EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

28 February 2018

Case Document No. 1

***Associazione Professionale e Sindacale* (ANIEF) v. Italy**
Complaint No. 159/2018

COMPLAINT

Registered at the Secretariat on 12 February 2018

Department of the European Social Charter Directorate General Human Rights and Rule of Law
Council of Europe
F-67075, Strasbourg Cedex

For the kind attention of the Executive Secretary of the European Committee of Social Rights,
acting on behalf of the Secretary General of the Council of Europe

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

****

Information concerning the complainant trade union organisation ANIEF

1. **ANIEF Associazione Professionale e Sindacale** (see the Statute, **Doc. 1**), with registered office at Via del Celso 49, Palermo 90134, Italian tax ID and VAT number 00906801006, represented by its current President and legal representative Mr Marcello Pacifico, born in Palermo on 28 April 1977, is a professional and trade union association which represents and assists more than 70,000 workers from the branch of schools in Italy administered by the state, including both teaching and administrative, technical and auxiliary staff working for the Ministry of Education, Universities and Research (hereafter, MEUR) under both permanent and fixed-term employment contracts (so-called supply appointments).

2. The membership of the ANIEF is comprised of 40,183 individuals whose membership forms were certified by the Ministry for the Economy and Finance in December 2017 and a further 24,665 individuals who paid membership fees again in 2017, amounting to a total of 65,000 teachers and fixed-term and permanent ATA (administrative, technical and auxiliary) staff represented (the underestimated provisional data are currently available, which have been appended to the list of convocations by ministers and Parliament, in **Doc. 2**). The ANIEF offers assistance to its members throughout the country at 46 branch offices and 126 contact points with 363 trade union officials who co-operate free of charge in the performance of their duties, including 40 on a leave of absence with the CONFEDIR, the trade union confederation representing public sector directors. During the last elections of

unitary trade union representatives in Italian schools, which were held in 2015, the ANIEF presented 2,301 lists for a total of 8,575 schools, and was able to elect 705 new trade union officials, covering almost one school out of nine. At confederal level it is represented by the CISAL – autonomous confederation for the public sector branch – whilst at national and supranational level it is represented by the CESI – a social partner recognised by the European institutions. Through its activity the ANIEF has established itself both as an opinion leader in the debate on Italian schools policy, as is apparent from widespread press reports and the considerable number of legal actions brought before the administrative courts and the Council of State (103,008 claimants) and before the labour courts (32,006 claimants), not to speak of the proceedings initiated that have reached the Constitutional Court and the Court of Justice of the EU.

In recent years the claims pursued by the ANIEF have resulted in around ten general strikes being declared and in various demonstrations and marches involving thousands of people, whilst the holding of training and refresher courses for staff in service has been continuously pursued with more than 1,652 seminars on the law applicable to schools attended by a total of 35,924 participants.

Finally, the institutional profile of the ANIEF has been recognised also by Parliament on the various occasions on which it has been heard by committees from both the Chamber of Deputies and the Senate in relation to all issues concerning schools and workers in schools as well as by the MEUR in informal meetings discussing various issues of particular significance for disputed matters and the state of agitation of workers in schools.

The ANIEF therefore represents and assists tens of thousands of workers from the branch of schools in Italy administered by the state, including both teaching and administrative, technical and auxiliary staff working for the MEUR under both permanent and fixed-term employment contracts, with a certified level of representativeness.

3. In this collective complaint the ANIEF is represented by its current President and legal representative Mr Marcello Pacifico. Communications for the purposes of this complaint should be made via the email address segreteria@anief.net or presidente@anief.net and/or the telephone number +39 091 7098355 and/or the fax number +39 091 6455845 and/or the mobile telephone numbers +39 338 4167107 or +39 392 9322359.

4. For the purposes of this complaint, the *ANIEF Associazione Professionale e Sindacale* is being assisted by **Mr Sergio Galleano** of the Milan Bar (Italian tax ID GLLSRN52E18F205N), **Mr Vincenzo De Michele** of the Foggia bar (Italian tax ID DMCVCN62A16D643W), **Ms Ersilia De Nisco** of the Rome bar (Italian tax ID

DNSRSL79T68A783N), **Mr Fabio Ganci** of the Palermo bar (Italian tax ID GNCFBA71A01G273E), **Ms Gabriella Guida** of the Foggia bar (Italian tax ID GDUGRL72759D643R) and **Mr Walter Miceli** of the Palermo bar (Italian tax ID MCLWTR71C17G273N).

Reference email address: roma@studiogalleano.it; studiodemichele@gmail.com.

5. ANIEF has already filed with the ECSR collective complaint no. 146/2017 concerning insecure employment within schools, which was declared admissible by the Committee and is currently in the merits stage, with the written observations of the Italian Government filed on 7 January 2018 and the deadline for the filing of a response by the ANIEF set at 12 March 2018.

6. The reason for the filing of this new collective complaint is the adoption of **judgment no. 11/2017 of 20 December 2017 of the Council of State in plenary session** (see **Doc. 3**), by which the supreme administrative court unexpectedly departed from the established case law of the 6th Division of the Council of State concerning the suitability of a **primary school teaching certificate** [“*diploma magistrale*”] awarded up to the 2001-2002 school year in establishing eligibility for inclusion in the provincial eligibility ranking lists to be drawn upon until exhaustion (so-called “ERE”) for the award of fixed-term annual supply teaching appointments (from 1 September until 31 August of the following year) and for appointments until the end of teaching activity (from 1 September to 30 June of the following year) pursuant to Article 4(1) and (2) of Law no. 124/1999, and also for the granting of tenured status pursuant to Article 399(1) and (2) of Legislative Decree no. 297/1994.

****

Contracting party which has violated the European Social Charter: ITALY

****

Presentation of national legislation

The Constitution

1. Constitution

7. The Constitution of the Italian Republic, adopted on 1 January 1948, provides as follows:

> **Article 1**
> Italy is a democratic Republic founded on labour.
> Sovereignty belongs to the people and is exercised by the people in the forms and within the limits set forth in the Constitution.

