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Charte
sociale
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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

FOLLOW-UP TO DECISIONS ON THE MERITS OF COLLECTIVE COMPLAINTS

Findings 2021

This text may be subject to editorial revision

2nd Assessment of the follow-up: European Organisation of Military Associations (EUROMIL) v. Ireland (No. 112/2014), decision on the merits of 12 September 2017, Resolution CM/ResChS(2018)2

1. Decision of the Committee on the merits of the complaint

The European Committee of Social Rights concluded that there was a violation of Article 5 of the Charter on the grounds that the complete prohibition against military representative associations from joining national employees' organisations was not necessary and proportionate.

As regards Article 6§2 of the Charter, the Committee had also found a violation as military representative associations were unable to meaningfully participate in national pay agreement discussions. This was considered to be brought in conformity in Findings 2020, for which reason the follow-up was terminated in this respect.

2. Information provided by the Government

In respect of the finding of a violation of Article 5 of the Charter, the report does not submit any information.

3. Comments provided by the Irish Human Rights and Equality Commission

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014.

In a submission registered in June 2021, it provides comments on the Government's follow-up to the Committee's decision.

As regards Article 5 (the right to organise) of the Charter, the report states that PDFORRA (Permanent Defence Force Representative Associations), following its long-standing position of supporting an affiliation with ICTU, formally requested an associate membership with ICTU (Irish Congress of Trade Union) in July 2019, and ICTU has subsequently agreed in principle to accept PDFORRA as an associate member. PDFORRA has sought an association with ICTU to provide the best opportunity to secure advances in pay remuneration for its members as they will be collectively represented rather than excluded in national pay talks. PDFORRA has since then terminated initial discussions between Department of Defence management (civil and military) over the practicalities of forming an affiliation and initiated legal proceedings on 26 June 2020 in the High Court. While no update on the legal proceedings was available at the time of submission, the Commission recalls the written communication sent by the International Labour Organisation to the Government in January 2021 asserting that a blanket ban on affiliation with the ICTU was in breach of human rights.

The Commission also noted the Committee's finding in 2020 that military representative organisations are able to meaningfully participate in national pay discussions, compliant with Article 6§2 of the Charter, due to the de facto inclusion of PDFORRA in public service pay negotiations, alongside public sector trade unions, non-ICTU affiliated unions and representative bodies.

4. Comments provided by the European Organisation of Military Associations and Trade Unions (EUROMIL), on behalf of PDFORRA

EUROMIL, on behalf of PDFORRA, in a submission registered on 27 May 2021, provides comments on the Government's follow-up to the Committee's decision.

PDFORRA disagreed with the Findings 2020 on Article 6§2, as it states that PDFORRA was effectively excluded from the most recent national pay talks held in December 2020. No member of the non-affiliate groups is represented on the compliance mechanisms built into the recently proposed agreement. Months after the finalisation of the recently proposed agreement, PDFORRA and its membership have no clarity surrounding the quantum to be applied to the Defence Sector under the awards agreed between the Public Services Committee of ICTU and the Department of Public Expenditure and Reform.

Within the last year, a new Minister for Defence has been appointed and he has established a new Commission on the Future of Defence, which has within its remit the investigation of remuneration systems. The Programme for Government (PfG) provides for the establishment of a Pay Review Body, which he appears to be widely promoting. This proposed body is, as outlined in the Programme, purported to be established to deal with issues of pay of members of the Defence Forces while adhering to public sector pay policy. PDFORRA considers that this will entirely contravene Article 6§2 and place its members in a more perilous position in terms of collectively bargaining. Moreover, this body appears, from observations made, to be modelled on the British model, which was established prior to Britain joining the EU and which did not permit representation of armed forces personnel.

Arising from the public pronouncement of the foregoing, PDFORRA had no alternative but to initiate legal action through its domestic system.

