, was originally signed in 2017 by the ANPIT and the CISAL. On account of the absolutely specific and unique nature of the above-mentioned collective agreement signed by

the CISAL and the ANPIT for the sector concerned, there is no need to enquire any further into the representativeness of the signatory organisations.

13) According to Article 16 of the ANPIT Statute, as its legal representative the President has authority to represent the association vis-a-vis third parties. He can validly represent the national association in all documents, contracts and proceedings, as well as in dealings with official bodies, companies and public or private institutions.

14) The aspects considered above are significant in establishing the representativeness of ANPIT, and hence its right to lodge collective complaints before the European Committee of Social Rights.

15) As it has the right to do so, the ANPIT submits this collective complaint against Italy to the Committee, acting through its President, who has authority to represent the association. As this authority has been specifically granted, he is thus fully entitled to lodge the complaint on behalf of the employers' organisation.

16) The CISAL is an independent trade union workers' confederation, the actions of which are inspired by the fundamental principle of trade union autonomy. Its objective is to uphold the interests of the categories of worker represented as well as the general interests of society at large.

17) The task of the CISAL is:

- to represent workers and members of the general public, including the unemployed;
- to assist member organisations involved in industrial disputes with regard to campaigning initiatives, negotiations relating to the conclusion of collective labour agreements and the settlement of any issues that may arise during the course of negotiations and otherwise that may affect the interests of workers, pensioners and the general public;
- to support, through jointly agreed concerted action, trade union and political activities conducted by trade union organisations and member associations in the interest of workers and of the country;
- to designate its own representatives for all fora (bodies, commissions, committees, observatories) where provision is made for trade union representation and the involvement of the social partners.

18) In organisational terms, the CISAL has a clearly defined structure. It is comprised of the following bodies: a) the Secretary General; b) the Confederal Secretary; c) the National Council; and d) regional, provincial and sectoral offices.

19) As it has the right to do so, the CISAL submits this collective complaint against Italy to the Committee, acting through its Secretary General, who has authority to represent the association. As this authority has been specifically granted, he is thus fully entitled to lodge the complaint on behalf of the organisation.

20) Acting for the purpose of protecting and on behalf of workers, the CISAL signs collective labour agreements along with ANPIT as the employers' association.

21) The CISAL can certainly be included amongst the category of "particularly representative" trade union organisations since:

- The **Decree of the President of the Council of Ministers of 8 August 2013** (cf. Enclosure 10) mentions the CISAL as a "particularly representative" trade union organisation, stating as follows: "*According to the results of investigations carried out and **the resulting COMPARATIVE assessments** conducted on the basis of the criteria mentioned, the following trade union organisations have 'particularly representative' status: for employees in the private sector, the Confederazione generale italiana del lavoro [Italian General Confederation of Labour] (CGIL), the Confederazione italiana sindacati lavoratori [Italian Confederation of Workers' Unions] (CISL), the Unione italiana del lavoro [Italian Labour Union] (UIL), the Unione generale del lavoro [General Labour Union] (UGL), the Confederazione generale dei sindacati autonomi lavoratori [General Confederation of Independent Workers' Unions] (CONFSAL) and the **Confederazione Italiana Sindacati Autonomi Lavoratori [Italian Confederation of Independent Workers' Unions] (CISAL)***".

- **Decree of the Ministry for Employment No. 14280 of 17 July 2014** (cf. Enclosure 11) restates and reiterates the above concept classifying the CISAL as a particularly representative trade union organisation. Moreover, **Decree of the Ministry for Employment No. 24 of 4 February 2021** established the Standing Advisory Committee on Workplace Health and Safety in relation to which the CISAL was identified as a representative organisation (with one active member and one substitute member);