Article 3
All citizens have equal social dignity and are equal before the law, without distinction with regard to sex, race, language, religion, political opinion or personal and social circumstances.
It is the duty of the Republic to remove those obstacles of an economic or social nature that constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

Article 4
The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective.
Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society.

Article 35(1)-(3)
The Republic shall protect work in all its forms and practices.
It shall make provision for the training and professional advancement of workers.
It shall promote and encourage international agreements and organisations that have the aim of establishing and regulating labour rights.

Article 39
Trade unions may be freely established.
No obligations may be imposed on trade unions other than registration at local or central offices, as provided for by law.
A condition for registration shall be that the statutes of trade unions establish their internal organisation on a democratic basis.
Registered trade unions shall have legal personality. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have mandatory effect for all persons belonging to the categories referred to in the agreement.

Article 51
Any citizen of either sex shall be eligible for public office and elected positions on equal terms, in accordance with the conditions established by law. To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men.
The law may grant Italians who are not resident in the Republic the same rights as citizens for the purposes of access to public offices and elected positions.
Any person who is appointed to public office shall be entitled to the time necessary in order to perform that function and to retain his or her existing employment.

Article 97
The public administrations shall ensure balanced budgets and sustainable public debt, in accordance with provisions of European Union law.
Public offices shall be organised according to law in such a manner as to ensure the proper conduct and impartiality of the administration.
The provisions governing the organisation of offices shall stipulate the areas of competence, the duties and the responsibilities of officials.

Employment within the public administration shall be accessed through competitive examinations, except in the cases established by law.

Article 117(1)
Legislative powers shall be vested in the State and the Regions in accordance with the Constitution and with the constraints deriving from EU legislation and international obligations.

****

Special legislation on the recruitment of teachers with a primary school teaching certificate in the Schools Branch

2. Legislative Decree no. 297 of 16 April 1994

8. **Legislative Decree no. 297 of 16 April 1994** approved the Consolidated Act of legislative provisions applicable to education in relation to schools of every type and level.

Article 197(1) of Legislative Decree no. 297/1994 provided, in conjunction with Article 53[1] of Royal Decree no. 1054 of 6 May 1923 (Gentile reform), for the recognition of the primary school teaching certificate as a qualification establishing accreditation for teaching in elementary schools.

Article 197(1) of Legislative Decree no. 297/1994 provided as follows until 24/9/1998:

1. Upon conclusion of the course of study in a grammar school [ginnasio-liceo classico], scientific secondary school [liceo scientifico], art high school [liceo artistico], technical secondary school [istituto tecnico] and primary school teacher-training institute [istituto magistrale] a school-leaving examination shall be taken, which shall be a state examination and shall be held in one single annual session. The qualification awarded in the school-leaving examination upon completion of the course of studies in the technical secondary school and the primary school teacher-training institute shall establish eligibility, respectively, to practise the profession and to teach in a primary school; the foregoing shall be without prejudice to the provisions laid down in special legislation.

Article 399 of Legislative Decree no. 297/1994 contains the provisions governing recruitment to permanent positions ("access to tenured status") of teaching staff within schools administered by the state.

Article 399(1)-(2) of Legislative Decree no. 297/1994 provided as follows until 24 May 1999:

1. Appointments to tenured teaching positions in nursery, primary and secondary schools, including art high schools and art institutes, shall be made pursuant to competitions based on qualifications and examinations and by competitions based solely on qualifications; 50% of the positions for which competitions are held shall be allocated each year to each type of competition.

[1] Article 53(1) Royal Decree no. 1054/1923 provides as follows: "Primary school teacher-training colleges shall have the purpose of training primary school teachers. It shall be delivered in '*istituti magistrali*'".

2. The holding of competitions shall be subject to the actual availability during the reference three-year period of tenured teaching posts or appointments, taking account of the provisions of Articles 442 and 470(1) applicable to new appointments as well as the number of transfers between different forms of tenured status or transfers between different levels of school implemented following completion of professional requalification courses. In the event that a ranking list for a competition based on qualifications and examinations has been exhausted and positions covered by it remain, these shall be added to the parallel competition based on qualifications; the same shall apply *mutatis mutandis* if the opposite is the case. The said positions shall be included on the occasion of the next competition procedure.

Article 399(1)-(2) of Legislative Decree no. 297/1994 has provided as follows since 25 May 1999:

1. 50% of the appointments eligible for allocation each year to tenured teaching positions in nursery, primary and secondary schools, including art high schools and art institutes, shall be made by competitions based on qualifications and examinations, whilst the remaining 50% shall be made by drawing on the permanent ranking lists pursuant to Article 401.
2. In the event that a ranking list for a competition based on qualifications and examinations has been exhausted and positions covered by it remain, these shall be added to those allocated to the corresponding permanent ranking list. The said positions shall be included on the occasion of the next competition procedure.

Article 401 of Legislative Decree no. 297/1994 contains the provisions governing the formation of ranking lists from competitions based on qualifications (until 24 May 1999) and permanent ranking lists (from 25 May 1999 until the present time) for the purposes of making permanent appointments for 50% of the quota provided for under Article 399(1) of Legislative Decree no. 297/1994, in addition to the fixed-term appointments of teaching staff from schools administered by the state.

Article **401** (“Competitions based on qualifications”)**(1)-(4) and (11) of Legislative Decree no. 297/1994** provided as follows until 24 May 1999:

