EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

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Case Document No. 6

***Associazione Professionale e Sindacale* (ANIEF) v. Italy**
Complaint No.146/2017

RESPONSE FROM ANIEF TO THE GOVERNMENT'S SUBMISSIONS ON THE MERITS

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Directorate general

Human rights and rule of law

Department of the European Social Charter

Complaint No. 146/2017

Professional and trade Union Association ANIEF v/ Italy

Response to the Additional Observations of the Italian Government of 1st february 2018

Recall all the observations made in the complaint and, in particular, the applicability of the Legislative Decree (hereinafter Legislative Decree) 368/2001 (now Legislative Decree No. 81/2015), given the additional observations of the Italian Government which, moreover, recall the application of this legislation to all sectors of work, public and private, the complainant organization observes what follows.

A) Further comments from the Italian Government

• First of all, the Italian Government, in its observations of 7 January 2018, underlined in point 7 that the Department of Education and Research of the Ministry of Education (MIUR) had given indications in order to coherently define the national contract of work with the following objectives: 1) full realization of the principle of non-discrimination between permanent and fixed-term workers, 2) limitation in the use of said relationships to "real" flexibility needs, therefore only to "exceptional" cases and temporary ".

• Then, in the collective agreement that was signed on the February 8th 2018 (Annex A), they have been careful not to resolve the issues indicated by the Italian government.

B) The Economic discrimination between temporary and permanent workers

• In fact, as we can see in the section "economic treatment" (articles 35 and following), nothing is said about the recognition of the length of service for economic purposes and, in particular, the recognition of the same, depending on whether the service was made as permanent or fixed-term employee.

• Remains in force, therefore, art. 526 of the Legislative Decree 297/94, which states: "The initial economic treatment and salary for the corresponding permanent teaching staff is also envisaged for non-permanent teaching staff". This means that the teacher hired with fixed-term contracts, albeit with several years of precariousness, before his entry into the role does not accrue any salary progression, always perceiving the basic salary, regardless of the years of teaching performed before.

• Remains in force, furthermore, art. 485, paragraph 1 of Legislative Decree 297/1994 (see page 4 Additional Observations of the Italian Government of the 1st february 2018, which claims its current applicability). The Ministry of Public Education, in fact, during the reconstruction of the former precarious teacher's career, meanwhile employed with a permanent contract, applies - for the purpose of its placement to the corresponding salary range - the provision contained in article 485, paragraph 1, of the Legislative Decree N. 297 of 1994, pursuant to which - without prejudice to the fact that nothing is due to seniority accruals acquired during the period of temporary work - *"To the teaching staff of secondary and artistic schools, the service provided at the aforementioned state schools and state-approved schools , including those abroad, as non-tenured professor, is recognized as full-time service, for legal and economic purposes, in full for the first four years and for the two thirds of any excess period, as well as for economic purposes only for the remaining third one. The economic rights resulting from the abovementioned recognition are kept and evaluated in all the following salary wages to the one attributed at the time of the recognition itself ".*

• This is clearer from the examination of the preliminary question submitted by the Court of Trento at the Court of Justice of the European Union of 18th july 2017 (Annex B), where the Italian referring judge, realizing the objective discrimination made by the Italian legislator in respect of the fixed-term teachers subsequently stabilized by the sliding of the *Graduatorie ad Esaurimento* (see on this point, the Observations of the Italian State of the 1st february 2018, page 4 and Anief complaint, points 11 and following), asks the CJEU whether this discrimination can only be justified only by the fact that the teacher has passed a competition.

• Indeed, as can be seen in the written Observations of the private section (Annex C), this legislative regulation is clearly discriminatory, since the activity of Italian teachers is focused on the teaching certificate and qualification (being the mentioned qualification, the condition of the relative teaching activities for both subjects, hired on a fixed-term basis or through a

competition[1]) and not on the competition, which concerns only access to the roles of the public service (see, moreover, the Additional Observations of the 01.02.18 of the Italian Government, page 1, point 3, first period) and certainly not as a parameter for the quality of the service performed. In the same direction, the written observations of the European Commission (Annex D).

