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EUROPEAN SOCIAL CHARTER

Response by the Government of Italy to comments submitted by the *Sindacato Italiano Lavoratori Finanzier* on the 21st National Report on implementation of the European Social Charter

Report registered by the Secretariat

on 18 August 2022

CYCLE 2022

SUBJECT: Case 140/2016 - Collective complaint to the C.E.D.S. (European Committee of Social Rights) presented by the C.G.I.L. (Italian General Confederation of Labor) vs. the Italian State.

EVALUATIONS AND COMMENTS ON THE OBSERVATIONS PRODUCED BY **S.I.L.F.** (Sindacato Italiano Lavoratori Finanzieri) IN ORDER TO THE "XXI REPORT ON THE APPLICATION OF THE EUROPEAN SOCIAL CHARTER" (EDITION 2021).

Preliminarily, from a "subjective" point of view, it is noted that the request of the SILF is presumably inadmissible, made by a party lacking - unless proven otherwise, not provided here - of representativeness pursuant to letter c) of article 1 of the Additional Protocol of the European Social Charter on the collective complaint system.

It is evident that in its document SILF carries out a critical examination of **law n.46 dated 28th of April 2022**, focusing on aspects and issues that have actually already been addressed and properly examined during the long and articulated parliamentary process of approval of the aforementioned provision, during which extended rounds of hearings were also held which also involved the CO.CE.R., the newly formed APCSM as well as organizations representing civilian workers and other sector associations.

Specifically, with regard to:

The Issue concerning the provision of a **closed trade union system** responds to the need for internal cohesion and neutrality of the military forces. Moreover, a similar limit is also provided for the State Police, which is a civil police force but with general competence (unlike the Penitentiary Police, cited by the SILF, which has sectorial jurisdiction), whose staff can join trade unions exclusively aimed at belonging to that police force (Article 82 of Law No. 121 of 1981, according to which "The members of the State Police have the right to associate in labor unions. They cannot join trade unions other than those of the police personnel or assume the representation of other workers".

The **prohibition** for the students of the basic training courses of military schools and academies to enroll in the APCSM (Article 1), stems from the need to guarantee the performance of the (indispensable and mandatory) initial training and the pre-eminent interest in study and didactic continuity of the activities, within which the **law n.46 / 2022 foresees**, moreover, the inclusion of the teaching of "elements of labor law and trade union law in the military field" (in the following art. 15).

The **legal status** of "Cadets" as such, are not yet bound by an employment relationship within the military administration, so much so that, for example, they dot not even receive a salary determined as a result of negotiation / concertation procedures , but a daily wage established by law (art.1798 of the COM). It is therefore clear that the registration ban only applies to military personnel who have the legal status of cadets.

The circular of the Ministry of Defense which dictates the first implementing provisions of the aforementioned law n. 46 of 2022, where it highlights that "the limitations on the

exercise of trade union freedoms towards "cadets" (Article 6, paragraph 1) must be understood as referring to staff attending a **basic training course** at Schools, the Military academies or other training bodies without holding any of the degrees provided by the system of the Administration to which they belong "

In any case, it should be considered that the prohibition of enrollment in the APCSM for the aforementioned purposes would exist only for a **limited period** immediately following enrollment (six months for student financiers and student inspectors and two years for student officers).

This foreclosure is also extended to military staff who have passed through the categories of reserve and absolute leave, as they can carry out other work activities, so that the provision of their adherence to the APCSM would involve circumventing - on a substantial level - the principles expressed by the Constitutional Court with ruling n.120/2018, regarding the exclusion of non-military personnel from these associations.

In this regard, the State Council, with its opinion n.2756 / 2018 , highlighted that "the limitation to military personnel in active and auxiliary service appears consistent with the nature of the associations and **does not conflict** with the principle of **freedom of association.** In fact, the rule under examination (Article 1475 of Legislative Decree no.66 / 2010), as interpreted by the ruling of the **Constitutional Court**, includes the qualification of associations as professional, so as to connote a foundation in the exercise of the duties of 'current or at least potential institution with a reasonable probability of effect (for the auxiliary), which cannot be found either for military reserve personnel or, much less, for those on leave ".

The need for the activity of the **APCSM** (trade union professional associations between military personnel) to comply with the principles of **internal cohesion**, **efficiency, neutrality** and **operational readiness** of the military administrations, the Constitutional Court itself, in the context of ruling n. 120/2018, specified how :

1) the aforementioned principles constitute **necessary and indispensable instrumental preconditions to ensure the effectiveness of the action of the armed and police forces** with military regulations, aimed at protecting a value of the order of a supreme and primary nature, which is the military defense of the nation.