1. The following shall be required in order to establish eligibility for competitions based solely on qualifications: a) successful completion of the examinations in a previous competition based on qualifications or examinations or of previous examinations even solely for the purpose of establishing accreditation in relation to the same competition class or the same position; b) teaching work in institutions and schools administered by the state of every type and level, including Italian schools abroad, in positions corresponding to tenured appointments, performed on the basis of the academic qualification required for eligibility for the appointments, as well as for teaching positions relating to competition classes. The work must have been performed for at least three hundred and sixty days, which need not have been continuous, over the previous three-year period, whereby, on the one hand, work performed in a nursery school may be cumulated with that performed in a primary school, whilst, on the other, work performed in secondary schools and educational institutes may also be cumulated. Work performed in Italian schools abroad shall be taken

into account if performed pursuant to an appointment by the Administration of Foreign Affairs.
2. Participation in competitions based on qualifications shall be permitted in two provinces and in all competitions for which the candidates fulfil the prerequisites for admission.
3. The ranking lists for competitions based on qualifications shall be drawn up on the basis of the overall score obtained by each competitor. Appointments to upper secondary school positions shall be ordered for the quota of the provincial roll to which participation in the competition relates.
4. The ranking lists relating to competitions based on qualifications shall have permanent status and shall be updated every three years. The new candidates shall be included in the position corresponding to the overall score obtained; candidates already included in the ranking lists who have not yet been appointed shall be entitled to remain in the ranking list and to alter their score through the assessment of new qualifications relating to teaching and educational activity, along with cultural, professional, scientific and technical activity, provided that they have requested their continuing inclusion, and submitted the new qualifications, within the time limit specified in the competition notice …..
11. The ranking lists for competitions based on qualifications may be used only after the exhaustion of the corresponding ranking lists compiled pursuant to Article 17 of Decree-Law no. 140 of 3 May 1988, converted with amendments into Law no. 246 of 4 July 1988 and to Article 8-bis of Decree-Law no. 323 of 6 August 1988, converted with amendments into Law no. 426 of 6 October 1988, and of the provincial ranking lists pursuant to Articles 43 and 44 of Law no. 270 of 20 May 1982, along with any other ranking lists that are still valid from previous competitions based on qualifications and examinations.

Article 401 ("Permanent ranking lists")**(1)-(2) of Legislative Decree no. 297/1994** has provided as follows since 25 May 1999:

1. The eligibility ranking lists for competitions based solely on qualifications to recruit teaching staff in nursery, primary and secondary schools, including art high schools and art institutes, shall be transformed into permanent eligibility ranking lists, which shall be used to make tenured appointments pursuant to Article 399(1).
2. The permanent eligibility ranking lists falling under paragraph 1 shall be regularly supplemented by the inclusion of teachers who have passed the tests set within the most recent regional competition based on qualifications and examinations for the same competition class and the same position, and of any teachers who have requested a transfer from the equivalent eligibility ranking list of another province. At the time the new aspiring candidates are included, the positions in the eligibility ranking list of those already included in the permanent eligibility ranking list shall be updated.

3. Law no. 124 of 3 May 1999

9. **Law no. 124 of 3 May 1999** made provision in relation to school staff. **Article 4 of Law no. 124/1999** makes provision to govern supply appointments (fixed-term contracts) of teaching (and ATA) staff to schools administered by the state.

Article 4 of Law no. 124/1999 provides as follows:

1. Annual supply teaching appointments may be made in order to cover teaching positions and posts that are effectively vacant and available before 31 December, and which are expected to remain so for the entire school year, where it is not possible to fill the vacancy using tenured teaching personnel employed within the same province or using supernumerary personnel, provided that no tenured personnel have already been allocated on any basis to such positions, pending the completion of competition procedures leading to the appointment of tenured teaching personnel.
2. Temporary supply teaching appointments may be made until the completion of teaching activities in order to cover teaching positions and posts that are not vacant but which become de facto available before 31 December and will remain so until the end of the school year. Similarly temporary supply teaching appointments may be made until the completion of teaching activities in order to cover teaching hours that are not part of time-tabled posts or positions.
3. In situations other than those provided for under paragraphs 1 and 2 supply teachers shall be appointed.
4. Provincial staffing posts may not under any circumstances be filled by the appointment of non-tenured teaching staff.
5. By decree adopted in accordance with the procedure laid down by Article 17(4) and (4) of Law no. 400 of 23 August 1988, the Minister for Public Education shall issue regulations to govern the awarding of annual and temporary supply appointments in accordance with the criteria set forth in the following paragraphs.
6. Annual supply teaching appointments and temporary supply teaching appointments until the end of teaching activity shall be made with reference to the permanent ranking lists pursuant to Article 401 of the Consolidated Act, as replaced by Article 1(6) of this Law.
7. Supply teaching appointments pursuant to paragraph 3 shall be made with reference to the district or school ranking lists. The criteria, arrangements and time limits applicable to the formation of such ranking lists shall be based on the principles of simplification and streamlining of procedures, having regard also to the documentation to be submitted by candidates.
8. Those persons who have been included in the permanent ranking lists pursuant to Article 401 of the Consolidated Act, as replaced by Article 1(6) of this Law, without prejudice to Article 40(2) of Law no. 449 of 27 December 1997, shall be entitled, in the relevant order, to absolute priority in the awarding of temporary supply appointments within the schools to which they have applied. Absolute priority for secondary and art schools shall be given only to the competition classes within the permanent ranking list on which the candidates have been included.
9. Candidates who, on the basis of competitions based on examinations and qualifications for positions as teachers in primary schools, have been included in the merit-based ranking list and who have passed the optional examination attesting to knowledge of one or more foreign languages shall be given precedence in the awarding of supply teaching appointments for positions the holders of which teach a corresponding foreign language.
10. The awarding of temporary supply teaching appointments shall be authorised exclusively for the period during which there is an effective service requirement. Remuneration shall be paid only for the actual duration of the supply teaching appointments.
11. The provisions of the previous paragraphs shall also apply to administrative, technical and auxiliary (ATA) staff. Supply teaching appointments of staff from the third category pursuant to Article 51 of the National Collective Labour Agreement for the "Schools"

Branch, published in ordinary supplement no. 109 to Official Journal no. 207 of 5 September 1995, shall be made with reference to the ranking lists for the provincial competitions based on examinations pursuant to Article 554 of the Consolidated Act.
12. The provisions of the previous paragraphs shall also apply to teaching and ATA staff in Academies and Conservatories.
13. The foregoing shall be without prejudice, for the Music Conservatory of Bolzano, to the special provisions on the awarding of supply teaching appointments adopted by way of implementation of the Special Statute for Trentino-Alto Adige.
14. Articles 272, 520, 521, 522, 523, 524, 525, 581, 582, 585 and 586 of the Consolidated Act shall be repealed with effect from the entry into force of the provision referred to in paragraph 5.
14-bis. Fixed-term contracts concluded for the purpose of awarding the supply teaching appointments provided for under paragraphs 1, 2 and 3, insofar as necessary in order to guarantee the constant provision of the schooling and educational service, may be transformed into permanent contracts only in the event that tenured status is granted in accordance with the applicable provisions and on the basis of the ranking lists provided for under this Law and under Article 1(605)(c) of Law no. 296 of 27 December 2006, as amended.