- By a document dated 29 August 2017 (cf. Enclosure 12) concerning the reappointment of the members of the CNEL for the 2017-2022 five-year period, **the Office of the President of the Council of Ministers included the CISAL in the list of representative confederations entitled to submit proposals through the CNEL**.
- The **Decree of the President of the Council of Ministers (DPCM) of 14 November 2017** (cf. Enclosure 13) declares that CISAL has comparatively most representative status for the purpose of the composition of the CNEL in the light of the above-mentioned note, which was followed by the appointment of members by **Decree of the President of the Republic of 23 March 2018** (cf. Enclosure 14).
- **The Decree of the Ministry for Employment of 26 July 2019** (cf. Enclosure 15) (which cites the DPCM of 26 September 2014) on the reconstitution of the **National Committee for the Implementation of the Principles of Equal Treatment and Equal Opportunities between Male and Female Workers** (Article 8 of Legislative Decree No. 198 of 2006) allocates two positions to the CISAL, as it does for the other particularly representative trade union organisations.
- **Decree of the President of the Council of Ministers (DPCM) of 1 June 2022** states that the CISAL has comparatively most representative status **for the purpose of the composition of the INPS Steering and Oversight Committee** (cf. Enclosure 16).
- **Decree of the Office of the President of the Council of Ministers No. 0012570 – P-27/04/23** (cf. Enclosure 17), **establishing the new composition of the National Council for the Economy and Employment (CNEL)** for the 2023-2028 five-year period, **confirmed that CISAL had the status of a "particularly representative" confederation, allocating one representative position to it**.

The State against which the complaint is filed.

1) As far as the respondent is concerned, this complaint is directed against Italy, which ratified the Charter by Law No. 30 of 9 February 1999 on the "Ratification and implementation of the Revised European Social Charter, with appendix, done in Strasbourg on 3 May 1996". By Law No. 298 of 28 August 1997 on the "Ratification and implementation of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, done in Strasbourg on 9 November 1995", Italy subsequently ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

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B) THE MERITS OF THE COLLECTIVE COMPLAINT

THE VIOLATIONS OF THE RIGHTS RECOGNISED UNDER AND THE PRINCIPLES ENSHRINED IN THE EUROPEAN SOCIAL CHARTER REGARDING WHICH THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS IS REQUESTED TO MAKE A FINDING

2) The complainant organisations consider that the applicable Italian legislation on eligibility for the wage guarantee fund [*cassa integrazione*] on an exceptional basis for the duration of the Covid-19 emergency undermines the efficacy of the rights and principles enshrined in the Charter, and that for this reason the systematic violation of the social rights guaranteed by the Charter must be objected to and brought to the attention of the Committee by means of this collective complaint.

3) Articles 5, 6 and 12 of the Charter are of particular significance in this case, and it appears to be particularly evident that they have been violated by the Italian legislature for reasons that will be illustrated below.

4) In particular:

- Article 5, entitled "**The right to organise**", provides *inter alia* that "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom";
- Article 6, entitled "**The right to bargain collectively**", provides that "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: 1 to promote joint consultation between workers and employers; 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into";

- Article 12, entitled **"<u>The right to social security</u>"**, 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; 4 to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure: *a* equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; *b* the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties".

5) The Italian legislation laid down by Article 22 of Decree-Law No. 18 of 17 March 2020, converted with amendments into Law No. 27 of 24 April 2020, governing eligibility for the wage guarantee fund on an exceptional basis for the duration of the Covid-19 emergency, provides that: "*With regard to employers from the private sector, including enterprises in the agricultural, fishing and tertiary sector, including religious entities recognised under civil law to which the protections laid down by the statutory provisions on the suspension or reduction of working hours for employees do not apply, the regions and autonomous provinces* ***<u>may, as a consequence of the COVID-19 pandemic, by agreement concluded either in person or remotely with the comparatively most representative trade union organisations at national level, grant wage guarantee payments on an exceptional basis</u>*** *for the duration of the reduction or suspension of the employment relationship, and in any case for a period not exceeding a maximum of nine weeks in respect of periods falling between 23 February 2020 and 31 August 2020, which period may be increased by five additional weeks over the same period only for those employers for which a period of nine weeks has already been authorised in full*".

6) Thus, according to the contested provision, the application seeking eligibility for the wage guarantee fund on an exceptional basis due to Covid-19 must be submitted along with an agreement concluded between the applicant business and the "comparatively most representative" trade union organisations at national level.

7) Paragraph 11 of Circular No. 72/2021 of the National Institute for Social Security makes provision to the same effect.

8) It is important to point out, in particular, that the matter to which this complaint relates is entitlement to sign the agreement upon which eligibility for the wage guarantee fund on an exceptional basis due to Covid-19 is conditional: under Italian law, such entitlement is not vested in the trade union that signed the national collective labour agreement (hereafter, NCLA) applied in the business/production unit, but rather in the trade union that signed a different agreement **on account of its status as – according to the adverb used by the provision – the *comparatively most representative trade union at national level***.