5. *Assessment of the follow-up*

With respect to Article 5 of the Charter, the sole remaining aspect of the complaint to be assessed under this follow-up procedure, the Committee notes that Ireland has not removed the complete prohibition against military representative associations from joining national employees' organisations. There is no information submitted by the Government. Therefore, the situation has not been brought in conformity with Article 5 of the Charter.

1st Assessment of the follow-up: *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint No. 140/2016, decision on the merits of 22 January 2019, Resolution CM/ResChS(2019)6

1. *Decision of the Committee on the merits of the complaint*

A. *Violation of Article 5*

The Committee concluded that there was a violation of Article 5 of the Charter on account of the fact the restriction on the right to organise of members of the *Guardia di Finanza* is excessive in that the establishment of trade unions or professional organisations by its members is subject to the prior consent of the Minister of Defence, in the absence of administrative and judicial remedies against arbitrary refusal of registration.

The Committee also held, with regard to freedom to join or not to join organisations, that the absolute prohibition on members of *Guardia di Finanza* under Article 1475(2) of the Military Code, to join “other trade unions”, where the *Guardia* is functionally equivalent to a police force or to an armed force, is disproportionate since it deprives its members of an effective means to claim their economic and social interests and is not necessary in a democratic society in breach of Article 5 of the Charter (§§83, 88 and 98 of the decision)

B. *Violation of Article 6§2*

The Committee concluded that there was a violation of Article 6§2 of the Charter on the grounds that the representative bodies of *Guardia di Finanza* were not provided with means to effectively negotiate the terms and conditions of employment, including remuneration. In particular, the Committee held, concerning the procedure laid down by the legislation with regard to consultations of the representative bodies of the *Guardia di Finanza*, that it was not shown that this procedure effectively ensures meaningful negotiations as opposed to mere hearing and that the representative bodies were, in the practice, able to frequently meet the Ministers concerned or their representatives in order to negotiate on matters relating to working conditions and pay of the members of the *Guardia di Finanza*.

The Committee also considered that in case of disagreement, the representative bodies may only send their observations to the respective Ministers and that this procedure did not present the characteristics of a real negotiation between two parties and a reasonable alternative to the bargaining process (§§ 130-132 of the decision).

C. *Violation of Article 6§4*

The Committee concluded that there was a violation of Article 6§4 of the Charter on account of the absolute prohibition of the right to strike imposed on members of the *Guardia di Finanza*.

The Committee considered that although restrictions on the right to strike in the context of “minimum service” requirements in the event of a strike in the defence sector, or the provision of a regular and effective procedure of negotiations between the members of the *Guardia di Finanza* and the command authority, would be proportionate and compatible with the Charter, the absolute prohibition of the right to strike imposed on members of the *Guardia di Finanza* cannot be considered as being necessary in a democratic society in violation of Article 6§4 of the Charter (§152 of the decision).

2. Information provided by the Government

A. Violation of Article 5

The report, registered on 4 March 2021, indicates that since the decision No. 120/2018 of 11 April 2018 of the Constitutional Court which declared unconstitutional the first part of Article 1475(2) of the Military Code with regard to the prohibition for military personnel to form trade unions, a total of seven Professional Trade Union Associations among Military Soldiers (APCSM) made up exclusively from the Military Corps, in addition to four joint APCSM, have been established.

Moreover, a draft law containing draft rules on “the exercise of trade union freedom of the personnel of the Armed Forces and Police Forces with military order, as well as delegation to the Government for regulatory coordination” was approved by the Chamber of Deputies and currently being examined by the Senate of Republic. Article 3 of the draft law provides that, before carrying out trade union activities, the APCSMs, should deposit the statute with the relevant Ministry which is required to ascertain its compatibility with the legal applicable framework and if so, to arrange for a transcription in the appropriate register. The report also indicates that the draft law regulates the participation of APCSMs in the proceedings in order to guarantee its legitimacy and transparency in the event of a refusal of the registration.

According to the report, pending approval of this draft law, all the requests regarding the establishment of professional associations for military personnel have been concluded with a favourable outcome.