4. Law no. 341 of 19 November 1990

10. Article 3(2) of Law no. 341/1990 on the reform of university teaching regulations provided for the establishment of a degree course offering two alternative specialisations, one for nursery school and the other for primary school, as a qualification establishing eligibility for participation in competitions for teaching posts.

Article 3(2) of Law no. 341/1990 provides as follows:
2. A specific degree course, offering two alternative specialisations, shall be established for the purpose of the cultural and professional training of teachers respectively in nursery schools and primary schools, having regard to the provisions governing their respective legal status. The degree shall constitute a necessary qualification, depending upon the specialisation chosen, for admission to competitions for teaching posts in nursery schools and primary schools. The degree course specialising in the cultural and professional training of teachers in primary schools shall also constitute a necessary qualification for the purpose of admission to the competitions for appointments as teachers in state educational institutions. Competitions shall have the function of establishing eligibility. The departments concerned shall contribute to the two degree courses; the proper operation of the above-mentioned courses shall be ensured using the facilities and, with their consent, the lecturers and researchers of any faculties in which the necessary expertise is available.

5. Inter-ministerial Decree of 10 March 1997 and status for the purposes of establishing accreditation of four-year primary school teacher-training certificates awarded up to the 2001-2002 academic year

11. In actual fact, it was only by the issue of the **Inter-ministerial Decree of 10 March 1997** that Law no. 341/1990 was enacted, with the establishment of a specific degree course,

offering two alternative specialisations, for the training of teachers of nursery schools and primary schools.

12. Article 1 of the Inter-ministerial Decree of 10 March 1997 provided, with effect from school year 1998-1999, for the abolition of the ordinary courses (three-year and four-year) respectively in primary school teacher-training colleges and teacher-training institutes along with the abolition, with effect from school year 2002-2003, of the annual supplementary courses held in teacher-training institutes, required to establish eligibility for university courses. Article 1 also provided that, until the introduction of the new course through regulation, primary school teacher-training colleges and teacher-training institutes could continue to operate until the completion of the five-year experimental courses established pursuant to Article 278 of Legislative Decree no. 297/1994, specifically those with a linguistic, socio-psycho-pedagogical and a scientific-technological focus, which however would not be considered to establish eligibility to teach in primary and nursery schools.

13. In addition, Article 2 of the Inter-ministerial Decree of 10 March 1997 provided that academic qualifications obtained following completion of the three-year and four-year experimental courses at primary school teacher-training colleges and experimental four-year and five-year courses at teacher-training institutes that were started during or before the 1997-1998 academic year or otherwise awarded during or before the 2001-2002 academic year should permanently retain their current legal status and establish entitlement to participate in the sessions for the granting of accreditation to teach in nursery schools, as provided for under Article 9(2) of Law no. 444/1968, as well as in ordinary competitions based on qualifications and examinations for teaching positions in nursery schools and primary schools.

14. With effect from 24 September 1998, Article 197(1) of Legislative Decree no. 297/1994, which recognised the completion of “ordinary” three-year courses at primary school teacher-training colleges and four-year courses at teacher-training institutes as establishing accreditation to teach respectively in nursery schools and in primary schools, was repealed and replaced, pursuant to Article 8(2) of Law 425/1997, **by Article 15(7) of Decree of the President of the Republic no. 323 of 23 July 1998**.

15. **Article 15(7) of Decree of the President of the Republic no. 323/1998** in particular provides that “*The certificates awarded in the state examination upon completion of courses at teacher-training institutes that began during or before school year 1997-1998 shall retain on a permanent basis* ***the current legal status and shall continue to constitute accreditation for teaching in primary schools****. They shall establish eligibility for participation in*

competitions based on qualifications and examinations for teaching positions in nursery schools and primary schools.".

16. However, for nine years from 1990 until 1999 no public competitions were organised for teaching in primary schools and nursery schools, nor were there any competitions based on qualifications pursuant to Article 401 of Legislative Decree no. 297/1994 (qualification establishing accreditation + 360 days of service during the three-year period prior to the holding of the competition), in the version in force prior to the amendment introduced by Article 1 of Law no. 124/1999, which had the effect of preventing the holders of primary school teaching certificates who had completed the ordinary four-year course establishing accreditation from participating in the recruitment procedures for permanent appointments pursuant to Article 399(1) of Legislative Decree no. 297/1994 through inclusion in the permanent ranking lists of the competition based on qualifications, which was operational until 24 May 1999.

17. Moreover, the new wording of Article 401 of Legislative Decree no. 297/1994, introduced by Article 1 of Law no. 124/1999, which involved the establishment of permanent ranking lists for supply teaching appointments, allocating 50% of the permanent positions to be recruited, also did not change the legal status of the holders of primary school teaching certificates who, whilst holding accreditation to teach, did not benefit from any provision **clearly** stipulating their automatic inclusion on the permanent ranking lists.

18. In particular, Article 2(2) of Law no. 124/1999 provided that the following persons were entitled to be included in the first round on the permanent ranking lists pursuant to Article 401 of Legislative Decree no. 297/1994, along with any teachers requesting a transfer from the corresponding ranking list of another province: ……. "*b) teachers who have passed the examinations in a previous competition based on qualifications and examinations or previous examinations even solely for the purpose of establishing accreditation in relation to the same competition class or the same position who, as at the date of entry into force of this Law, have been included on a ranking list for the hiring of non-tenured staff.*". Essentially, the examination establishing accreditation for the award of the primary school teaching certificates, along with inclusion in the band III institute ranking lists (which the MEUR stipulated as the sole lists establishing eligibility for the holders of such qualifications to teach in primary schools, notwithstanding the fact that the band III institute ranking lists were intended for teachers "lacking accreditation") should in any case have enabled the inclusion of the holders of a primary school teaching certificate on the permanent ranking lists established pursuant to Article 401 of Legislative Decree no. 401/1994.