2) the **restriction imposed on the trade union freedoms** of military personnel pursue a **legitimate aim**, having regard to the tasks and purposes of the relevant institutions, which are based on internal cohesion and on the hierarchical order, which would otherwise risk being compromised by internal conflicts;

3) **the prohibition for the military personnel to join other trade union associations** (other than those made up of members of the military armed and police forces) is justified by the specificities of the military system which implies, among other things, the need to avoid inadmissible conditioning in the pursuit of institutional goals.

Precisely by virtue of the **uniqueness and specific nature** of the military system, the APCSM constitute a "**new model of trade union**" not comparable to those traditionally already exsisting, which has been regulated by a provision of legal status which establishes, positively, **the rights and the prerogatives.**

For the purpose of guaranteeing the protection of other primary values which are also of constitutional rank (such as the principles of democracy, transparency and participation), the **full legitimacy**, as well as the absolute **reasonableness**, of some **limitations** imposed derives in a clear and unequivocal manner to all military personnel and, consequently, to the related APCSM.

Even in carrying out the trade union role the military staff are however bound primarily by the peculiar juridical status, which implies compliance with the duties deriving from the **sworn oath.**

"**The power of control and interference in the exercise of trade union freedom**" which would be attributed to the Administrations from the wording of the law and which "essentially and perennially subjects the unions of the Guardia di Finanza to the dominion of the Government", **has no legal basis** in the rationale of the provision which, on the other hand, complies with the principles established by Judges of the law, where it was clearly highlighted that, with reference to the constitution of the APCSM, "the uncensored provision of art. 1475, paragraph 1, of the legislative decree n. 66 of 2010, according to which "The constitution of associations or clubs among military personnel is subject to the prior consent of the Minister of Defense". This is a general condition valid for those of a trade union nature, both because they are of the kind considered by the law, and because of their particular relevance ".

In this regard, it should be noted that **article 39 of the Italian Constitution** draws up a mechanism which, although never implemented, should have allowed registered unions (paragraph 2), and therefore equipped with an "internal system on a democratic basis" (paragraph 3), to acquire legal status and conclude collective agreements "with mandatory effect for all members of the relevant category" (paragraph 4).

In this sense, **the registration of the established APCSM** in the register constitutes a condition to be met in order to accomplish and fulfill their interests in relating with the relevant Administration.

Furthermore, the provision according to which the procedure for verifying the compliance of the statutes with the requirements of the law in preparation for registration in the ministerial register and the subsequent periodic control are entrusted to the relevant Ministries, is to be understood, contrary to what is asserted by the party, as a guarantee of impartiality with respect to the military administrations on which the personnel registered with the trade unions directly depend.

The reference not only to **announcing a strike** but also to actions to replace it, without however any indication of what these replacement actions are, with obvious worrying implications for the real possibility of an overlap - and therefore prohibited - freedom to express ones thought, it should be noted that the provision of the aforementioned prohibition is necessary in order to avoid that union activities related to disputes, although not falling within the classic form of collective abstention from work, may still interfere with the regular performance of the work to be carried out by military staff.

In this regard, it seems appropriate to reiterate - as already widely anticipated - that the ban on strikes for the personnel of the Armed Forces and police responds to the need to guarantee the fundamental interests of citizens, in terms of adequate protection of democratic institutions and defense of the order and internal and external security, which cannot be placed on the same level of the typical labour market collective conflict relations. This forecast is also in line with previous guidelines of the CEDS itself, which considered the ban on exercising the right to strike legitimate for the military personnel required by law, as necessary for maintaining of the high institutional functions of defense of the democratic order (see **complaint n°. 112/2014 "EUROMIL Vs Ireland"**, para. 117: "…*therefore and having regard to the specific nature of the tasks carried out by members of the armed forces, the special circumstances of members of the armed forces who operate under a system of military discipline, the potential that any industrial action could disrupt operations in a way that threatens national security, the committee considers that there is a justification for the imposition of the absolute prohibition on the right to strike set out in section 8 of the 1990 industrial relations act. The statutory provision is proportionate to the legitimate aim pursued and, accordingly, can be regarded as necessary in a democratic society*").