As to the prohibition imposed on members of *Guardia di Finanza* under Article 1475(2) of the Military Code, to join “other trade unions”, the report indicates that the abovementioned draft law, in order to ensure the “compactness” and “unity” of the military institutions, expressly establishes/maintain the prohibition (i) for professional trade union associations among military personnel (APCSM) to assume the representation of workers who do not belong to the military or police forces; (ii) for military personnel to join trade union professional associations other than APCSM.

In order to justify the prohibition maintained by the draft law, the report indicates that the prohibition is provided in a rule of primary status (Article 1475(2) of the Military Code) and that the legitimacy of this limitation was confirmed by the Constitutional Court in its decision No. 120/2018. In this respect, the report underlines that, in its decision, the Constitutional Court pointed out that the “specificities of the military order justify the exclusion of forms of association deemed not to meet the consequent needs for compactness and unity of the organisations that make up this order”. According to the report, the crucial role played by the military personnel would be irremediably compromised by the presence in its ranks of individual representatives of the Armed Forces who were allowed to affiliate or join associations which, by their very nature and for the purposes pursued, clash with the founding principles of the military institutions of which they belong.

B. Violation of Article 6§2

The report refers to the draft law currently under examination by the Senate of Republic which provides, among other things, the attribution of negotiating powers to the APCSMs that will be recognised, based on the number of members, as the most representative at national level and which will take part in the negotiation procedures for the stipulation of trade union agreements.

The draft law will also introduce an additional negotiation procedure through which the APCSMs will be able to settle with the relevant administrations, issues relating to the distribution of ancillary and productivity.

C. Violation of Article 6§4

The report indicates that in its decision No. 120/2018 of 11 April 2018, the Constitutional Court has recognised the legitimacy of the prohibition of the right to strike for military personnel, in particular, in view of the “principle of neutrality” provided for by the Constitution for the entire public administration, but which is a vital value for the military corps responsible for the “defence of the homeland”. The ban on right to strike, therefore, aims at preventing that the abstention from work compromise the most important constitutional rights such as individual freedom, physical integrity, citizen’s safety and national security.

According to the report, the protection of fundamental rights must always be “systemic and not divided into a series of uncoordinated and potentially conflicting rules”. Otherwise, there would be unlimited expansion of one of the rights (the right to strike in this case), which would become a “tyrant” against other legal situations that are constitutionally recognised and protected, including, as specified by the Council of State, the military defence of the State.

The report states that there is an absolute incompatibility between the principles of neutrality, cohesion, and the efficiency of the military administrations for the protection of fundamental interests of Italian and EU citizens and the recognition of the right to strike (i.e. to decide to independently “abstain” from the duties and obligations to defend the fundamental interests, the democratic life and integrity of the Nation). The Government is of the opinion that any collective abstention from work by the members of the *Guardia di Finanza* is inadmissible because it would undermine the very foundations of the State and endanger human life and personal safety.

The report also considers that the “minimum service” requirements, referred to by the Committee in its decision, cannot be recognised as an efficient measure considering the specificities of national defence task, to which corps contributes by being an integral part of the Armed Forces and participating in the political-military defence of borders. Therefore, for the report, the concrete ways of exercising the freedom of trade union association must carefully be balanced with the fundamental functions of national defence, order and public security.

In comparing other European legal systems to that of Italy, the Government finds that the right to strike in the defence and security sector is subject to similar limitations than those in force in Italy. The report states that the absolute ban on strikes for military personnel is a fundamental principle aimed at ensuring the protection of the entire national system and State security. Therefore, the draft law under examination by the Senate of Republic maintains the ban on strikes for military personnel.

