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COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 4

***Confederazione Generale Sindacale* CGS v. Italy**
Complaint No. 144/2017

ADDITIONAL SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

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Repubblica Italiana
Ministero degli Affari Esteri
e della Cooperazione Internazionale
Ufficio dell'Agente del Governo

ADDITIONAL OBSERVATIONS BY

THE ITALIAN GOVERNMENT ON

THE MERITS

ROME, 1 February 2018

1. The Italian Government (referred to hereinafter as "the Government") refers to the letter of 19 January 2018 from Mr Viotti of the Collective Complaints Division on behalf of the President of the European Committee of Social Rights (hereinafter "the Committee") inviting it to make additional submissions on the merits of the collective complaint against Italy lodged by the Confederazione generale sindacale (CGS) for the violation of Articles 1, 4, 5, 6, 24 and E of the European Social Charter by the Italian state.

2. The Government, while confirming its submissions of 7 January 2018 on the merits, submits the following observations to the Committee.

ADDITIONAL OBSERVATIONS ON THE MERITS

3. Distinction between the private sector and the civil service. The rule that access to employment in the civil service must be through a competition.

It should be pointed out that in the Italian system, competitions are the usual means of access to employment in the civil service – and a procedure which makes it possible to secure its efficiency – except in the cases laid down by the law (Article 97, paragraph 4, of the Constitution).

The aim is not only to ensure that the actions of civil servants are impartial (by limiting the use of direct appointment procedures) but also to guarantee a thorough selection of the most suitable and qualified staff to perform certain functions, with a view to ensuring the proper functioning of state services. Derogations are possible but only in exceptional circumstances and for specific and unusual public interest requirements.

In this context, the Constitutional Court has stated that public competitions have a wide scope of application in that they are intended not only to recruit new employees from outside the civil service but also for the redeployment of employees already in service and the transformation of the employment relationships of non-established staff and staff who did not originally sit a competition into permanent employment contracts (judgments nos. 150/2010, 293/2009, 205/2004).

It has therefore been emphasised in constitutional case-law that "*the extension of the legal rules on established employees to those who, before redeployment, were bound to the authorities by private-law contracts, and the recognition of all the effects of the equality between the services they have rendered and those rendered under a public-law contract is a breach of the principle of impartiality giving rise to unwarranted privilege in comparison to those who were recruited from the outset following an ordinary public competition*" (Constitutional Court, judgment No. 52 of 2011).

Under ordinary case-law, the following has been established: "*In the civil service, a fixed-term employment relationship may not be transformed into a permanent contract, given the prohibition established in Article 36 of Legislative Decree No. 165/2001, whose lawfulness has been recognised by the Constitutional Court (judgment No. 98/2003) and which was not amended by Legislative Decree No. 368 of 6 September 2001, establishing the regulations on fixed-term employment. It follows that in the event of a breach of the rules on the protection of workers' rights, the only possibility for the workers concerned, given that it is impossible for them to convert their employment contract is to obtain compensation for the damage incurred*" (Civil Court of Cassation, Labour Division, judgment No. 14350 of 15 June 2010).

The aforementioned arguments take account of all the protections granted to workers in the public or private sector, bearing in mind that the employment conditions in each sector are not comparable.

The aim of the two regimes is also to avoid inverse discrimination, to the detriment of established staff recruited on the basis of a public competition.

4. The special nature of the education sector

The complainant organisation also neglected to mention the entirely special nature – in the civil service context – of the education sector, a factor which is acknowledged not only in domestic case-law but also in European law, following the *Mascolo* judgment of the Court of Justice of the EU on 26 November 2014, paragraph 95 of which states as follows: "*It must be acknowledged that such factors show that, in the education sector at issue in the main proceedings, there is a particular need for flexibility which, in accordance with the case-law recalled in paragraph 70 of this judgment, is capable, in that specific sector, of providing an objective justification under clause 5(1)(a) of the framework agreement for recourse to successive fixed-term employment contracts in order to meet demand in schools in an appropriate manner and to avoid exposing the State, as employer in that sector, to the risk of having to grant tenure to a significantly greater number of teachers than is actually necessary for it to fulfil its obligations in this regard*".

The system for the recruitment of teaching staff does indeed have specific characteristics which make it necessary to organise the system of access to this type of public employment, and the use of fixed-term contracts, along different lines to those which are generally adopted in the civil service sector.