• As we can see, therefore, we are very far from an effective equality of economic treatment between temporary and permanent workers.

C) The recurrence of forward contracts

• Likewise, as regards the term of forward contracts, the same is true.

• The Italian State, in its additional remarks, in section 4, reiterates its argument, repeatedly put forward in front of the High European Courts, about the alleged particularities that would characterize the school sector which would justify a special framework and would lead to the removal of forward contracts to the regulation of (although recalled by the Government between the applicable legislation to all labour relations) of Legislative Decree No. 368 of 2001 which imposed the obligation to indicate the objective reasons regarding the stipulation of the forward contract.

• Actually, these special factors are linked to ordinary market fluctuations (changes in the student population, choice of sectors by families, internal migratory flows from one region to another, relocation of teachers, etc.) that affect any company or public administration operating on a national scale, just think of the national health service or tax collection offices that are subject to even more pronounced and unpredictable market flows.

• Nor does this reasoning justify the fact that the European Court, in *Mascolo* ruling, paragraph 95, referred to this situation: the Court has in fact limited itself to taking note of the Italian Government's statements on the matter and to estabilish a factual situation which, in fact, occurs in every economic

[1] Moreover, the Court of Justice of the European Union, in *Mascolo's judgment* of 26.11.14 (C-22/13, EU: C: 2014: 2124) perfectly described in point 89 the permanent school recruitment system and the conditions to gain access to the permanent teaching role: 'In the present case, it must first be noted that, from the order for referral and from the explanations given at the hearing, show that, pursuant to the national legislation at issue in the main proceedings, as provided for by law n. 124/1999, the staff recruitment in state schools takes place both for a permanent period through the "entry into a role" or for a fixed term through the provision of substitutes. The permanent position (the status acquired with the *perm role* as a new tenured teacher) is carried out according to the so-called "double channel" system, that is, as regards the half of the vacant posts per school year, through competitions by qualifications and exams and, as for the other half, drawing on *Graduatorie Permanenti* (permanent rankings), in which the teachers who have won such a competition are not entitled to a permanent position, and those who have attended qualification courses held by the graduate schools for teaching. The substitutes were drawn from the same rankings: the succession of substitutes by the same teacher entails their advancement in the rankings and can lead him to the *role.* "

activity. Not surprisingly, this did not prevent the Court from ruling on the illegitimacy of the Italian school recruitment system[2].

• In reality, nothing justifies the organizational system of the Italian school sector, still in fact in force, as we shall see, which is the main source of Italian precariousness.

• We have already mentioned, in the complaint, in points 13 and 14, to which reference is made, as regard the question of the *Organico di Fatto* and to that *Organico di Diritto* which still constitutes, as we shall see, the specific characteristic of the Italian school and it justifies the massive use of precarious employees. The question still deserves a brief analysis.

•The *Organico di Diritto* of Italian schools (Article 4 paragraphs 1, Law 124/1999, for teachers and 11, for ATA) is established in theory before the beginning of each school year, by the Ministry of Education based on predeterminations of an essentially financial nature. This staff includes workers hired for an unlimited period (permanent employees) and, for vacancies (triggered by the non-entry competitions for over 11 years: see point 42 of the *Mascolo ruling*[3]), involves the assignment of professorships for the entire school year (from September to August of the following year).

• The aforementioned *Organico*, by its very nature, has no connection with the actual needs of the school structure, and followed by the enrollment of pupils in the middle of the year, June-July, an adjustment that leads to the *Organico di Fatto* (article 4, paragraph 2, law 124/1999), in relation to which assignments are instead conferred up to the end of the teaching activity, i.e. from September to June.