3. Comments by the European Organisation of Military Associations and Trade Unions (EUROMIL)

In its comments, registered at the Secretariat on 3 August 2021, the *European Organisation of Military Associations and Trade Unions* (EUROMIL) states that the Government has allowed the current, so-called trade unions, to establish their organisation but without allowing them to carry out any activity. According to EUROMIL, the authorities continue to communicate exclusively with the representative bodies of the *Guardia di Finanza* (COCER) which results in a real exclusion of the so-called trade unions from the relevant consultations. EUROMIL submits that in a letter of 18 November 2020, the Ministry of Economy and Finance refused the request made by the National Financiers Union (SI.NA.FI) to participate in the consultation process of the renewal of the collective agreement for the period 2019-2021, stating that “until the adoption of an ad-hoc reform, it will not be possible (...) to allow the request to convene this association, like any other professional body that has received recognition from the Ministry of Economy and Finance”.

EUROMIL also criticises the draft law which is currently pending before the Senate of Republic that it constrains the operational activity of the unions by way of requiring ministerial consent

and that the Ministry may revoke the authorisation to carry out trade union activities if it considers that any subsequent amendment to the statute of the trade union is incompatible with legal requirements. In addition, under the draft law and the current ministerial decree rules, armed force personnel and the *Guardia di Finanza* and their trade unions, are not allowed to join trade union organisations that are not specifically set up for military personnel.

The absolute ban on the right to strike is still imposed on members of the *Guardia di Finanza* under the provisions of the Military Code whereas the Committee concluded that this total ban is not proportionate to the legitimate aim pursued and, therefore, is not necessary in a democratic society.

4. Comments by Associazione Finanziari Cittadini e Solidarieta' (FICIESSE)

In its submissions, registered at the Secretariat on 20 September 2021, the *Associazione Finanziari Cittadini e Solidarieta'* (FICIESSE) states that after the judgment no. 120/2018 of the Constitutional Court recognising the legitimacy of trade unions of military personnel, the Ministry of Defence and the Ministry of Economy and Finance issued two circulars in 2018 indicating specific conditions, including the maintenance of the ban on the right to strike and on joining other non-military trade union associations, to allow the procedures for the establishment of trade union professional associations. The procedure for obtaining prior authorisation and, therefore, being able to establish a trade union is as follows: - transmission to the General Command of the *Guardia di Finanza* of a draft statute of the union to be established; - formulation by the General Command of an opinion and transmission to the Ministry of Economy and Finance, together with the draft statute; - within 180 days of the request, issuing of an authorisation (or rejection) decree signed by the Minister.

In addition, the decree of 22 December 2018 of the Ministry of Defence attributed the power of consultation to the military representative bodies, granting the military unions the exercise of an unspecified activity of dialogue with reference only to the issues of general nature. The FICIESSE states that although, as of February 2020, 18 trade unions for military personnel have been established, the Government continues to engage in dialogue only with military representative bodies (such as COCER) and therefore, the military trade unions are effectively excluded and prevented from fulfilling their activities. By failing to recognise trade union subjectivity with its own aims and objectives, the Government denies the right of its employees to make use of the trade union structure to which they are registered for the defence of their interests, to the detriment of the employees whose trade union rights inevitably end up being denied.

5. Comments by Confederazione Generale Italiana Del Lavoro (CGIL)

In its comments, registered at the Secretariat on 4 August 2021, the *Confederazione Generale Italiana Del Lavoro* (CGIL) refers to the above-mentioned two circulars issued in 2018 by the Ministry of Defence and the Ministry of Economy and Finance which provide for burdensome obligations for obtaining prior authorisation for the establishment of military trade unions and maintain the prohibition on their right to strike and on joining other non-military trade union associations by their members. For the CGIL, it is obvious that the provisions of a prior authorisation from the Ministry for the establishment of a trade union association limits the trade union rights of the workers of the *Guardia di Finanza ab origin* and that the procedure as described in the above-mentioned 2018 circulars is not simple nor easy to apply. The CGIL also observes that the draft law currently pending before the Senate also maintains the prohibitions on the members of armed forces to join trade unions other than those specifically established for military personnel, in addition to other limitations, such as the provision that the representation of a single category of military personnel must not exceed 75 percent of the total members of the trade union. This draft law, according to CGIL, even if adopted, cannot satisfy the requirements of the Committee's decision in this case.