19. However, that possibility is contradicted by the legislature itself by the change introduced by Law no. 124/1999, Article 2(4) of which provides that, at the same time as the first competition based on qualifications and examinations following the entry into force of Law no. 124/1999 is announced, the Minister of Public Education shall announce a reserved session of examinations for the award of the accreditation or eligibility required in order to teach in nursery schools, in primary schools and in institutes and schools providing secondary and art education, establishing entitlement to inclusion on the permanent ranking lists.

20. Article 2(4) of Law no. 124/1999 draws a distinction, for the purposes of eligibility to take the reserved examinations, between teachers who are not accredited and primary school teachers (who are deemed to be accredited to teach pursuant to Article 197 of Legislative Decree no. 197/1994 [but]) "who have not been certified as eligible", who have worked in institutions and schools administered by the state, including Italian schools abroad, or in institutes or schools providing secondary education that have been lawfully recognised or recognised as equivalent to schools administered by the state or in authorised nursery schools or in primary schools recognised as equivalent to schools administered by the state for at least 360 days during the period falling between the 1989-1990 academic year and the date of entry into force of this Law, including at least 180 days during or after the 1994-1995 academic year.

21. The exclusion of holders of primary school teaching certificates – notwithstanding the fact that they hold accreditation to teach in primary and nursery schools – from inclusion on the permanent ranking lists has been repeated on the occasion of the annual updating of the permanent ranking lists, including the inclusion of new candidates, pursuant to Article 1 of Decree-Law no. 255 of 3 July 2001.

22. A situation which is in part different occurs upon the new biennial updating of the permanent ranking lists since, in redetermining, under Article 1(1), the prerequisites for inclusion in the last bracket (band III) of the permanent ranking lists pursuant to Article 401 of Legislative Decree no. 297/1994 on the basis of the table annexed to the Decree, **Decree-Law no. 97 of 7 April 2004** (converted, with amendments, into Law no. 143/2004), stipulates as prerequisites for eligibility "*the completion of a competition based on qualifications and examinations, or of an examination even solely for the purpose of establishing accreditation or eligibility, the receipt of accreditation following attendance of a specialisation school for secondary teaching [scuola di specializzazione per l'insegnamento secondario, SSIS] or* ***accreditation/qualification establishing accreditation to teach, irrespective of the basis on which it was obtained, that is recognised as valid for inclusion***

in the same competition class or for the same position in respect of which inclusion on the permanent ranking list is sought", thereby including the qualification establishing accreditation of the "primary school teaching certificate" [*diploma magistrale*].

23. Moreover, in keeping with Article 2(1)(c-bis), Decree-Law no. 97/2004 provides that universities may each year run courses leading to the award of accreditation to teachers holding a primary school teaching certificate awarded in 1999, 2000, 2001 or 2002 who have worked for at least 360 days in a nursery school or in a primary school from 1 September 1999 as at the date of entry into force of Decree-Law no. 97/2004 and who "do not hold accreditation": it is obvious that **this does not apply to** the holders of primary school teaching certificates where such a qualification establishes accreditation in itself, but **to all those who received a diploma that was not valid as accreditation upon completion of the three-year and five-year experimental courses in teacher-training colleges and of the four-year and five-year experimental courses in teacher-training institutes** that began during or before the 1997-1998 academic year, or were otherwise awarded during or before the 2001-2002 academic year, as provided for under Article 2 of the Inter-ministerial Decree of 10 March 1997.

24. Even with the entry into force of Decree-Law no. 97/2004, the MEUR did not allow the holders of primary school teaching certificates to be included on the permanent ranking lists, but only to be included in the band II institute ranking lists intended for teachers "not holding accreditation". Article 9(20) of Decree-Law no. 70/2011 (converted with amendments into Law no. 106/2011) provided for the triennial updating of the ERE and Article 1(10-bis) of Decree-Law no. 210/2015 (converted with amendments into Law no. 21/2016) extended until the 2018-2019 academic year the deadline for the updating of the provisional ERE, which had previously been updated for the 2014-2017 three-year period.

5. Law no. 296 of 27 December 2006

25. **Article 1(605)** of Law no. 296 of 27 December 2006 (Finance Law for 2007) provided for a three-year plan for the granting of tenured status to teaching and ATA staff in schools administered by the state and the **transformation of permanent ranking lists pursuant to Article 401 of Legislative Decree no. 297/1994 into ERE**.

> **Article 1(605) of Law no. 296/2006** provides as follows:
> 605. In order to optimise the role and activities of the school administration through measures and investments, including those structural in nature, enabling the rational usage of spending resources and ensuring the greater efficacy and efficiency of the education system, initiatives shall be adopted by a decree or decrees of the Minister for Public Education concerning: a)………; b)………; c) the definition of a three-year plan for the appointment on a permanent basis of teaching staff over the years 2007-2009, to be

verified annually, in consultation with the Ministry for the Economy and Finance and the President of the Council of Ministers – Department of Public Administration, with regard to its specific feasibility, amounting to 150,000 appointments in order to provide an appropriate solution to the lack of secure employment in schools and to avoid its re-emergence, to stabilise and improve the functioning of school personnel, and to promote initiatives to reduce the average age of teaching staff. A similar plan for the hiring of permanent staff shall be drawn up for administrative, technical and auxiliary (ATA) staff amounting to 30,000 positions. The appointments made in accordance with the plans falling under this sub-paragraph shall comply with the regime applicable to the granting of authorisations for appointments laid down by Article 39(3-bis) of Law no. 449 of 27 December 1997. …….With effect from the date of entry into force of this Law, the permanent ranking lists provided for under Article 1 of Decree-Law no. 97 of 7 April 2004, converted with amendments into Law no. 143 of 4 June 2004, shall be transformed into ERE. **The foregoing shall be without prejudice to the teachers who are to be included on the said ranking lists for the 2007-2008 two-year period who already hold accreditation**, and, subject to the receipt of accreditation, teachers who, on the date of entry into force of this Law, are attending the special accreditation courses arranged pursuant to Decree-Law no. 97 of 2004, held at Specialisation Schools for Secondary Teaching (SSIS), biennial level-two academic courses specialising in teaching (COBASLID), music teaching courses held at music conservatories and degree courses in Theory of Primary Education.