9) Essentially, the Italian provision separates the assessment of representativeness – the criterion used for establishing entitlement to sign the agreement concerning access to the wage guarantee fund on an exceptional basis due to Covid-19 – from an examination of trade union organisations' actual representative capacity in the business/production unit, as signatories of the NCLA applied in it.

10) The concept of "comparatively most representative trade union organisation", which according to Italian law is relevant in the case under consideration, is premised on a selection amongst the most representative trade unions at national level, in order to determine the union(s) that is/are more representative than others for a given category of worker.

11) Making the identification of those trade union bodies that are deemed to be eligible to participate in trade union consultation procedures and to sign an agreement concerning the receipt of public financial benefits and subsidies conditional on the concept of "comparatively most representative trade union organisation" de facto violates the trade union prerogatives of organisations that are without doubt representative in the business/production unit.

12) Leaving aside the usage of the adverb "comparatively" chosen in the Italian legislation, Article 22 of Decree-Law No. 18 of 17 March 2020 prevents representative organisations (insofar as signatories of the NCLA applied in the business/production unit) from concluding the trade union agreement that is necessary in order to obtain the public benefit concerned.

13) In guaranteeing access to the wage guarantee fund on an exceptional basis due to Covid-19 if, and only if, the agreement [concerning wage guarantee payments] has been signed not by the trade union that signed the NCLA applied in the business/production unit but rather by the trade union that signed a different agreement, Article 22 fosters a dumping effect as well as opportunistic and aberrant behaviour.

14) Essentially, the consolidation of the legislative intention established according to a literal interpretation of the Italian provision risks excluding from the dynamics of industrial relations certain organisations that are representative of the social partners in that they are fully capable of building consensus and representing the socio-economic interests of groups. As a

result of this approach, the role of organisations the representativeness of which has been established by the fact of having signed the NCLA applied in the business/production unit is marginalised. This results in an irreparable breach of those principles, which must be guaranteed, of pluralism and trade union freedom, which require equal treatment amongst all organisations where more than one trade union association is involved.

15) In view of the arguments set out above, the Italian legislation – insofar as the matter specifically regulated by it is concerned – is complained about on the ground that it is based on a mistaken and aberrant interpretation of the concept of representativeness, and hence of the participatory rights of the trade union organisations entitled to sign the agreement concerning the benefit to which this complaint relates.

16) The analysis of representativeness must take due account of the need to protect the principle of representative pluralism in order to avoid a theoretical lack of representativeness from causing a substantive impairment of the ability to exercise the right to organise guaranteed under the Charter. Therefore, under this scenario the capacity of trade union organisations to sign the agreement [concerning wage guarantee payments] must be based on a concept of representativeness that must be construed in an inclusive sense, also taking account of the efficacy of the representative force of the trade union organisations that have signed the NCLA applied in the business/production unit.

17) It is inadmissible to render eligibility for certain prerogatives conditional upon the organisations' comparative representativeness; on the contrary, a specific review must be carried out based on other objectively verifiable considerations, such as, for example, whether they have signed the NCLA applied in the business/production unit.

18) Within a legal system that guarantees pluralism, entitlement to sign the agreement [concerning wage guarantee payments] – which guarantees a welfare benefit – must be deemed to lie with those organisations that have signed the NCLA specifically applied in the business/production unit: it cannot be overridden by inappropriate legislative choices that are indifferent to the need for proximity to the actual circumstances of businesses. The solidity of that assumption can be demonstrated in the light of the consideration that the entitlement of the organisations that have signed the NCLA applied in the business/unit also flows from the choice made to apply that specific contractual framework, which has been signed by some organisations and not by others.

19) Moreover, to favour trade union organisations that have not signed the NCLA applied in the business/production unit would entail calling into question the very efficacy of the

specific NCLA applied, making it extremely difficult to devise strategies to combat practices of contractual "dumping".

20) It must be acknowledged that the special circumstances of the various productive sectors as well as the numerous different legal and economic prerequisites for dumping within the various contractual frameworks prevent a single, universal model from being developed for regulating the practice. However, there is an undeniable need for legal and interpretative solutions that respect trade union freedom, and that are also capable of preventing gaps appearing within the system by authorising organisations that have signed an NCLA different from that applied in the business/production unit to sign the agreement concerning the benefit to which the complaint relates.