According to CGIL, the Government's observations concerning the prohibition of the right to strike imposed on members of the *Guardia di Finanza*, do not stand up to scrutiny, as this body deals mainly -and almost exclusively- with the economic and financial police, consisting of inspections and inquiries in matters of revenue, expenditure and market control. The *Guardia di Finanza* deals with security and public order issues only on an auxiliary manner and the Customs Agency and Entries Agency carry out activities largely superimposed on that of the *Guardia di Finanza*.

Lastly, the CGIL states that the trade unions of the members of the *Guardia di Finanza*, even if formed regularly, are ignored, and excluded from any dialogue and negotiation with the Ministries and the Government maintains a behaviour of total indifference vis-à-vis those unions, refusing even to give an answer to their requests. Therefore, the newly formed unions appear as "empty shells" as they are denied the ability of participating in consultations alongside the military representative bodies, as well that of engaging genuine negotiations with representatives of the ministries on issues relating to working conditions.

6. The Government's response to the comments by the workers' associations

In its responses, registered at the Secretariat on 3 August 2021 and 28 October 2021, the Government states that the comments by the workers' associations are centred around the content of the draft law containing "Rules on the exercise of trade union freedom of the personnel of the Armed Forces and military police, as well as delegation to the Government for regulatory coordination" which is currently being examined by the Senate of Republic. In this regard, the Government points out that it should be noted that during parliamentary proceedings, numerous amendments were presented, which are still under consideration by the Commission for Defence, with a view to addressing, inter alia, the considerations of EUROMIL. The Government emphasizes the inclusive character of the parliamentary proceedings: extended rounds of hearings have been carried out, in the context of which interested parties, including COCER, military trade unions as well as organisations representing civil workers and other associations, including EUROMIL, were consulted and had already the opportunity to provide their contributions.

The Government states, in particular, that the Ministry of Defence has already ordered the simplification of the procedure concerning the prior consent of the Ministry for the registration of military trade union and brought the deadline by which the consent procedure must be concluded to 90 days, instead of 180 days. According to the Government, the draft law under consideration by the Senate, replaces the "Ministerial prior consent" to the establishment of military trade unions, with a "sort of qualification to exercise trade union activity by registering with a specially constituted register" which comply, according to the Government, with the principles laid down by the Constitutional Court in the light of Article 5 of the Revised Charter. Also, the submission states that the prohibition of joining trade unions other than the military ones responds to the needs of safeguarding the peculiarities of the military structure and the number of military trade unions so far established, is in itself a guarantee of the possibility, for any military personnel, to choose whether and by which association to have their rights safeguarded.

The Government also considers that the draft law aims at the transition from the old system of protection of the rights and interests of military personnel by military representative bodies, to the new system of protection by military trade unions. However, the transition should take place gradually and until the adoption of the draft law, military representative bodies cannot be replaced by military trade unions and should maintain their role and tasks provided by primary-level legislation currently in force.

As to the right to strike, the Government reiterates its position that the right to strike of the military personnel including the *Guardia di Finanza* is incompatible with duties deriving from military status.

7. Assessment on the follow-up

A. Violation of Article 5

The Committee takes note of the information contained in the report submitted by the Government, as well as of the comments made by the different workers' associations and of the reply by the Government to those comments.

The Committee notes with interest that following the decision No. 120/2018 of 11 April 2018 of the Constitutional Court which declared unconstitutional the provisions of the Military Code regarding the prohibition for military personnel to form trade unions, several requests regarding the establishment of military trade union associations have been concluded with a favourable outcome.