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[2] Let us recall that this is prnounced in the operative part of the *Mascolo judgment*: "Clause 5, point 1, of the framework agreement on fixed-term work, concluded on 18 March 1999, which is annexed to Council Directive 1999/70 / EC, of 28 June 1999 on the framework agreement for CES, UNICE and CEEP on fixed-term work, must be interpreted as precluding a national legislation, such as that at issue in the main proceedings, which it authorizes, pending completion of the insolvency proceedings for the recruitment of permanent staff in state schools, the renewal of fixed-term employment contracts for the covering of vacant and available positions of teachers as well as administrative, technical and auxiliary staff, without indicating deadlines for the completion of said insolvency procedures and excluding any possibility for these professors and staff to obtain compensation for any damage suffered because of such renewal. It appears, in fact, that this legislation, without prejudice to the necessary checks by the referring courts, on the one hand, does not permit the definition of objective and transparent criteria in order to verify whether the renewal of these contracts actually meets a real need, is suitable to achieve the objective pursued and is necessary for this purpose, and, secondly, does not provide for any other measure aimed at preventing and sanctioning the abusive appeal to a succession of fixed-term employment contracts ".

[3] Thus point 42 cited: "42 The Constitutional Court [Italian] nevertheless notes that article 4, paragraph 1, of the law n. 124/1999, although it does not provide for the repeated renewal of fixed-term employment contracts and does not exclude the right to compensation for damages, it allows to provide for temporary vacancies for vacant and available vacancies "pending completion of the insolvency procedures for the recruitment of the tenured staff ». The insolvency proceedings would have been interrupted between 2000 and 2011. This provision could configure the possibility of a renewal of fixed-term contracts without the provision of certain times for the competitions to take place. This circumstance, combined with the absence of provisions recognizing the right to compensation for damage to state school staff who have been unduly subjected to a succession of fixed-term employment contracts, could be in conflict with Clause 5, paragraph 1, of the framework agreement ".

• This situation, although constituting a basis for the identification of the staff actually needed for the structure management and which therefore constitutes "normality", does not however resolve the effective coverage of the real workforce, since the additional events (absence of the sickness or maternity or other unpredictable scenarios) are then replaced with temporary substitutes (Article 4, paragraph 3 of Law 124/1999: on these points see *Mascolo ruling*, paragraph 90[4]).

• Furthermore, temporary substitutes on the *Organico di Fatto*, they do not constitute, in principle, "legitimate" fixed-term contracts as the Italian Court of Cassation states (paragraph 102, sentence 22552 of 07.11.16, on which we will return), because the jurisprudence of the Supreme Court forgets art. 14 of the law n. 270/1982:

"14. Use of tenured teaching staff.

The use of the teachers of the additional equipment must contribute to the primary and secondary school, and as far as compatible with the kindergarten, to carry out an educational program in accordance with the law of 4 August 1977, n. 517, while ensuring that the following requirements are met as a matter of priority:

- coverage of teaching posts that can not contribute to estabilish professorships or *COE*[5];

- coverage of teaching posts which are in any case vacant and available for a period of not less than 5 months within the district or neighboring districts;

- replacement of the teachers assigned to the tasks referred to in the following sixth paragraph;

- replacement of teachers involved in the implementation of full-time schools;

- replacement of teachers involved in the development of adult education courses in order to achieve qualifications and for the teaching in experimental courses at secondary school made for workers;

- replacement of teachers used in accordance with the ninth paragraph, second sentence of this article.

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[4] Thus the quoted point: "90 The same order for reference states that the national legislation in question, as is clear from Article 4 of Law no. 124/1999, read in conjunction with Article 1 of Decree n. 131/2007, provides for three types of substitutes: first, the annual substitutes on the *Organico di Diritto*, pending the completion of competition procedures for the recruitment of permanent staff, for vacant and available positions, as without a holder, whose term corresponds to that of the school year, i.e. 31st august; secondly, temporary substitutes on the *Organico di Fatto* workforce, for non-vacant but available places, whose term corresponds to that of teaching activities, i.e. on 30th june, and, thirdly, the temporary substitutes, or temporary short substitutes, in other hypotheses, whose term corresponds to the cessation of the needs for which they were arranged ".

[5] *Copertura Oraria Esterna* (covering additional working hours to ensure the educational continuity and to allow teachers to complete their 18h/24h scheduled time par week).

To this end, the director of studies defines the contingent on a district basis and assigns to each circle or school, in relation to needs, a contingent of teachers of additional provision for kindergarten, elementary and middle school. "

• As you can see, in theory, the system is perfect: the temporary needs should be covered by the additional staff and, therefore, the contracts for (allegedly) temporary substitutes on the *Organico di Fatto* actually have no reason to be stipulated, unless the employer - administration does not prove to have activated and to have exhausted the personnel hired in the additional staff and the existence of the objective reason that requires the use of fixed-term employment.