A rapid review should therefore be made of this sector's distinctive features

The specific characteristics of the recruitment system in the education sector are covered by Article 6 of Legislative Decree No. 165 of 30 March 2001, under which this sector benefits from special derogations where it comes to the procedures for the establishment of organisation charts. In this article, exceptions are established in paragraph 5 for "*the provisions in force for the establishment of the organisation charts of education establishments and schools of all types and levels and training establishments*" and in paragraph 6-bis for "*procedures for the recruitment of teaching, educational and administrative, technical and auxiliary (ATA) staff for state schools and education establishments, institutions for advanced artistic, musical and choral education and*

universities …".

In addition, Article 36 of Legislative Decree No. 165 of 2001 excludes the teacher recruitment system from the general rules on fixed-term contracts. Paragraph 5-quinquies of this article provides: "*This article shall, without prejudice to paragraph 5, not apply to the recruitment of teaching, educational and administrative, technical and auxiliary (ATA) staff on fixed-term contracts in state and local authority schools and education establishments [and] institutions for advanced artistic, musical and choral education…*". Paragraph 5, as referred to by this article, provides for the payment of damages by way of compensation for violations of binding rules on the recruitment or employment of workers by the public authorities. To this end, this paragraph states that "*at all events infringement of binding provisions on the recruitment or employment of workers by the public authorities cannot serve to justify the establishment of permanent employment relationships with those public authorities, without prejudice to any liability or sanction. The worker concerned is entitled to compensation for damage incurred as a result of working in breach of binding provisions. …*" .

The general rules on fixed-term contracts were set out in Legislative Decree No. 368/2001, which implements Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. However, this Legislative Decree was almost entirely repealed by Article 55 of Legislative Decree No. 81/2015 establishing "*Basic rules on employment contracts and revision of the legislation on positions under Article 1, paragraph 7, of Law No. 183 of 10 December 2014*".

Paragraph 4-bis of Article 5 (Expiry of the time-limit and penalties – Successive contracts) of Legislative Decree No. 368/2001 provided that "*subject to the provisions on successive contracts referred to in the preceding paragraphs and without prejudice to the provisions of national, local or company collective agreements concluded with the most representative trade unions at national level, if because of the existence of consecutive fixed-term contracts for the performance of similar duties, the employment relationship between an employer and an employee has exceeded a total of 36 months, including extensions and renewals and irrespective of breaks between contracts, the employment relationship shall be considered to be the equivalent of a permanent contract within the meaning of paragraph 2. When calculating the maximum 36-month length of fixed-term contracts, account shall also be taken of assignment periods for the purpose of equivalent functions completed between the same bodies, within the meaning of Article 20 of Legislative Decree No. 276 of 10 September 2003 and its subsequent amendments, concerning the award of fixed-term contracts. By derogation from the provisions of the first part of this paragraph, an additional successive fixed-term contract between the same parties may be concluded only once, provided that this is done at the provincial labour directorate with local jurisdiction in the presence of a representative of one of the most representative trade union organisations at national level of which the worker is a member or which has been designated to do so by the worker. The most representative trade unions and employers' organisations at national level shall establish the duration of such additional contracts in a joint notice. In the event of a failure to comply with this procedure or the overstepping of the time-limit set in the contract, the new contract shall be regarded as a permanent contract*".

Article 10 (Exclusions and special provisions), paragraph 4-bis excluded the fixed-term

contracts of teachers and ATA staff appointed to work as replacements from the scope of the decree in question, in view of the requirement to provide an uninterrupted school and education service even in the event of the temporary absence of teachers or ATA staff with either fixed-term or permanent contracts. This provision stated as follows: "*On the basis of the provisions of Article 40, paragraph 1, of Law No. 449 of 27 December 1997 and its subsequent amendments, of Article 4, paragraph 14-bis, of Law No. 124 of 3 May 1999, and Article 6, paragraph 5, of Legislative Decree No. 165 of 30 March 2001, fixed-term contracts concluded to fill replacement posts for teachers and ATA staff shall be excluded from the scope of this decree in view of the requirement to provide an uninterrupted school and education service even in the event of the temporary absence of teachers or ATA staff with either fixed-term or permanent contracts. At all events, Article 5, paragraph 4-bis, of this decree shall not be applicable in such cases. In order to ensure respect for the right to education, the derogations provided for in this paragraph shall be applied in the kindergartens and nursery schools of local authorities with due regard for the stability pact and financial constraints which limit the budget allocated to staffing and recruitment for local authorities, including for teaching and school staff*".