26. The exceptional plan for the appointment of 150,000 teachers provided for under Article 1(605) of Law no. 296/2006 **was never implemented** due to the early general election and the change of government in 2008. The only trace that has remained of it has been the transformation of the permanent ranking lists into ERE, without however absorbing any of the historical backlog of employees in insecure positions. For a full thirteen years from 1999 until 2012 no competitions based on qualifications and examinations were held for teachers in schools administered by the state.

27. Moreover, the MEUR has never implemented Article 1(605) of Law no. 296/2006 for the holders of primary school teaching certificates, or during the 2007-2008 two-year period included "**teachers already holding accreditation**" on the permanent ranking lists, as transformed into ERE.

28. Teachers with primary school teaching certificates received up to the 2001-2002 academic year were able to teach in primary schools administered by the state only through supply appointments made on the basis of the band III institute ranking lists as well as in accredited independent schools, under either permanent or fixed-term contracts, until the adoption of the Presidential Decree of 25 March 2014 (see **Doc. 4**), which accepted the extraordinary appeal made to the Head of State by a holder of a primary school teaching certificate, acknowledging the right of such persons to inclusion in the band II institute ranking lists of accredited teachers.

6. Law no. 107 of 13 July 2015

29. Article 1(95)-(99) of Law no. 107 of 13 July 2015 ("Reform of the national education and training system and delegation of authority to reorganise applicable legislative provisions") provided for the extraordinary recruitment of teaching staff largely by way of exception to the procedures applicable to the granting of tenured status governed by Article 399 of Legislative Decree no. 297/1994. **Article 1(131) of Law no. 107/2015** laid down a prohibition on the conclusion of new fixed-term contracts after 36 months in service, which resulted in the expulsion of all holders of primary school teaching certificates with a qualification establishing accreditation obtained up to 2001-2002 who had already been excluded from the exceptional plan for the granting of tenured status pursuant to Law no. 107/2015 if they had not been included in the provincial ERE. Legislative Decree no. 59 of 13 April 2017 ("Rearrangement, updating and simplification of the system of initial training and access to teaching positions in secondary schools with the aim of ensuring the social and cultural furtherance of the profession, adopted pursuant to Article 1(180) and (181) of Law no. 107 of 13 July 2015") does not provide for a transitional phase for the recruitment of teachers in secondary schools or a new system for the recruitment and training of teachers in primary and nursery schools.

Article 1(95)-(99) of Law no. 107/2015 provides as follows:

95. For the 2015-2016 academic year, the Ministry of Education, Universities and Research is authorised to implement an exceptional plan for the recruitment of permanent teaching staff to school institutions administered by the state of every type and level in order to cover all ordinary and assistant positions within the legal workforce that remain vacant and available following completion of the operations to grant tenured status for the same school year pursuant to Article 399 of the Consolidated Act laid down in Legislative Decree no. 297 of 16 April 1994, following which the ranking lists for competitions based on qualifications and examinations held prior to 2012 shall be abolished. For the 2015-2016 academic year, the Ministry of Education, Universities and Research is also authorised to cover the further posts set forth in Table 1 appended to this Law, allocated among the levels of primary and secondary education and the types of position indicated in the Table, and also between the regions in proportion, for each level, to the number of pupils attending schools administered by the state, also taking account of the existence of mountainous areas, small islands or internal areas with a low population density or experiencing high immigration, as well as areas characterised by high levels of early school leaving. The positions referred to in Table 1 shall be allocated to the purposes specified under paragraphs 7 and 85. The allocation of the positions referred to in Table 1 between the competition classes shall be made by order of the responsible director from the regional schooling office on the basis of the needs stated by individual schools, subject to the limit associated with the ranking lists falling under paragraph 96. With effect from the 2016-2017 academic year, the positions referred to under Table 1 shall be incorporated into the notional workforce, which may be supplemented by those positions. With effect from the 2015-2016 academic year, these supplementary positions may not be occupied by staff who have concluded short-term or casual supply contracts. For the 2015-2016 academic

year only, the said positions may not be made available for the supply teaching appointments pursuant to Article 40(9) of Law no. 449 of 27 December 1997 and shall not be available for the purposes of mobility or provisional usage or allocation.

96. The following shall also be hired under permanent contracts, subject to the limit on positions pursuant to paragraph 95: a) individuals who are fully registered, on the date of entry into force of this Law, in ranking lists drawn up following public competitions based on qualifications and examinations for positions and teaching posts called pursuant to director's decree of the Ministry of Education, Universities and Research no. 82 of 24 September 2012, published in the Official Journal, 4th special series no. 75 of 25 September 2012 for the recruitment of teaching staff to schools administered by the state of every type and level; b) individuals who are fully registered, on the date of entry into force of this Law, in the ERE of teaching staff provided for under Article 1(605)(c) of Law no. 296 of 27 December 2006, as amended, exclusively according to the score and with the preferential qualifications and grounds for precedence held as at the date of the most recent updating of the ERE for the 2014-2017 three-year period.

97. Individuals referred to in paragraph 96 shall participate in the exceptional recruitment plan. Individuals who have filed a request to that effect in accordance with the procedures and time limits laid down in paragraph 103 shall participate in the phases provided for under paragraph 98(b) and (c). Individuals belonging to the two categories provided for under paragraph 96(a) and (b) shall choose in that application for which of the two categories they are to be considered.

98. The exceptional recruitment plan shall be implemented in accordance with the procedures and in the phases indicated below, in sequential order: a) individuals provided for under paragraph 96(a) and (b) shall be hired by 15 September 2015, subject to the limit of vacant and available positions within the legal workforce pursuant to the first sentence of paragraph 95, in accordance with the ordinary procedures provided for under Article 399 of the Consolidated Act laid down in Legislative Decree no. 297 of 16 April 1994, as amended, falling under the competence of the regional schooling offices; b) notwithstanding Article 399 of the Consolidated Act laid down in Legislative Decree no. 297 of 16 April 1994, as amended, individuals provided for under paragraph 96(a) and (b) who do not receive a proposal of employment during the phase provided for under sub-paragraph (a) of this paragraph shall be appointed, with legal effect from 1 September 2015, subject to the limit of vacant and available positions within the legal workforce remaining after the completion of the phase falling under sub-paragraph (a), in accordance with the national procedure provided for under paragraph 100; c) notwithstanding Article 399 of the Consolidated Act laid down in Legislative Decree no. 297 of 16 April 1994, as amended, individuals provided for under paragraph 96(a) and (b) who do not receive a proposal of employment during the phases provided for under sub-paragraphs (a) or (b) of this paragraph shall be appointed, with legal effect from 1 September 2015, subject to the limit of positions set forth in Table 1, in accordance with the national procedure provided for under paragraph 100.