21) Conversely, it is readily apparent that it would be reasonable to grant authority to sign the agreement to the organisations that have signed the NCLA applied in the business/production unit, this also being true as regards the promotion of the anti-competitive role of these trade unions, which obviously understand the various dynamics in the relevant context better than others.

22) This approach is in keeping with the view that the concept of representativeness is not amenable to one single uniform interpretation, but must be construed having regard to the objectives pursued by the provisions that refer to it.

23) Accordingly, where the representativeness of the trade union organisations that have signed the NCLA applied in the business/production unit is recognised, this is certainly conducive to establishing their social guarantee function in signing the agreement [concerning wage guarantee payments].

24) There is no doubt that the "organisational moment" of collective interests as a precondition for the establishment of a genuine system of industrial relations can provide further support for the view that one particular trade union organisation is entitled to sign the agreement rather than another, irrespective of the degree of comparative representativeness or otherwise.

25) This consideration cannot be called into question in situations in which the organisations that have signed the NCLA applied in the business/production unit fulfil qualitative/quantitative representativeness requirements that can be used to assess the capacity of the association to operate as a valid interlocutor, such as the existence of a significant number of members, geographical distribution (number of offices present throughout the country and the different sectors in which the association operates); the structure of the organisation; the

number of national collective agreements signed and their dissemination; involvement in training and the number of interventions in individual and collective disputes.

26) The representativeness of the trade union organisations that have signed the NCLA applied in the business/production unit establishes their entitlement to sign the agreement [concerning wage guarantee payments]: it is based unequivocally on the indisputable and constant recurrence of factual evidence linked to the specific exercise of trade union prerogatives, and which provides the criteria to be employed in establishing such representativeness.

27) This approach tends to emphasise the principle of representativeness understood in a dynamic sense which, since it is not premised on predefined parameters, requires a nuanced assessment based on the specific circumstances of each individual case.

28) For the avoidance of doubt, it should be pointed out that the argument proposed here does not purport to assert that entitlement to sign the agreement [concerning wage guarantee payments] should be recognised universally and without distinction. Indeed, it is certainly legitimate to deny such entitlement to organisations for which the parameters referred to above do not exist. Any other conclusion would entail distorting trade union prerogatives beyond recognition.

29) The arguments set out above preclude the alleged lawfulness of the provision challenged in this complaint.

30) The solidity of the considerations set out above demonstrates that, from the perspective of the state legal system, it is legally inconceivable and unsustainable to reject an organisation's entitlement [to sign the agreement concerning wage guarantee payments] by virtue of the sole fact that it is not one of the comparatively most representative trade unions. Indeed, the activity carried out by the organisations that have signed the NCLA applied in the business/production unit must be fully implemented in the legal order, as these organisations express and protect collective interests that are not self-declared, but that have a tangible and verifiable link with a particular professional group and business context. This is particularly the case since the composition of the collective interests embodied in the NCLA does not exist in isolation from the full and effective participation of representative bodies. Therefore, it is the rule-making process itself that enables the legitimacy and real significance of a trade union that has signed an agreement to be determined.

31) From this perspective, it is clear that the absence of a platform for making claims that lead to the conclusion of the collective agreement, the lack of full involvement of individuals in the negotiation process, and negotiations which systematically tend to downgrade certain

economic and regulatory aspects are symptomatic indicators for identifying an organisation that lacks legitimate representativeness and hence is structurally alien to the system guaranteed by Articles 5, 6 and 12 of the Charter.

32) On the other hand, in the absence of such failings, entitlement to sign the agreement concerning access to the wage guarantee fund on an exceptional basis due to Covid-19 must be granted to organisations that have signed the NCLA applied in the business/production unit.

33) This conclusion is even more compelling if one considers the wording of Article 19 of Law No. 300 of 20 May 1970, which governs the appointment of company trade union representatives.

34) Following the 1995 referendum, the only prerequisite for the recognition of representativeness for the purposes of Article 19 is specified directly in the legislation, and consists in the conclusion of a collective agreement applied in the production unit.

35) Accordingly, as a result of that change in the law, the acquisition of trade union rights in the business is conditional solely on the strictly empirical consideration of "effective" trade union activity, consisting in representativeness in collective bargaining processes.