Faced with such a personal limitation as well as the additional peculiarities that characterize the employment relationship of members of the Administrations of the "Security-Defense" Section, the law recognizes the **"specificity"** of their status, with related enhancement carried for purposes, including, **economic protection, pensions and social security.**

In relation, then, to the identification of limits to the hiring of the representation of individual categories of military personnel, the same responds to the need to avoid internal conflicts between different roles and possible gaps in the protection of certain categories of personnel with respect to others, profiles, these, that are likely to undermine the internal cohesion and functionality of the military administrations.

Similarly, **the ban on "creating federations, affiliations or relationships of an organizational or conventional nature with trade unions other than those of military personnel"** is aimed at ensuring the aforementioned principles of neutrality, impartiality and internal cohesion of military administrations, avoiding that, through the establishment of these relations, on the one hand, the prohibition for members of the military armed and police forces to join trade unions other than those of a military nature

is potentially violated and, on the other, cause potential problems in terms of incompatibilities, in relation to the possibility that the agreements in question can be stipulated with profit-making entities (and this applies in particular to the APCSM representing the staff of the Guardia di Finanza).

The **"prohibition to interfere** with the **regular performance of institutional services"**, the same, as repeatedly highlighted, is absolutely justified by the particular needs of **efficiency** and **operations** of the military organization.

Likewise, the **exclusion** of some **matters from the competence of the APCSM** "without making substantial changes" compared to those of the Military Representation is not "motivated with the aim to confine the interaction between public administrations and trade unions to the sole contractual purpose" as asserted by SILF , but it is aimed at **safeguarding** - in the **exclusive public interest** - the aforementioned needs, to which these matters are indissolubly connected.

In fact, if the purpose of the union in general is the representation and protection of the collective interests of the category of workers to which it refers to, such principle must be brought back (in compliance with art. 5 of the European Social Charter) within the context of reference, namely the military system. It is therefore necessary to achieve **the right balance** that allows to represent and protect the collective rights and interests of military personnel without causing harm to the performance of **high institutional functions** to be carried out by members of the military armed forces.

The statement according to which the law provides for **"territorial articulations**, **which however would not seem** comparable to regional ones, provincial trade union structures or other territorial structures, endowed with their **own autonomy"**, does not find any legal basis given that the law without prejudice shall not affect the right for the APCSM to **establish territorial articulations at any level** and to **define their competences** in the relative statutes. The provision referred to in paragraph 3 of article 6 introduces, rather, a level of dialogue "not lower than the regional level" in order to regulate the **dialogue between** the APCSM and the military administrations, identifying a place of confrontation with the aforementioned peripheral articulations - also in terms of uniform application at the local level of national sectorial collective bargaining - so as to avoid burdening the central structures of military administrations for dealing with issues of merely peripheral importance.

Moreover, any provision aimed at allowing a direct comparison with the lower command levels could have resulted **in multiple and uncoordinated flows of communications**, with **uneven applications** of the same provisions. This negatively affecting the efficiency of the administrative action of the various military institutions and causing likely effects of "disorientation" for the military staff;

The **ban on "receiving inheritances or bequests, donations or subsidies in any way"** is necessary in order to ensure compliance with the principle of neutrality

referred to in Articles 97 and 98 of the Constitution and so that the financing of the APCSM meets the criteria of **absolute transparency** of the means of financing and exclusive referability to the members.

It is therefore essential that the associations support themselves autonomously with the contributions of the members, with the **absolute exclusion of any external financing** that could affect trade union activity through the influence of forces and interests divergent to the military structure, possibly antithetical to the aforementioned principles of democracy and neutrality.

These claims appear increasingly compelling for the Italian financial police force/custom officers such as the Guardia di Finanza;

The **requirements** of the military staff who intend to hold **elective positions** in the APCSM , it should be noted that having carried out service activities for a minimum period allows union representatives to acquire **adequate experience** and **knowledge** of the **dynamics** of the military administration to which they belong, ensuring the most effective **safeguarding** of their collective rights and interests to all members of the associations.

In line with the aforementioned reasons, the provision of a **maximum duration** of **managerial appointments** (equal to four renewable years) is based on the need to guarantee an **adherent knowledge** of the changing problems subject to trade union protection, while avoiding the deterioration of the technical information of high profile of the personnel concerned, ensuring the maximum efficiency and professionalism of a modern military instrument.