99. Individuals appointed in accordance with sub-paragraphs (b) and (c) during the phases provided for under paragraph 98(b) and (c) shall be assigned to a specific school upon completion of the relevant phase, unless they have concluded a supply contract other than a short-term or casual supply contract. In such an eventuality, assignment shall occur on 1 September 2016 for individuals working under annual supply appointments, and on 1 July 2016 or at the end of the final level-two secondary school examinations for individuals working under supply appointments until the end of teaching activity. The financial effect of the associated employment contract shall commence at the start of service at the school to which they have been assigned.

Article 1(131) of Law no. 107/2015 provides as follows:
131. With effect from 1 September 2016, fixed-term employment contracts concluded with teaching, educational, administrative, technical and auxiliary staff at school and educational institutions administered by the state in order to cover vacant and available positions may not have an overall duration in excess of thirty-six months, even if not continuous.

****

Presentation of the legislation and interpretation of the European Union

Directive 1999/70/EC on fixed-term work

30. **Directive 1999/70** was adopted in accordance with Article 139(2) of the EC Treaty and, in accordance with Article 1, its aim is to put into effect **the framework agreement on fixed-term contracts**, which is annexed to the Directive, **concluded on 18 March 1999 between the general cross-industry organisations ETUC, UNICE and CEEP**.

Clause 1 of the framework agreement, entitled "**Purpose**", provides as follows:
The purpose of this framework agreement is to:
a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

Clause 2 of the framework agreement, entitled "**Scope**", provides as follows:
1. This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.
2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:
a) initial vocational training relationships and apprenticeship schemes;
b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.

Clause 3 of the framework agreement, entitled "**Definitions**", provides as follows:
1. For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.
2. For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.

Clause 4 of the framework agreement, entitled "**Principle of non-discrimination**", provides as follows:
1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.
2. Where appropriate, the principle of pro rata temporis shall apply.
3. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law and national law, collective agreements and practice.
4. Period-of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of-service qualifications are justified on objective grounds.

Clause 5 of the framework agreement, entitled "**Measures to prevent abuse**", provides as follows:
1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
a) objective reasons justifying the renewal of such contracts or relationships;
b) the maximum total duration of successive fixed-term employment contracts or relationships;
c) the number of renewals of such contracts or relationships.
2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:
a) shall be regarded as "successive";
b) shall be deemed to be contracts or relationships of indefinite duration.

Directive 2005/36/EC on the recognition of professional qualifications and EU Commission Communication of 31/01/2014

31. **By Communication of 31 January 2014** (see **Doc. 5**) to the European Parliament, in response to petition no. 567/2011 presented by Mr Fabio Albanese who requested recognition for the primary school teaching certificate **in accordance with Directive 2005/35/EC**, which had initially been refused by the Italian State, as a qualification establishing accreditation to teach in the United Kingdom**, the European Commission found that the primary school teaching certificate is a full qualification to teach in Italy in nursery and primary schools**. The competition for a tenured post does not amount to an accreditation procedure but only a procedure for recruitment to schools administered by the state. Accordingly, the holders of primary school teaching certificates are fully entitled to teach throughout Europe.

32. **The European Commission has definitively clarified both that the certificate establishes full eligibility and that the competition was a simple recruitment procedure within schools administered by the state and does not establish any accreditation**.

****

Statement of facts and the conduct of the Italian State objected to

The legislation governing fixed-term contracts within public sector employment

33. By Legislative Decree no. 368 of 6 September 2001, Italy implemented Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; these rules are also applicable to employment relations with all public administrations, including schools, as stipulated in paragraphs 7-14 of the **judgment in the *Marrosu-Sardino* case of the Court of Justice of the European Union** (see **Doc. 6**), as "contractualised" public sector work did not fall under the grounds for exclusion from the scope of Legislative Decree no. 368/2001 laid down by Article 10 of that Decree.

34. Legislative Decree no. 368/2001 was repealed with effect from 25 June 2015 by Legislative Decree no. 81/2015, which sets out the new rules governing fixed-term contracts in Articles 19-29, which however are expressly not applied to staff working in schools administered by the state and healthcare staff working in the National Health Service [see Article 29(2)(c)], whilst they continue to apply to all public administrations (including schools administered by the state and National Health Service workers) as provided for under Article 36 of Legislative Decree no. 165/2001, which continues to refer to paragraphs 2, 5-*bis* and 5-*ter* of the repealed Legislative Decree no. 368/2001.

35. In particular, Article 36(2) of Legislative Decree no. 165/2001, as in force between 25 June 2008 and 22 June 2017 (amended by Legislative Decree no. 75/2017), provided that "*national collective agreements shall make provision to regulate the issue of permanent employment contracts ……. in accordance with the provisions laid down by Legislative Decree no. 368 of 6 September 2001*".

36. Also Article 36(5-ter) (introduced by Decree-Law no. 101/2013, converted into Law no. 128/2013, with effect from 1 September 2013 until 22 June 2017, when it was repealed by Legislative Decree no. 75/2017) of Legislative Decree no. 165/2001 referred to Legislative Decree no. 368/2001 with regard to all public administrations, including supply teachers in schools. Article 70(8) of Legislative Decree no. 165/2001 provides as follows: "*8. The*

provisions of this Decree shall apply to staff working in schools. ………The foregoing shall be without prejudice to the procedures governing the recruitment of staff in schools....”.

37. Conversely, **Article 36(5) (formerly paragraph 2) of Legislative Decree no. 165/2001 lays down a prohibition on the conversion into permanent contracts of fixed-term contracts concluded in breach of mandatory statutory provisions, without prejudice to the right to compensation**.