36) In this respect, 18 years after the referendum was held, by judgment No. 231 of 23 July 2013 the Italian Constitutional Court once again considered the legitimacy of Article 19 of Law No. 300 of 20 May 1970 with regard to this aspect, adopting an "additive-manipulative" ruling (to fill a legal vacuum) and offering a broad interpretation of the term "signatory" trade union associations. Indeed, the Court added a rule into the legislation, according to which not only a trade union which signed a collective agreement but also any other trade union that actively participated in the procedure, without actually signing the collective agreement, is entitled to be recognised as a trade union representative body. Essentially, the Court held that Article 19(b) of Law No. 300 of 20 May 1970 was unconstitutional **insofar as it did not provide that trade unions which, whilst not having signed the collective agreements applied in the production facility, have nonetheless participated in negotiations relating to those agreements as representatives of the company's workers may be designated as company trade union representative bodies.**

37) That decision is of fundamental importance under domestic law, as it adds "positive" interpretative criteria, thereby avoiding the impasse of a mere "negative" ruling that the provision was unconstitutional and ensuring that the system does not lack the legal instruments necessary in order to regulate the specific issue of trade union representation.

38) The arguments set out thus far concerning the establishment of company trade union representative bodies are by no means irrelevant or without merit; on the contrary, they serve

to highlight the coexistence in the same legal system of provisions laying down different rules without reference to any criterion of reasonableness.

39) It is readily apparent from the wording of Article 22 of Decree-Law No. 18 of 17 March 2020 that national lawmakers intended to limit the exercise, or rather preclude the availability, of trade union rights, the right to bargain collectively and the right to social security laid down in Articles 5, 6 and 12 of the Social Charter. The sacrifice imposed on the beneficiaries follows as a direct, inevitable consequence of this: they are required to suffer the negative effects of that irrational legislative choice – for which there is no social reason, not to speak of any legal reason – in being deprived of a social stabiliser, as an aspect of a passive policy of income support.

40) Thus, if company trade union representative bodies can also be established for trade union associations which have not signed the collective agreements applied in the production unit, but which nonetheless participated in negotiations relating to those agreements, access must also be granted to the wage guarantee fund on an exceptional basis due to Covid-19 following signature of an agreement [concerning wage guarantee payments] with the trade union which signed the NCLA applied in the business/production unit.

41) However, there is more.

42) It should be pointed out that the inadequacy of the provision which stipulates that the agreement [concerning wage guarantee payments] may only be signed by the comparatively most representative trade union organisations at national level is even more aberrant since, in situations similar to those to which this complaint relates (i.e. concerning the ordinary wage guarantee fund provided for under Article 14 of Legislative Decree No. 148 of 14 September 2015), Italian law only requires the company to inform the trade union organisations concerning the decision to reduce hours for the employees affected, along with the reasons and the duration. In fact, the provision stipulates as follows: “In the event of the suspension or reduction of production activity, the enterprise is obliged to give advance notice to the trade union representatives or to the single trade union representative, if these exist, as well as the local offices of the comparatively most representative trade union associations at national level, stating the reasons for the suspension or reduction of working hours, the anticipated scale and duration, as well as the number of workers affected”.

43) In the light of the above, the provision laid down concerning access to the wage guarantee fund on an exceptional basis for the duration of the emergency caused by the spread of COVID-19 is inevitably contradictory and discriminatory. Although it involves a mechanism that has some similarity with, if not being outright identical to, the ordinary wage guarantee

fund governed by Article 14 of Legislative Decree No. 148 of 14 September 2015, the impugned provision incorporated into Italian law arbitrarily subjects the parties involved to different and disproportionate procedural obligations, thereby violating the principle of equal treatment.

44) The requirement laid down by Article 22 of Decree-Law No. 18 of 17 March 2020 is clearly unlawful in that it not only fails to comply with the principles laid down by the Charter but also disregards the legislative and legal context of Italian positive law.

45) The flaw within the provision is even more abnormal since Italian law has adopted more flexible and less cumbersome procedures in order to deal with the emergency caused by the pandemic. Indeed, the legislature's intention in enacting emergency legislation at the height of the pandemic was to provide assistance to businesses in crisis that had been forced to suspend or reduce operations due to events associated with the Covid-19 pandemic.