On the other hand, as regards **the exclusion** of eligibility for personnel subject to **state disciplinary sanctions**, this is **consistent** with the function of the measures in question, which entail the termination (temporarily or definitively) of the employment relationship at hand. This provision, therefore, relates to breaches of regulations that make it irreconcilable (even if only temporarily) the stay of the individual within the military administration.

The absence of any limitation to the eligibility of personnel to the managerial positions of the APCSM would be completely inconsistent with the sensitivity and relevance of the role entrusted to these experts, who would thus be authorized to represent the staff and to deal with the Administrations (in all the envisaged locations, including the contractual one) despite being in incompatible conditions of status that are with active service (by way of example, suspension from employment, convicted of non-culpable crimes, etc.).

Therefore, the allegations made by SILF (which are serious) about possible arbitrary uses of the **inspection powers** by the Military Administration aimed at initiating criminal proceedings pretexts whose purpose would be to determine the forfeiture of the "inconvenient" manager of the APCSM: the principle of neutrality, transparency and good

performance is unequivocally imposed on the Administration by the Italian Constitution itself (articles 97 and 98) and constitutes its founding basis.

The "**provision for the equalization of the posting to service activity**", cannot in any way be admitted as it would allow the advancement of soldiers in trade union activity (up to the rank of lieutenant colonel or equivalent) on the basis of only minimum periods of seniority, regardless of the other requirements and inclusion in rates and advancement frameworks, in excess of the number of promotions established annually.

This is a **claim** of unjustified favor for the military staff concerned, **in contrast** to the current **system of promotions** to the higher military rank (in particular for the personnel of the officer category), which in addition to the minimum periods of seniority also provides for other requirements accrual for the purposes of career progression (eg: periods of command; degree title; etc.) as well as access to certain military ranks through a specific merit scrutiny (so-called "optional" advancement).

The number of maximum promotions that can be conferred annually, set by law, also responds to the need to ensure a harmonious career development of personnel, taking into account the limits imposed by the military structure, characterized by a "pyramidal" configuration.

As regards the provision of **limits to the duration of posting** and unpaid **trade union leave** of personnel who hold managerial positions in the APCSM, this necessary in order **to avoid the progressive de-skilling** of those who take on a trade union role sine die, with consequent detriment to the efficiency of military administrations. Moreover, the provision of a period of active service between each posting or unpaid trade union leave allows the staff in question to maintain an effective and updated knowledge of the changing problems subject to collective protection.

In any case, the possibility of making use of paid trade union posting, leave and permits, as well as unpaid trade union leave and permits will be established within the limits of the quota set by decree adopted by the Minister for Public Administration to be issued pursuant to article 16, paragraph 4 , of the aforementioned law no. 46 of 2022 "after consulting the Ministers of Defense and the Ministers of Economy and Finance […], and trade union professional associations among the military administrations".

The **procedures for carrying out trade union meetings**, the law provides that these are **agreed with the Commanders in order to make them compatible with the needs of military service activity**. The authorization required by law, far from exercising a "preventive control" as improperly asserted by SILF, has rather the purpose of **facilitating the orderly conduct of the meetings** in question, in the event that the use of the premises is required by the Administration, also due to any simultaneous service needs.

The lack of **minimum recognition of contractual matters comparable to that of the police forces**. For example, without any competence in the articulation of working hours, this is justified by the need to guarantee the **operational, organizational and functional needs** of the military administrations, which must have the necessary flexibility in regulating these aspects according to the contingent needs connected to the performance of the relevant and delicate activities assigned.

The provision of **consultation** on the articulation of the **working hours** (that is, on the methods of daily work and duty shifts) of military personnel would have constituted an element of **strong rigidity** with respect to the need to ensure permanently and in all conditions - in the exclusive public interest - a device aimed at guaranteeing **national defense** and the maintenance of **public order** and **security**.

The **procedures and matters subject to information and consultation** by the military administrations, these will be properly **laid down** in the regulation to be issued pursuant to Article 16, paragraph 3, of Law 46 of 2022;

The statement according to which "throughout the working world, both private and public (including the State Police)", **representativeness** "is calculated on the total number of personnel as trade unions members", this **does not correspond to the truth**. In fact, article 43, paragraph 1, of Legislative Decree no. 165 dated March 30th 2001, containing "General rules on the organization of work for those employed by public administrations", allows "to national collective bargaining the trade unions that have a **representativeness not less than five percent**, **considering for this purpose the average between the associative data and the electoral data** "expressed by the latter" **by the percentage of votes obtained** (by each trade union) in the elections of the unitary staff representatives, compared to the total of the votes cast in the considered area ".