Article 29 of Legislative Decree No. 81 of 2015, which almost entirely repealed Legislative Decree No. 368/2001, replaced the Article 10, paragraph 4-bis, cited above, with the following paragraph: "*Given that they are covered by specific provisions, the following shall be excluded from the scope of this paragraph: … (c) fixed-term contracts of teachers and ATA staff relating to replacement posts and those of the health staff, including the managers, of the National Health Service; (d) the fixed-term contracts specified in accordance with Law No. 240 of 30 December 2010 … 4. The provisions of Article 36 of Legislative Decree No. 165 of 2001 shall not be affected*".
Articles 21 and 22 of Legislative Decree No. 81/2015 now govern cases of conversions from fixed-term contract to permanent contract in place of Article 5, paragraph 4-bis in place of Legislative Decree No. 368/2001.
Nor does Legislative Decree No. 81/2015 affect Article 9 (Budgetary constraints in the civil service) of Decree-Law No. 78/2010 and its subsequent amendments, which expressly provide for an exception to the application of the rules limiting the establishment of fixed-term contracts with reference to the education system by stating in Article 28 that "… *For the sectors of education and institutions for higher education and arts and music specialisations, reference shall be made to the specific provisions governing these sectors…*".
The exception clauses were introduced because every year the school authorities face a variation in demand depending on the schools and the regions concerned, which sometimes occurs in the course of the school year for a whole range of reasons, most of which are beyond the Government's control (variations in total numbers of pupils, choices of courses by families, internal migration from one region to another, teacher transfers, etc.). The indispensable flexibility of recruitment methods in the teaching sector is also linked to the particular functions performed by teaching staff and the inherent rigidity of the means by which this service is provided: the number of teachers – and, to a lesser extent, of non-teaching staff – cannot be reduced without giving up on providing this service.
A proper dose of flexibility is needed therefore to avoid two opposing risks: firstly, the risk of having pupils without teachers or not having enough teachers to cover total demand;

secondly, the risk of having teachers without pupils or of recruiting teachers who are then unused. Consequently, any provision which, in limiting the use of fixed-term contracts, imposed rigid organisation charts, would contribute to one or the other of these risks. The use of fixed-term contracts is a guarantee against these risks, albeit to the detriment of the interests of the workers concerned.

The current system of recruitment in Italy, which is based on a "dual arrangement" (50% of recruitment takes place through competitions while the other 50% is based on the permanent ranking lists – which will, incidentally, no longer be renewed once they have been used up – by partial derogation from the mechanism provided for in Article 97 of the Constitution), makes it possible to counter the negative effects of this flexibility in terms of uncertainty and insecurity of employment as teachers on fixed-term contracts not only are authorised to take part in competitions but may also count on being appointed to a permanent post after a number of years.

Non-permanent recruitments in the education system are not fixed-term recruitments in the technical sense.

Most fixed-term staff in the education sector follow a path which is fixed materially on recruitment and, in always working for the same employer (the Italian state), such staff can accumulate a sufficient number of fixed-term periods of activity to be taken on permanently. At the same time, by sitting competitions, they have a chance of speeding up the process of permanent appointment.

This recruitment system makes it possible for school staff to blur the distinction between fixed-term and permanent employment, which is much more clear-cut in other sectors. Above all it is the insecure conditions and hence the risks which the European rules on fixed-term contracts are intended to prevent that are alleviated, as they form part of a set path leading to permanent appointment following a relatively predictable timeframe.

For example, where it comes to the recognition of professional experience in the case of fixed-term contracts for teachers, it should be pointed out that Article 485, paragraph 1, of Legislative Decree No. 297/1994 provides as follows: *"For non-permanent teaching staff at secondary and arts education establishments who have served in state or state-certified schools including schools abroad, such periods of activity shall be entirely assimilated into permanent service for legal and financial purposes for the first four years and by two-thirds for any period exceeding this and solely for financial purposes for the remaining third"*.

In other words, the teacher recruitment system provides that four years of service prior to permanent appointment will be taken into account in full and that the value of any other years will be reduced by a third as to their legal effects and two-thirds as to their financial effects; professional experience amassed under fixed-term contracts is therefore taken into account through recognition of the service provided as a non-permanent teacher for the purposes of career progression when the teacher is taken on permanently.