• Reason that must be clarified, assumed that every act of the Italian public administration must be motivated (moreover it was provided) for Article 1 of Legislative Decree 368/2001 and also it is provided for Article 36 of the Legislative Decree 165/2001, that allows the signature of forward contracts by the public administration only in the presence of "exceptional or temporary" reasons).

• Not by chance, the Collective Agreement in force before the recent renewal, on art. 40, required the identification of the replaced worker in the event of replacement of absent staff.

• Well, in the new collective agreement signed on 8th february 2018 on this obligation no trace can be found and for this only, the idea that the statement of the new contract would be suitable for contributing to overcoming the precariousness, appears to be completely prodigious.

• It is no coincidence that the European Commission, at the moment, after closing the infringement proceeding 2010/2124, was forced to open another one, the 2014/4231, still pending following the continuous and repeated petitions of the precarious Italian public employees.

• Furthermore, to demonstrate the artificial character of the distinction between Organico di Fatto and Organico di Diritto, consider yourself, moreover, that by the admission of the same Government [...] *In Italy we have little more than 600 thousand teachers assigned to the classes. They constitute the "Organico di Diritto", calculated starting from the number of students enrolled, from the classes required and authorized, and from the timetable of the individual subjects of teaching. There are just over 600 thousand professorships between primary, secondary and first level secondary schools. But in the classroom we do not have as many professors hired and usable for all the educational activities. (...) However this staff is not enough to cover all the lessons. Every year a misalignment is created between the expected need each school urge for the next year and the actual requirement needed in September, at the beginning of the year. All this, over the years, estabilished what in the school world is called "Organico di Fatto": a "parallel*

force" of teachers that meets the concrete needs and that photographs the real school situation... [...]
(Quote from the document "La Buona Scuola").

• This clarification of the Italian government helps to understand how the distinction between *Organico di Fatto* e *Organico di Diritto* (more simply: temporary staff, up to the month of july / permanent staff, up to July) concerns in any case the needs for employees, namely staff number need.

• These are two parallel organics, the first of which responds to a programme made on the basis of the enrolments, the second, to the needs updated at the time of the beginning of the lessons.

• The staff hired as *Organico di Fatto*, therefore, is going to cover the real lack of staff, not replacing any holder.
From the point of view of the REAL organic needs, the departments of the *Organico di Fatto*, form EMPTY professorships, such as:

- without a holder

- required to satisfy a stable organic need.

• Lastly, the permanent and structural nature of the needs of school staff, satisfied with substitutes hired from *Organico di Fatto* is clearly demonstrated by the composition of the staff made of teachers in charge of didactic support for disabled pupils.

The support staff in the last ten years have been as follows:

Year	**Jobs in *Organico di diritto* assigned to Tenured Professors.**	**Jobs in *Organico di Fatto* assigned with contracts until the 30th june.**
2007/08	48696	40.661
2008/09	53581	36.445
2009/10	58463	30.701
2010/11	63348	31.158
2011/12	63348	34.735

2012/13	63348	37.917
2013/14	67795	44.417
2014/15	81378	38.006
2015/16	90.032	38.895
2016/17	96.238	46.692

• Of the 142,930 didactic support- posts activated in 2016/2017, therefore, only 96,238 have been assigned to tenured professors, while the remaining 46,692 are by derogation, i.e. transferred from teachers with contracts until the 30th june. This is enough to show that - as the Italian Government itself recognizes - the *Organico di Fatto* represents a "parallel" contingent of teachers that satisfies the concrete needs and which reflects the real situation of the Italian school.

D) The legislative action refered to in Law 107/2015

• The system that has now been described is still in full force, despite the approval of Law 107/2015 and the recalled renewal of the Collective Agreement. In fact, let us look at what was claimed by the Italian State in point 5 of the additional remarks of 1st february 2018.