Procedures and parameters for ascertaining trade union representativeness in the public sector which are also fully applicable to the personnel of the civil police forces, such as the **State Police** towards whom, however, such personnel do not have any forms of elective representation , only the associative data is considered for the purpose of determining the representativeness and in the percentage measure, as mentioned, of 5% (higher than that envisaged for the APCSM).

The argument regarding "**the transfer of the union delegate** [...] gives a free rein to the military administration for **reasons of incompatibility**. Cases of incompatibility can lead to discretionary proceedings for the expulsion by the military administration of trade union representatives who are freely elected, but not appreciated by the chain of command", this issue lacks any legal basis.

First of all, the provision concerning the possibility of transferring union leaders for reasons of " incompatibility with the surrounding environment" is necessary, on the one hand, to ensure that the performance of these functions is free from limitations or constraints and, on the other hand, **to avoid** that, by virtue of the trade union mandate

exercised, actual situations may be classified that **undermine** that role of exemplary **legality**, **impartiality** and **neutrality** that must characterize of belonging to a military body.

Secondly, the recognition of **rights and protections** only to the APCSM representative at national level, in addition to avoiding the instrumental use of the provision, through the ad hoc constitution of associations for the sole purpose of being able to benefit from the regime established by Article 14, it **is consistent** with the regulations in force on the subject of **State Police** trade unions which establish similar guarantees in favor of the union leaders of the nationally representative associations only.

The "**manifestation of thought** [...] permitted only in the matters envisaged by the law", the legislative provision is aimed at avoiding a circumvention of Article 5 (which defines the matters falling **within the competence** of the APCSM), with respect to which Article 15 is coordinated.

On the other hand, as regards the ways in which the trade unions intend to **advertise** their activities, the law leaves absolute discretion, since the law has the sole purpose of making the members **aware** of the contents of the resolutions, votes, reports, etc. of the APCSMs to which they are members.

The attribution of trade union disputes in the military sector to the **administrative judge** instead of the **labor judge**, it should first of all be noted that the choice of the Legislator was determined by the need to avoid excessively fragmented and divergent pronouncements between them (due to the smaller fragmentation of the administrative judge on the territory compared to the "labor" judge), who could have undermined the **compactness**, **readiness**, **operational homogeneity** and **cohesion** of the military instrument.

On this point, there are now numerous **rulings** of the ordinary Courts, relating to disputes promoted before the entry into force of the law, which **recognized the jurisdiction of the administrative judge** by reason of the **specialty and specificity** of the military system, such as not to allow a analogous application to the APCSM of the provisions governing trade union freedom in general;

The functioning of the Commissions cannot be decided unilaterally by a single party, given that **the procedures for setting up and functioning of the central and peripheral conciliation commissions** will be defined in the context of a specific **regulation** to be issued by decree of the Minister of the defense, in agreement with the Minister of Economy and Finance, as far as is of interest, it is noted that the **impartiality** of these collegial bodies is guaranteed by a **president**, appointed, "after consulting the competent parliamentary committees official for this area", by decree of the Minister of Economy and Finance and "chosen from among those enrolled in a list specifically established at" the Ministry of Economy and Finance "and including magistrates, lawyers

enrolled in the special register of lawyers admitted to legal aid before the higher courts and university professors ".

This taking into account, on the one hand, **the peculiarity** of the issues referred to the evaluation of the commissions (deriving from the specificities of the military systems) and, on the other hand, the need to ensure that the presidency of the commissions is entrusted to subjects with suitable professional experience.

The **continuation of the mandate of the delegates of the Military Representation**, the law ensures the necessary **continuity** of the representation of military personnel even in the **transition phase** related to the entry into force of the law, specifying that the repeal of the provisions of the " military regulations governing the functioning of the military representation bodies as well as the forfeiture of the delegates of the aforementioned bodies occurs from the entry into force of the ministerial decree by which the contingents of detachments and trade union permits are determined for each armed force and police force with military order, to be allocated among the representative APCSMs pursuant to article 13.

With this in mind and in order to facilitate the progressive process of organizing unionisation of military personnel as well as avoiding possible criticalities, **there is no foreclosure to the delegates of military representation**, of all levels, from simultaneously **holding managerial positions in the APCSM.**