The criterion for the calculation of service prior to permanent appointment, including the coefficient which partly reduces its value for the purposes of official length of service, is based on the following principles: the unit of measure of the service provided by teaching staff before and after permanent appointment is the full academic year. This implies that when a career is reconstructed, only "full years" are taken into account. As to work prior to permanent appointment, a "full year" equates to an annual contract to fill vacant or available posts; temporary replacement contracts are added up and counted as a "full year" if they total at least 180 days in the same school year (including non-working days and public

holidays); replacement contracts totalling less than 180 days count as a "full year" if the teacher's activity was uninterrupted from 1 February up to the end of the year-end examinations (Law No. 124/1999, Article 11, paragraph 14). Periods of activity are counted and acknowledged regardless of the number of weekly working hours (under the fixed-term contract); whereas fixed-term contracts are concluded for a predetermined number of weekly hours, replacement contracts may provide for a lower number of hours. This implies that the work time calculated for the period prior to permanent appointment is assimilated to the activity carried out by a permanent member of staff even if the number of weekly hours was lower. Consequently, a year of work prior to permanent appointment can prove shorter or lighter than the annual workload given to a permanent teacher.

Nonetheless, it should also be pointed out that the ETUC-UNICE-CEEP framework agreement on fixed-term work appended to Council Directive 1999/70/EC provides as follows:

- "*This agreement sets out the general principles and minimum requirements relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situations*" (paragraph 3 of the Preamble);
- "*fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers*" *(*paragraph 8 of the general considerations);
- "*this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the Community economy and to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings*"*(*paragraph 11).

It becomes clear from this that:

i) the spirit and the content of Community law are not entirely against fixed-term contracts or their renewal. In fact such contracts are considered useful because they afford a degree of flexibility provided that they comply with the conditions for their use;

ii) the Directive cannot be implemented with complete disregard for the specific features of the national context and hence of some public or private sectors (this point is confirmed by Article 151 TFEU (formerly Article 136, EC Treaty), which states that the Union and its Member States, with the aim of promoting employment and improving living and working conditions must "implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy");

iii) social policy choices intended to increase protection for fixed-term workers, must always seek solutions making it possible to strike a balance between

two conflicting demands: on the one hand adequately protecting the weakest party in the employment relationship, to protect him/her from all possibility of prevarication or abuse on the part of the employer while, on the other, making sure that the employer is still in a position to perform his/her entrepreneurial activities to his/her profit. This point should be emphasised all the more where it comes to interpreting sectoral provisions, including where the employer is a public authority.

5. The current regulations. Efficiency of the measures introduced by Law No. 107 of 2015 and Legislative Decree No. 59 of 13 April 2017

Although the complaint filed describes the development of the legislation and case-law in the field concerned in a detailed and thorough manner, it must be said that there are a number of gaps in this survey. When asserting the existence of the alleged violations, the complainant organisation should have looked more into the regulations which currently govern the field rather than focusing on regulations that are already obsolete.

With this in mind, it is therefore essential to supplement the information on the relevant legislation set out in the paragraphs above by describing the rules introduced recently by Law No. 107 of 13 July 2015 on the "*Reform of the national education and training system and the delegation of powers for the reorganisation of the legislation in force*", then to make the necessary comments regarding the efficiency of the measures adopted by the Italian state with a view to limiting the use of fixed-term contracts in the education sector.

It is clear that these measures render the complaint under consideration totally unfounded.

More specifically, the reform dubbed "La Buona Scuola", provided for by Law No. 107/2015, and its implementing decrees, includes the following measures:

- new rules on recruitment based on fixed timeframes for the conduct of competitions designed to fill vacant and available posts (Article 1, paragraph 113, of Law No. 107/2015 and Article 3, paragraph 2, of Legislative Decree No. 59/2017);
- access to permanent posts for the teaching staff of state schools, subject to the special recruitment plan through national public competitions based on qualifications and examinations held at regional level, as described in Article 400 of Legislative Decree No. 297 of 1997 and its subsequent amendments (Article 1, paragraph 109);
- an upper-limit of 36 months for fixed-term contracts designed to fill vacant and available posts (Article 1, paragraph 3, of Law No. 107/2015);
- penalties consisting of compensation for the damage incurred in the event of repeated fixed-term contracts for a total period of more than 36 months (Article 1, paragraph 132, of Law No. 107/2015).