Concerning the procedure of "prior consent" of the Minister of Defence, for the establishment of military trade unions which, in the absence of administrative and judicial remedies against arbitrary refusal of registration, lead the Committee to find a violation of Article 5 of the Charter, the Government states that the draft law under examination by the Senate of Republic will replace the "prior consent" with a "sort of qualification to exercise trade union activity by registering with a specially constituted register". However, the report does not sufficiently clarify how the new registration system as laid down in the draft law ensures the right of the members of the *Guardia di Finanza* to establish trade unions without prior authorisation. Currently, in the framework of the registration procedure, the General Command of the *Guardia di Finanza* formulates an opinion concerning the statute of the trade union and transmits it to the Ministry of Economy and Finance which, within a deadline, issues an authorisation or rejection. Nevertheless, the criteria used by the General Command when formulating its opinion, or by the Ministry of Economy and Finance when refusing or accepting the registration are not clarified in the report. Nor the report provides sufficient information on the administrative and judicial remedies at the disposal of trade unions in case of arbitrary refusal of registration.

The Committee requests therefore that the next report provide detailed information on the registration procedure provided by the draft law and explanations on how the new registration system satisfies the requirements of the Committee's decision in the present case, under Article 5 of the Charter. Information is also requested concerning the legislative process and the adoption of the draft law in question.

The Committee also finds that the prohibition imposed on members of the *Guardia di Finanza* to join "other trade unions" under Article 1475(2) of the Military Code is still in force and the draft law under examination in the Senate, in order to ensure "compactness" and "unity" of the military institutions, maintain this prohibition.

In view of the above, the Committee finds that the situation has not been brought into conformity with Article 5 in these respects.

B. Violation of Article 6§2

The Committee takes note of the information submitted by workers' organisations that despite the registration of a number of military trade unions following the decision of the Constitutional Court of 11 April 2018, the authorities continue to communicate exclusively with the representative bodies of the *Guardia di Finanza* which results in a real exclusion of the trade unions from the relevant consultations. It also takes note of the reply of the Ministry of Economy and Finance following a request by a military trade union to participate in the consultation process of a collective agreement, that until the adoption of legislative changes, it will not be possible to allow the trade union to engage in consultations.

The Committee also notes the Government's submission that the transition to a system where military trade unions are involved more efficiently in the negotiations on the terms and

conditions of employment, should take place gradually. For the Government, it is therefore not possible, before the adoption of the draft law, to replace military representative bodies by military trade unions as to their role in the negotiation processes.

The Committee recalls that in its decision on the merits in the present case, it considered, with regard to consultations of the representative bodies of the *Guardia di Finanza*, that it was not shown that this procedure effectively ensures meaningful negotiations as opposed to mere hearing. The Committee takes note that the draft law provides for the attribution of negotiating powers to military trade unions which will be able to take part in consultation processes with the relevant ministries upon the adoption and entry into force of the bill. Nevertheless, the report does not provide information on measures taken or envisaged to be taken pending the adoption of the draft law in question, in order to improve the existing procedure and to ensure meaningful consultations of representative bodies and their efficient involvement in negotiations.

Therefore, the Committee asks that the next report provide information, firstly, regarding the legislative changes and specifically the extent to which they increase the negotiation powers (e.g. with regard to remuneration) of the military trade unions and, secondly, measures taken, pending the adoption of this draft law, in order to improve the negotiation powers of military representative bodies, such as COCER.

In view of the above, the Committee finds that the situation has not been brought into conformity with the Charter.

C. Violation of Article 6§4

The Committee finds that the arguments put forth by the Government in the report, in order to justify an absolute ban on the right to strike by members of the *Guardia di Finanza* were already submitted to the Committee in the framework of the present case and those arguments were already dismissed by the Committee in its decision on the merits of 22 January 2019 which concluded that an absolute prohibition of the right to strike on *Guardia di Finanza* is in violation of Article 6§4 of the Charter for being disproportionate to the legitimate aim pursued by the prohibition.

The Committee notes that not only this absolute prohibition on the right to strike is maintained in the provisions of the Military Code, but the draft law under examination by the Senate also provides for such prohibition.

Therefore, the Committee finds that the situation has not been brought into conformity with Article 6§4 of the Charter in this respect.