46) It is therefore not inaccurate to conclude that Italian legislation, on the one hand, established streamlined processes whilst, on the other hand, unreasonably rendering procedures more cumbersome, especially those relating to access to a welfare benefit, the nature of which is inconsistent with superfluous and unjustified red tape. It is as if the Italian legal system had surreptitiously taken steps to transform the legal nature of the scheme in question, disregarding the objectives it was designed to pursue, which require timely action and easy accessibility to the benefit.

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47) The following considerations must be also pointed out in addition to the above:

48) The Italian legislation analysed above has recently been scrutinised by several domestic high courts: the interpretation provided by these courts confirms that the Italian legislation under discussion violates the principles enshrined in the Charter and irredeemably damages both the organisations acting in these proceedings as well as the employees of businesses applying collective agreements that have been signed by the ANPIT and the CISAL.

49) By judgment No. 8300 of 26 September 2022, the Italian Council of State allowed the appeal filed by the INPS against judgment No. 1840 of 10 December 2021 of division III of the Puglia Regional Administrative Court sitting in Bari (after the Regional Administrative Court had allowed the action seeking the annulment of decisions No. 1508 and No. 1893 issued by the Bari office of the INPS on 29 July 2021). The contested decisions had rejected two applications for access to the wage guarantee fund on an exceptional basis due to Covid-19 made pursuant to Article 22-quater of Decree-Law No. 18 of 2020 on the grounds that "the

business, which has an average of more than five employees, has not submitted the trade union agreement [concerning wage guarantee payments] signed by the comparatively most representative trade union organisations at national level".

50) In its reasons, the Council of State dwelt at length on the status of the CISAL and the collective agreement applied by the business that had been successful in proceedings at first instance.

51) On a preliminary basis, the Council of State referred to the applicable legislation and questioned the status of the CISAL, attempting to explore the concept of "comparatively most representative trade union":

It should be pointed out that Article 22 of Decree-Law No. 18 of 2020, which governs eligibility for the wage guarantee fund on an exceptional basis for the duration of the Covid-19 emergency, provides that the application must be accompanied by an agreement concluded with the 'comparatively most representative' trade union organisations for employers at national level.

Having therefore clarified the prerequisite for the agreement to be valid for the purposes of eligibility for the wage guarantee fund – i.e. being the 'comparatively most representative' ['comparativamente più rappresentativa'] trade union organisation, and not one that is 'particularly representative' ['maggiormente rappresentativa'] – it is now necessary to establish whether, as asserted by the Bari office of the INPS, the CISAL does not fulfil this prerequisite. In support of the conclusion reached by the Bari office of the INPS, the appellant asserts, as clarified in section 3, that the 'comparatively most representative' trade union organisations are those that have signed the 'leading national collective labour agreement', namely the CGIL, the CISL and the UIL.

For the purposes of its decision, it appears appropriate to the Court to clarify the concept of the 'comparatively most representative' trade union, which has now replaced the criterion of 'particular representativeness'. The latter criterion was introduced by Article 19 of Law No. 300 of 20 May 1970 and soon attracted criticism, as it granted preferential status to trade union associations that were exempt from any assessment as to their effective representativeness solely on the grounds that they were affiliated to the three main confederations operating at national level (CGIL, CISL and UIL). Accordingly, criteria were developed, above all within case law, for measuring the prerequisite of representativeness based on actual consensus as a measure of democracy, including in terms of relations between workers and the trade union (Constitutional Court judgment No. 30 of 26 January 1990).

The following criteria were regarded as indications of particular representativeness: numerical size, balanced operation within a broad range of production sectors, an organisation spread throughout the country, and effective participation – on an ongoing and systematic basis – in collective bargaining (Court of Cassation, employment division, judgments No. 7622 of 10 July 1991 and No. 9027 of 22 August 1991).

Moreover, the persistence of the critical aspects highlighted and the parallel emergence of situations in which more than one collective agreement applied in the same sphere – both or all theoretically applicable to the same employment relationship – led the legislature to elaborate the new concept of 'comparatively most representative' trade unions. These were considered to be those trade unions that were most representative, according to a comparison with other trade union associations that had signed the same national collective labour agreement.