In addition to these provisions, the law also includes a series of transitional measures. Article 1, paragraph 95, of the law provides as follows: "*For the 2015/2016 academic year, the Ministry of Education, Universities and Research shall be authorised to implement a special plan for the recruitment of teaching staff on fixed-*

term contracts for state schools of all types and levels to fill any standard and support posts on the statutory organisation chart which are still vacant and available following the permanent recruitment operations for the same academic year provided for by Article 399 of the Single Text referred to in Legislative Decree No. 297 of 16 April 1994, under which the classification lists deriving from competitions based on qualifications and examinations held before 2012 shall be abandoned". Paragraph 109 (c) also provides that Article 399 of Legislative Decree No. 297/1994, under which recruitment may also be carried out through access to the permanent classification lists, will be applied until these lists are used up.

The adoption of all the aforementioned measures has eliminated at source any risk of incompatibility between domestic law and Community law.

In judgment No. 187/2016, the Italian Constitutional Court held that the measures provided for by this law to remedy the problem of insecure employment in the education sector had eliminated the irregularities of which the Italian state was accused with regard to the aforementioned European rules. The Court found that the stabilisation provided for by Law No. 107/2015 through the special recruitment plan and other selection and competition mechanisms was an adequate and proportionate measure to punish abuses. In its judgment the Court stated as follows: "*The wide range of measures authorised by the relevant Community rules has already been mentioned; it should be specified at this point that these measures are interchangeable and it is enough therefore to apply just one of them. This is clear in particular from paragraph 79 of the grounds, under which 'where abuse of successive fixed-term contracts has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to punish that abuse and nullify the consequences of the breach of Community law'. It is enough therefore to apply only one measure provided that it offers effective and equivalent guarantees of protection. The EU Court of Justice adopted the same approach with regard to clause 5(1) of the framework agreement when it stated that it was for the member states to rely on one or more of the measures listed in that clause, or on existing equivalent legal measures, while taking account of the needs of specific sectors or categories of workers, in order to ensure the effective prevention of the misuse of successive fixed-term employment contracts (Judgment of 15 April 2008, Case C-268/06, Impact; Judgment of 23 April 2009, Joined Cases C-378/07 to C-380/07, Angelidaki and Others). The choice is moreover implicit in the identical effectiveness of the two measures identified by the Court, both of which made it possible to "cancel out the effects of the violation" (paragraph 79). This effectiveness is an abiding feature of the standard penalty of compensation and does not require any further elaboration; the effectiveness of the alternative measure is, however, no less obvious as it is also a type of compensation but one taking a specific form. This would be especially clear if the alternative punishment consisted in converting the fixed-term contract into a permanent contract but the EU Court of Justice, having taken note of the principle of public competitions also referred to in Order No. 207 of 2013 considered that it was enough to make use of measures offering genuine chances of stabilising the employment relationship. The various arrangements made in Italian legislation*

in 2015, both transitional and permanent, still all include one of the measures which is compatible with the criteria set by the Court of Justice. … It is therefore reasonable to conclude that the Italian state was responsible for an infringement of EU law but this irregularity has now been 'eliminated' by the adoption of compensatory measures for the staff concerned".

As to the stabilisation of teachers with professional qualifications acquired under the so-called SPQ and AET mechanisms, with regard to whom it is stated several times over in the complaint that there are no stabilisation measures, it should be noted that Law No. 107/2015, paragraph 181(b), sets the criteria for the exercise of delegated statutory powers whose purpose is to establish the initial training and recruitment of secondary school teachers on the basis of criteria including "*the introduction of transitional measures with regard to the various training programmes in force for the professional qualification and recruitment of teachers and to the evaluation of the skills of staff obtaining their qualifications before the entry into force of the legislative decree referred to in this sub-paragraph"*.

Legislative Decree No. 59 of 13 April 2017, putting into practice the delegated powers referred to in Article 181(b), introduced specific measures whose purpose was to give teachers with SPQ and AET certificates permanent posts. For the most part this meant holding competitions reserved solely for such staff, with posts earmarked for them on the basis of declining percentages over the years (100% of vacant and available teaching posts identified annually for the academic years 2018/2019 and 2019/2020, 80% for the years 2020/2021 and 2021/2022, 60% for 2022/2023 and 2023/2024, 40% for 2024/2025 and 2025/2026, 30% for 2026/2027 and 2027/2028 and 20% for the following periods – Article 17, paragraph 2(b)), Legislative Decree No. 59/2017). Prospects of stabilisation are therefore tangible and effective as the competition is based on a particularly simple structure comprising an oral test on didactic and methodological aspects and an assessment of qualifications with no minimum score designed to establish a regional order of merit including all those who submit a request to take part (Article 17, paragraph 4, Legislative Decree No. 59 of 2017).