• It is true that the regulations indicated by the Italian Government provide both specific deadlines for new competitions and an extraordinary plan to the stabilization of precarious workers.

• On the first point we can already state, pursuant to art. 17 of the Legislative Decree 59/17, as implemented by the Ministerial Decree n. 995 of 15th december 2017, that not even the staff, currently precarious, excluded from the extraordinary plan of permanent positions required by law 107/15 - as not present at the *Graduatorie Permanenti e di Merito* -, and admitted to the new competition launched on the management of the transitional phase, will be stabilized as the percentage of new hires reserved for new *Graduatorie Regionali di Merito ad esaurimento* -regional ranking list- while in the next decade will come up to cover only the 20% of those vacancies and available posts, which again today continue to be covered with substitutes from *di Fatto* staff (87,000 for the 2017/18 academic year), in the terms specified above.
On the contrary, as a result of the aforementioned systems, the number of employees included into the new regional merit-based rankings will be reduced in the next decade to the 20% of the *Organico di Diritto* overall vacant.

• The same is true for the stabilization work, initially planned for 150,000 precarious workers in 2014 and then concretely implemented, in 2015 for only 85,000 precarious teachers present in the *Graduatorie ad Esaurimento e di Merito*, without any enhancement of the previous fixed term-teaching period. Extraordinary stabilization plan that, already, other times the Italian State had prepared and implemented partially before the *Mascolo* ruling of the ECJ (see Law 296/06 for a forecast of 150 thousand units and law 106/11 with the construction of new 67 thousand permanent roles).

• In the *Graduatorie ad Esaurimento* were in fact subjects who had never done even one day of teaching, but had remained enrolled at the very end of those rankings for years and that, suddenly, they have been called to go to the chair and teach without any experience or a proper preparation.

• In truth, the absence in law 107/15 of a stabilization measure for teachers in the *Graduatorie d'Istituto*, or those engaged in the *Organico di Fatto* and already mentioned, was not compensated by the management of the new transitional phase for the teachers recruitment. The latter, a large number of them have abundantly exceeded 36 months of service, they constitute over 100,000 subjects, still in a precarious employment status.

• No stabilization measures, finally, for *ATA* employees (administrative technical assistants), who are only reserved the possibility of obtaining compensation for damages (see below), apart from the 8 thousand in-service permanent entries arranged over the five-year period in the context of 50 thousand annual forward contracts.

• Indecisive is the measure that indicates in 36 months the maximum period of use (extendable for a further year) of the precarious teacher, as provided by the art. 1, paragraph 131 of the law 107/15. This is a measure that certainly does not solve the problem of insecurity and precariousness, rather it amplifies it. In fact, as long as the system does not overcome the problem of the *Organico di Fatto e Organico di Diritto*, fully applying to the school sector the art.5 paragraph 4 bis of Legislative Decree 368/2001 (see the related standard, cited in the Additional Observations of the Italian Government, page 3, point 4) and stabilizing the staff with more than 36 months of service, exceeding the deadline set from paragraph 131[6] of the art. 1 of Law 107/2015 the school precariousness, teachers and ATA staff, will continue to persist and increase.

• Since the school staff will not be able to work for more than 36 months, it will be the consequence that precarious employees will lose the possibility to work in the school after this period (except the recruitment in a different category, expressly provided for in Article 5 paragraph 4 bis[7]), with all the consequences resulting from the loss of job.

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[6] And not "paragraph 3", as erroneously indicated in the Additional Written Remarks of the Italian Government.

[7] This also speaks about the suitability of this provision in order to prevent and sanction the illegal use of fixed-term contracts: it is in fact sufficient that the worker exceeds three (four) years of job insecurity and hired again in a different professional category so the abuse can reiterate indefinitely for the same period.

• Moreover, the school administration will be forced to hire more staff, increasing the number of temporary workers.

• As we can see, therefore, insecurity problem in the school sector is not behind us or, even if only, in the process of being overcome, assumed that those who lose their jobs by virtue of paragraph 131 of art. 1 of Legislative Decree 75/2015 will be forced to turn to private institutes to teach, which are taking them to temporary positions.