More specifically, the concept of 'comparatively most representative trade union organisation' started to emerge in the field of employment law around the middle of the 1990s with the aim of identifying those trade union bodies that were considered suitable for defining the relevant contractual system either for the receipt of public financial benefits and subsidies or for the possibility of introducing flexible labour rules (hours, contractual types, etc.), where a variety of collective agreements applied in relation to the same production sector.

As far as the previous criterion of 'particular representativeness' is concerned, it has been established in case law that the legislature normally uses the phrase 'particularly representative trade union' where the purpose of the provision is to grant specific prerogatives and rights to trade union associations operating within specific employment contexts. The analysis of the representativeness of these associations must take adequate account of the need to protect the principle of representative pluralism in order to prevent any theoretical lack of representativeness resulting in a substantial impairment of the freedom of trade union action guaranteed under the constitution.

In this case therefore, the concept of particular representativeness must be construed in an inclusive sense, taking account – as held in Constitutional Court judgment No. 54 of 6 March 1974 – of the effective representative weight of trade union confederations. On the other hand, when regulating the establishment of public collegial bodies, the relevant consideration is not protecting trade union freedoms, at least not directly, but rather the need to incorporate collective interests into choices and decisions relating to the pursuit of public interests. This is done through the appointment by representatives of business associations or

trade unions of their own representatives (cf. most recently Council of State, fourth division, judgment No. 537 of 22 January 2019). The legislature has thus referred to the concept of 'comparatively most representative' association which, in contrast to the concept of 'particular representativeness', entails a selection of trade union associations based on a comparative assessment of the effective representative capacity of each of them.

It was in fact clarified some time ago that, where the administration must allocate a limited number of positions on an administrative board, the assessment of particular representativeness cannot be limited to the factor of representativeness in effective terms. On the contrary, it is necessary to select from the various trade union bodies, based on an examination that is necessarily comparative, those that are particularly representative. The aim in doing so is to choose the bodies that, compared with others, have a predominant presence in the particular category falling within the territorial remit of the board. It follows that the pluralist principle, which tends to ascribe significance to category interests in their different manifestations within the ambit of industrial relations, must be reconciled with the proportionality principle. This means the 'most representative' associations amongst those represented must be identified in order to grant the limited number of benefits provided for under the rule (Council of State, sixth division, judgment No. 455 of 3 June 1992).

52) After completing its analysis, the Council of State reached its first conclusion:

In conclusion, the Court finds that the definition used by the legislature since 2020 of 'comparatively most representative' association, in contrast to the concept of 'particular representativeness', entails a selection of trade union associations based on a comparative assessment of the effective representative capacity of each of them. The purpose of this is to render particular prerogatives conditional upon the effective representative capacity of the organisations under comparison.

In other words, the concept of comparative (and no longer presumed) representativeness is incompatible with any irreversible ex ante recognition of the representativeness of a trade union organisation – even if it is representative according to the traditional understanding – and conversely requires an ongoing review of, and an updated comparison among, trade union organisations on the basis of objectively verifiable and rebuttable considerations (Constitutional Court, judgment No. 492 of 4 December 1995).

53) On the basis of this conclusion, the Council of State went on to examine the status of the CISAL:

As has been rightly asserted by the appellant, the fact that the CISAL is a sufficiently representative trade union at national level as to be able to appoint members to a collegial body does not automatically mean that it is also the most representative trade union in the sector when compared with the other confederal trade unions, the representativeness of which is demonstrated by the fact that they have signed national collective agreements. 6. That having been clarified, having regard to the relationship between the CISAL and the confederal trade union organisations, the CGIL, the CISL and the UIL, the CISAL cannot be deemed to be 'comparatively most representative'. This means that the agreement signed by it with the respondent was not capable of establishing eligibility for access to the wage guarantee fund on an exceptional basis.

The conclusion reached by the Council of State is also not affected by the fact that, in this case, none of the above-mentioned 'comparatively most representative' trade union organisations to which the respondent company had sent the agreement [concerning wage guarantee payments] for signature had signed it, thereby precluding eligibility for the wage guarantee fund on an exceptional basis pursuant to Article 22 of Decree-Law No. 18 of 2020. The legislature's intention in enacting emergency legislation at the height of the pandemic was to provide assistance to enterprises in crisis that had been forced to suspend or reduce operations due to events associated with the Covid-19 pandemic. It introduced simplified arrangements based on an agreement signed with comparatively most representative trade union organisations, without prejudice to the possibility, in the event that no such agreement was reached, of having recourse to the option of applying for other forms of social stabilisers where the prerequisites were met.