6. AFAM staff and the applicable provisions

Our main task here is to ascertain whether the provisions of Law No. 107/2015 and hence the measures introduced by this law to remedy the insecure employment situation in the education sector also apply to the staff in the AFAM sector, namely those working for the Advanced Training and Arts and Music Specialisation Institutions.

In the event that these measures are not applicable to the staff in question, it will have to be ascertained that substantive alternative protection measures exist.

In this connection, we take the view that the reform to the system provided for by Law No. 107/2017 does not apply to the teaching staff in the AFAM sector, given that they are covered by the special provisions laid down in Law No. 508 of 1999.

Under Article 2, paragraph 1, of this law, "*fine arts colleges, the National Dramatic Arts College, ISIAs, music academies, the National Dance College and the musical institutes recognised by the state constitute the system of Advanced Training and Arts and Music*

Specialisation Institutions". Paragraph 6 also specifies that *"the working contracts of the staff referred to in Article 1 are covered by the provisions of Legislative Decree No. 29 of February 1993 and its subsequent amendments, establishing a separate branch with two distinct negotiating frameworks, one for teachers and the other for non-teaching staff"*.[1]

[1] Under Article 5 of the framework collective agreement of 11 June 2007 for the definition of negotiating branches, employees of the following institutions (under fixed or permanent contracts) form part of this branch:

- fine arts colleges
- the National Dance College
- the National Dramatic Arts College
- Higher Arts Industry Institutes (ISIAs)
- music academies and equivalent music schools.

By contrast "the staff of nursery, primary, secondary and arts schools, education institutions, special schools and any other type of school managed by the state" except AFAM and university staff (Article 11 CCNC, 11 June 2017) shall be considered to form part of the school education branch. When presenting the developments in case-law and norms which have punctuated the history of the insecure situation of teachers in recent years, the relevant court referred solely to the judgments and legislation relating to school staff, not to AFAM staff.

Furthermore, the developments in case-law and norms which have punctuated the history of the insecure situation of teachers in recent years have related solely to school staff.
For example:

1) the judgment of 24/11/2014 (*Mascolo* judgment) by the EU Court of justice relates specifically to the issue of the insecure situation of teachers in the school sector;

2) Law No. 107/2015 and, more particularly, the measures adopted to remedy the problem of compatibility with European rules on fixed-term contracts (Article 1, paragraphs 95, 131 and 132) refers expressly to the teaching staff in the school sector;

3) in Judgment No. 187 of 17/05/2016 the Constitutional Court ruled – on a preliminary referral by the Court of Justice – on four decisions by the Courts of Rome and Lamezia Terme on staff in insecure employment in the school sector including a school assistant, which related to the declaration of "limited" unconstitutionality of Article 4, paragraphs 1 and 11, of Law No. 124/1999 ;

4) the case-law deriving from the aforementioned deliberations, which identified the criteria for the interpretation and application of the national rules with a view to settling the disputes concerned, related once again to insecure staff in the school sector.

Accordingly, the solutions adopted as part of the above-mentioned series of statutory measures introduced and judgments given to deal with the problem of insecure employment in the school sector do not apply to the teachers in insecure employment in the AFAM sector, who are governed by a different recruitment system to that which applies to the teaching staff in the school sector, set out in Law No. 509/1999.

To further clarify the differences between the AFAM and school sectors, it is necessary

to look at Judgment No. 206/2013 of the Constitutional Court.

In this judgment, the Constitutional Court deals separately with the two questions of constitutional compliance put to it, one relating to Article 4, paragraph 1 of Law No. 124/1999 (recruitment of teaching staff) and the other to Article 2, paragraph 6, of Law No. 508/1999 (recruitment of the staff of the Advanced Training and Arts and Music Specialisation Institutions) and, while declaring both questions inadmissible, it therefore recognises *de facto* that these are two distinct systems governed by different rules.