E) On compensation for damages as an insufficient sanctioning measure

• The situation, in the same way, is not decisive with reference to the measure of compensation for damage guaranteed by the new Legislation.

• The jurisprudence of the Italian Court of Cassation has in fact pronounced itself with a series of twin sentences mentioned in the complaint to the points 88 and following to which reference is made.

• In summary[8], however, it is noted that the compensation is in fact limited to those who have passed the four-year contract term[9] and who have carried out their activities on *Organico di Diritto*[10]. In theory the compensation is also due to those who have operated on *Organico di Fatto* but the Court of Cassation, with the judgments mentioned, has surprisingly stated that working on the *Organico di Fatto* actually requires the legitimacy of the contract, charging the employee of the obligation to prove that the contract was not aimed to the replacement of absent staff, whereas the burden of proof on the conditions justifying the conclusion of the temporary contract has always been placed on by the employer, in the previous and consolidated case law of the Court of Cassation, in homage also to the general principle of closeness to the trial[11].

• But not only. In the Tenore c/ Miur case, which ended in judgment 9058/2017, the Court of Cassation, although it is not disputed that the applicant, a teacher with more than 36 months, had worked to be considered certainly on the *Organico di Diritto*, the claim for damages was rejected because, in the course of proceedings, she become a permanent employee.

• This ruling has been the subject of an appeal to the ECHR by the worker (Annex F) which, at present, has declared it admissible (Annex G).

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[8] More widely, see the complaint, points 88 et seq.

[9] Until three years the contracts are considered *ipso iure legitimi* (point 127 of the ruling 22552/2017) even if performed on *Organico di Diritto*. It should be noted that, moreover, the *Organico di Diritto* coincides with the staff included in the *Graduatorie ad Esaurimento*, i.e. the one that should have been stabilized pursuant to Law 107/2015.

[10] Also item 127 of the judgment 22552/2017, cited in the previous note.

[11] Which evidently is of the employer who organizes the company or the public administration concerned. On the question of closeness to the proof, see the consolidated jurisprudence of Italian legitimacy: ex multis: Cass. civ. Sec. III, 31/03/2016, n. 6209 (see 639386); Cass. civ. Sec. III, 25/03/2016, n. 5961 (see 639331); Cass. civ. Sec. V, 09/03/2016, n. 4623; Cass. civ. Sec. work, 14/01/2016, n. 486 (see 638521); Cass. civ. Sec. V, 02/12/2015, n. 24492.

F) The need for the intervention of the Social Rights Committee

• As we can see, the current Italian legislation, despite the legislative measures that have taken place and the renewal of the National Collective Agreement, has not solved the problem of the precariousness of the school, on which, moreover, two other preliminary rulings are pending before the European Court of Luxembourg, relevant to the present case.

• The first concerns precisely the decision of the Court of Cassation not to recognize the compensation for damage even against years and years of school job insecurity due to the fact that the stabilization as a permanent employee involved the worker concerned (Rossato procedure, case C-494/17) and the second concerns the prohibition of stabilization to a permanent position in lyric institutions - of a public nature - in the light of the abuse committed in the use of fixed-term contracts (Sciotto, case C-331/17).

• In both these proceedings, the conclusions of the European Commission (which are attached below H and I) fully accepted the demands of temporary workers, noting that the current national legislation, under the different profiles examined, precludes the EU Directive no. 70 of 1999.

• In short, in this situation it is not right that someone can say that a pronouncement of this Committee is completely useless.

P.Q.M.

the Committee is asked to comment on the violations of the convention denounced with the 146-177 complaint submitted by Anief.

It produces:

A) Ccnl school 2016-2018

B) Question for a preliminary ruling Trib. Trento in Motter c / Miur

C) Observations in the European Court in proc. C-466/17 of the private part

D) Observations on the European Commission in Motter C-466/17

E) Italian Court of Cassation ruling 22552/2017

F) Recourse to the ECHR Tenor Vs. MIUR

G) Certification of admissibility of the appeal Tenor

H) Conclusions EU Commission in Rossato c / Miur

I) Conclusions EU Commission in Case Sciotto c / Teatro opera

Rome, there 3rd April 2018

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