54) This decision was recently cited by the Constitutional Court (judgment No. 52 of 28 March 2023) which, when considering the efficacy of company-level (and local) collective agreements, focused briefly on the matter at issue in these proceedings, as the case being examined by that court involved a CISAL contract:

"The referring Court of Appeal has not commented on the requirement laid down by Article 8 that the trade union signing the company agreement concerned was one of the trade unions that is 'comparatively most representative at national or local level', but has rather limited itself to considering the different (and in actual fact not relevant) connotation of 'particularly representative trade union'. As an aside, it may also be noted that, albeit for a purpose other than the employer's eligibility for the wage guarantee fund on an exceptional basis, it is precisely the confederation to which the trade union which signed the company agreement at

issue belongs that was ultimately found not to be comparatively most representative (Council of State, third division, judgment No. 8300 of 26 September 2022).

55) Accordingly, the judgments of the Council of State and the Constitutional Court set out an interpretation of the Italian legislation that openly violates the principles set out in the Charter: **were these interpretations to become consolidated, this would prevent workers from receiving benefits from the fund, as this would be conditional upon the signature of an agreement [concerning wage guarantee payments] not with the trade union that signed the NCLA applied in the business/production unit (in this case: ANPIT-CISAL) but rather with the trade union that signed a different agreement**.

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56) In view of the above, it is beyond doubt that the Italian State has adopted legislation aimed at preventing in any form and manner the implementation of the principles enshrined in the Charter, in breach of the following provisions:

• Articles 5 and 6 insofar as, through its legislation, the Italian State has infringed the complainants' trade union rights and freedoms and has thus failed to comply with the commitment to guarantee the related protection of the rights of workers and employers;
• Article 12 insofar as the Italian State has failed to comply with the commitment to guarantee the effective exercise of the right to social security by limiting the possibility of access to the wage guarantee fund on an exceptional basis due to Covid-19 provided for under Article 22 of Decree-Law No. 18 of 17 March 2020, converted with amendments into Law No. 27 of 24 April 2020.

In view of all of the above submissions and arguments, we hereby present the following

CONCLUSIONS

May it please the Secretary General of the Council of Europe, acting through the Executive Secretary of the European Committee of Social Rights, to rule as follows:

- to declare this complaint admissible and well-founded, and accordingly to declare that, for the reasons set out above, the Italian State has violated and inadequately applied Articles 5, 6 and 12 of the Charter;
- to declare that Article 22 of Decree-Law No. 18 of 17 March 2020, converted with amendments into Law No. 27 of 24 April 2020, as well as any executive act, whether known or unknown, related to, associated with or resulting from the foregoing, is not compliant with Articles 5, 6 and 12 of the Charter;

- to require the Italian State to bring its legislation into line with the Charter;
- to order the Italian State to pay the costs and legal fees associated with these proceedings.

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

The following documentation, referred to in the substantive submission, is appended to this complaint:

1. ANPIT Statute;
2. CISAL Statute;
3. Decree-Law No. 18 of 17 March 2020, converted with amendments into Law No. 27 of 24 April 2020;
4. Legislative Decree no 148 of 14 September 2015:
5. Law No. 300 of 20 May 1970;
6. Circular No. 72/2021 of the National Institute for Social Security;
7. Constitutional Court judgment No. 231 of 23 July 2013;
8. Council of State, judgment No. 8300 of 2022;
9. Constitutional Court, judgment No. 52 of 2023;
10. Decree of the President of the Council of Ministers of 8 August 2013;
11. Decree of the Ministry for Employment No. 14280 of 15 July 2014;
12. Office of the President of the Council of Ministers, document of 29 August 2017;
13. Decree of the President of the Council of Ministers (DPCM) of 14 November 2017;
14. Decree of the President of the Republic of 23 March 2018;
15. Decree of the Ministry for Employment of 26 July 2019;
16. Decree of the President of the Council of Ministers (DPCM) of 1 June 2022;
17. Decree of the President of the Council of Ministers No. 0012570 – P- 27/04/23 establishing the new composition of the CNEL for 2023/2028.

Cosenza-Rome, 3 October 2023 ANPIT

CISAL

Counsel (Prof.) Flavio Vincenzo Ponte