Given that it is impossible to apply the regulatory framework set out in Law No. 107/2015, and the measures introduced by this law to remedy the problem of historic insecurity of employment in schools, to the staff of the AFAM sector, in order to prove that the provisions in force are compatible with the Community provisions on fixed-term contracts, the following points have to be emphasised:

- *in view of the relevant case-law, the unlawful use of fixed-term contracts will always be considered to be detrimental to employees performing their work under illegal conditions, thus entitling them to compensation. Therefore, staff without a permanent position, who have not fulfilled one of their aspirations in life (to obtain a permanent contract) and consequently initiated legal proceedings, are entitled to compensation whose amount and principles are set by leading judgment No. 5072/2016 of the Court of Cassation, sitting as a full court;*
- *compensation is an effective measure and sufficiently dissuasive to ensure the full effectiveness of the standards adopted pursuant to the framework agreement in sectors other than that of school teaching, for which the provisions in force – having regard to their specific features – have established a different system of protections and measures.*

In point of fact, in several disputes concerning these staff, the courts have dismissed requests for fixed-term contracts to be converted into permanent ones and ordered the authorities to pay compensation for the abuse of successive fixed-term contracts, with recognition of the length of service provided for by the national collective agreement for indefinite-term employees pursuant to the principle of equal treatment established by clause 4 of the framework agreement on fixed-term work appended to Directive 1999/70/EC, to the extent provided for by Article 485 of Legislative Decree No. 297 of 16 April 1994.

In this connection, it should be pointed out that Article 19, paragraph 2 of the National Collective Agreement for the AFAM sector for 2006-2009 provides as follows: *"Article 59 of the National Collective Agreement of 16 February 2005 shall be amended as follows: '1. Pursuant to Article 69, paragraph 1, of Legislative Decree No. 165/2001, all general and special civil service regulations which were in force on 13 January 1994 and have not been repealed shall no longer be applicable after signature of this agreement with the exception of the following provisions and those referred to in the text of this agreement, which shall remain in force:…*

- *Article 4, paragraphs 3 and 13, of Presidential Decree No 399/1988 (recognition of periods of service of the staff concerned) ;*
- *Article 485 of Presidential Decree No. 297/1994 (recognition of periods of service of teaching staff) …".*

In the light of the foregoing, the staff of the AFAM sector are therefore subject, in the event of the unlawful use of fixed-term contracts, to a different, yet just as effective, compensation measure provided for by Article 36, paragraph 5, of Legislative Decree No. 165/2001.

CONCLUSIONS

In the light of the observations above, it should be held that the following violations of the European Social Charter alleged in the complaint being investigated are without foundation in view of the following arguments:

1) The alleged violation of Article 1, commitments 1 and 2, with regard to the right to work and the Italian state's commitment to pursue "*the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment*".

   This complaint is unfounded in the light of the foregoing considerations and, more specifically, the fact that recruitments to schools under non-permanent employment conditions are not fixed-term recruitments in a technical sense. Most fixed-term staff in the education sector follow a path with a fixed material outcome in the form of appointment to a permanent position and, as they always work for the same employer (the Italian state), their fixed-term periods of service can be taken into account for the purposes of their permanent appointment. At the same time, by sitting competitions, they can speed up the process leading to stable employment. Through this recruitment system, the distinction for teaching staff between fixed-term and permanent contracts is less marked than in other sectors. The insecure conditions and hence the risks which the European rules on fixed-term contracts are intended to prevent are clearly alleviated as they form part of a set path leading to permanent appointment within a relatively predictable timeframe.

   This framework must by extension be interpreted in the light of the new rules on recruitment set out in Law No. 107/2015 and, more specifically, the measures adopted by the Italian state in this law to limit the use of fixed-term contracts in the education sector. These measures clearly show the legislator's intention to introduce measures aimed, firstly, at limiting the use of fixed-term contracts in education and remedying the problem of historic insecure employment in this sector and, secondly, at steering the system towards forms of recruitment based primarily on permanent contracts and, then only to a lesser extent, on fixed-term contracts.
   It should also be stressed that the infringement procedure (No. 2010/2124) launched by the European Commission against Italy for incomplete implementation of Directive 1999/70/EC concerning the framework agreement on fixed-term work with

regard to the teaching staff in state schools was discontinued without penalties for reasons including the provisions mentioned above. It should be emphasised that the objections raised by the European Commission related specifically to the less favourable legal and economic treatment afforded fixed-term teaching staff in comparison to permanent staff and the employment rules in the education system, which it considered to be lacking in effective measures to counter the misuse of fixed-term contracts.

2) The alleged violation of Article 4 on the right to a fair remuneration, commitments 1 and 4, and, more specifically, "*the commitment towards … fixed-term workers to recognise sufficient remuneration such as will guarantee them … a dignified standard of living …[and] the commitment to recognise the right of public workers in insecure employment to a reasonable period of notice for termination of employment*".

This allegation is unfounded in view of the foregoing. More specifically, the rules set out in Law No. 107/2015, and the provisions in force with regard to the recognition of the previous work experience of teachers on fixed-term contracts, make it possible to assert that fixed-term workers in the school sector are awarded remuneration capable of guaranteeing them a decent standard of living. This is especially true given that this remuneration and the other rights granted to such staff are equivalent to those granted to permanent staff.

More specifically, as we have already seen, reference should be made to Article 485, paragraph 1, of Legislative Decree No. 297/1994, which states as follows: "*For non-permanent teaching staff at secondary and arts education establishments who have served in state or state-certified schools including schools abroad, such periods of activity shall be entirely assimilated into permanent service for legal and financial purposes for the first four years and by two-thirds for any period exceeding this and solely for financial purposes for the remaining third*".

This provision is compatible with the principle of non-discrimination between fixed-term and permanent workers set out in clause 4 of the framework agreement on fixed-term work, particularly in the light of Article 1, paragraph 131, of Law No. 107/2015. This provision states in particular that "*from 1 September 2016 onwards, fixed-term employment contracts concluded with teaching, educational and administrative, technical and auxiliary (ATA) staff for state schools to fill vacant and available posts may not exceed a total length of 36 months, whether successive or not*". The new system therefore provides that the period before permanent appointment may not exceed three years of annual contracts and that over this period the reduction coefficient is not applied, meaning that for the purposes of calculating length of service, the work performed by teachers on fixed-term contracts is counted in full. Thus, in the light of the aforementioned regulations, the maximum period prior to permanent appointment (36 months) is shorter than the maximum period which counts fully for length of service (four years).

In this connection, it should be pointed out that the European Commission also dropped the case EU Pilot 5945/13/EMPL, which was opened in order to ascertain whether the Italian legislation recognised the accumulated work experience of teachers on fixed-term contracts pursuant to the principle of non-discrimination set out in clause 4.

On a procedural level, it should be pointed out that these teachers' remuneration complies with that laid down in the relevant collective agreement.

As to commitment 4 on the right of all workers to reasonable notice, it should be stressed that, contrary to the complainant organisation's claims, this right is not violated because the length of fixed-term contracts is set when the contract is drawn up.

3) The alleged violation of Article 5, because " *the Italian State has not guaranteed the freedom of workers in schools to form national trade union organisations such as the complainant CGS for the protection of their economic and social interests and to join those organisations*" and
4) the alleged violation of Article 6, commitment No. 4, "*because the Italian State has failed, through both legislation and the judiciary, to recognise the right of workers in schools administered by the state to collective action through the complainant CGS*".

These allegations are unfounded because the complaints in question fail to put forward any detailed legal or factual evidence capable of proving that they are well-founded. In addition, the right of association is recognised by Article 18 of the Constitution; only a criminal law may limit the exercise of this right and only when it is exercised for purposes prohibited to individuals by the Constitution.

To our knowledge, the Italian state has never adopted a criminal law which limits the exercise of the right of association granted to citizens and hence, in the case in question, to the staff of schools.

5) The alleged violation of Article 24, "*because the Italian State, as an employer and through legislation and the judiciary, has not recognised for hundreds of thousands of public sector fixed-term workers who were unlawfully hired under fixed-term contracts to vacant positions within the workforce the right of all workers not to have their employment terminated … or the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief*".

This allegation is completely unconnected with the subject of the complaints as these are violations linked to supposed dismissals imposed by the Italian state on workers in the school sector and to the lack of provisions capable of recognising the "right not to be dismissed". As to the presumed dismissals, there is good reason to disregard the possible dismissal of these workers by the Italian state, bearing in mind also that the aim of the above-mentioned provisions on the civil service, and those relating more specifically to teaching staff, is to define the terms of the employment contract in question, not the rules

on dismissal.

In the light of the foregoing considerations, the allegations of violations of the provisions of the European Social Charter forming the subject of the complaint submitted are unfounded.

The Government therefore submits these additional observations for the Committee's attention and asserts once again that it has not violated Articles 1, 4, 5, 6, 24 or E of the European Social Charter.

Rome, 1 February 2018

Office of the Government Agent