38. Article 36(5) of Legislative Decree no. 165/2001 has been interpreted within the prevailing case law of the merits courts and of the Court of Cassation as being capable of preventing under all circumstances the establishment of a permanent employment relationship on the basis of fixed-term employment contracts even in situations in which they are abused by public administrations as punished under Article 1(2) and Article 5(2)-(4) of Legislative Decree no. 368/2001, notwithstanding the fact that Article 11 of Legislative Decree no. 368/2001 provides for the repeal of previous legislation that is incompatible with the new rules introduced to implement Directive 1999/70/EC, and notwithstanding the fact that almost all permanent staff in the public administrations (in particular in the Schools Branch) have been and are hired upon completion of legitimate recruitment procedures by public selection.

39. Conversely, **private sector workers hired under fixed-term contracts have always been guaranteed full protection entailing reinstatement into their position pursuant to Legislative Decree no. 368/2001 in situations in which Articles 1(2), 3, 4 and 5(2), (3), (4) and (4-bis) have been violated**.

40. Article 25(3) of the National Collective Labour Agreement (NCLA) for the Schools Branch of 29 November 2007 provides as follows in relation to teaching staff: “*3. The individual permanent or fixed-term employment relations of teaching and educational staff in institutions and schools administered by the state of every type and level shall be established and regulated by individual contracts, in accordance with statutory provisions, Community legislation and the applicable national collective agreement*.” Article 40(4) of the NCLA provides as follows concerning the “Fixed-term employment relationship” of teaching staff: “*4. A fixed-term employment relationship may be transformed into a permanent employment relationship as a result of specific legislative provisions.*”

41. By circular of 25 October 2008 (see **Doc. 7**), the Ministry of Education, Universities and Research (MEUR), as the employer of all teaching and ATA staff in schools administered by the state, recognised that Legislative Decree no. 368/2001 applied to supply teachers in schools administered by the state, a position which was reiterated in the circular of 19 September 2012 of the Department of Public Administration (see **Doc. 8**).

The special legislation governing teacher recruitment

42. The recruitment of MEUR teaching staff is governed by Article 399(1) of Legislative Decree no. 297 of 16 April 1994 (Consolidated Act of legislative provisions applicable to education in relation to schools of every type and level), as replaced by Article 1 of Law no. 124/1999 (Urgent provisions on school staff), according to the twin-track system for recruitment, with 50% originating from ranking lists based on the results of competitions and 50% from permanent ranking lists.

43. Teachers holding accreditation to teach were (and are) included in the permanent ranking lists. The ranking lists are structured on a provincial basis and are updated at triennial intervals having regard to the positions of those included; however, as a result of the provisions of Law no. 296 of 27 December 2006 (see below), they are not open to the inclusion of new candidates.

44. The **permanent ranking lists for teachers in schools administered by the state are structured**, according to the description provided by the MEUR on its website, **in three bands**:

- the **first band** includes teachers who, at the time the permanent ranking lists were established (May 1999) were included in the ranking lists based on qualifications only (so-called twin track);
- the **second band** includes teachers who, at the time the ranking lists were established, had not only fulfilled the prerequisite of accreditation but had also worked as teachers for 360 days;
- the **third band** includes those who have obtained accreditation to work as a teacher over the years.

45. The permanent ranking lists have been and are used in order to make tenured appointments up to the limit of 50% of the available appointments authorised each year, and also for the award of fixed-term contracts. However, in the event that the ranking lists based on competitions had been exhausted or were insufficient in order to cover 50% of the stable staffing needs pursuant to Article 399(1) of Legislative Decree no. 297/1994, the MEUR could have drawn upon, as compensation, all or part of the permanent ranking lists beyond the 50% limit, and hypothetically even up to 100% of the lists pursuant to Article 399(2) of Legislative Decree no. 297/1994.

46. That compensation could have proved to be particularly beneficial, as the MEUR had decided not to hold public competitions for the appointment of permanent teaching staff for 13 years from 1999 until 2012, resulting in the exhausting of the merit-based competition

ranking lists. However, the compensation mechanism provided for under Article 399(2) of Legislative Decree no. 297/1994 was never activated.

47. Fixed-term supply contracts of any school staff (teachers and ATA) were (and are) governed by Article 4 of Law no. 124/1999 and fall into three classes: annual supply appointments from 1 September until 31 August, i.e. for the full school year (paragraph 1), to vacant and available positions in the so-called *de jure* workforce; supply appointments until the conclusion of teaching activity (30 June) to positions that are not vacant but available in the so-called *de facto* workforce (paragraph 2); temporary supply appointments in order to replace staff who are absent (paragraph 3), subject to the obligation in this case to state the name of the absent worker in writing in the contract of employment (Article 40(2), for teachers, of the 2007 NCLA). The difference between annual supply appointments and supply appointments until 30 June is dependent solely on the organisational choices of the MEUR.

48. Teaching staff are appointed to supply positions by working through two types of eligibility rankings: a) primarily the permanent provincial rankings pursuant to Article 401 of Legislative Decree no. 297/1994, which were transformed into ERE, pursuant to Article 1(605) of Law no. 296/2006 with effect from 1 January 2007, into which teachers who qualified after transformation into ERE could not be included, other than, until the end of the 2007-2008 two-year period, for teachers **who already hold accreditation** or for teachers who, on the date of entry into force of Law no. 296/2006, and subject to receipt of the qualification establishing accreditation, are attending the special accreditation courses arranged pursuant to Decree-Law no. 97 of 2004, courses held at Specialisation Schools for Secondary Teaching (SSIS), biennial level-two academic courses specialising in teaching (COBASLID), music teaching courses held at music conservatories and degree courses in Theory of Primary Education; b) thereafter, they are appointed on the basis of school or district ranking lists, in which qualified and non-qualified teachers who do not feature in the ERE may be included.

49. In particular, all teachers who qualified through SPQ[2] or AET[3] university training courses, graduates in Theory of Primary Education who started their degree courses after 1 July 2007

---

[2] SPQ (Special Qualifying Pathways) are training pathways leading towards a teaching qualification, which are intended for school teachers who have been working under a fixed-term contract for at least three years in schools administered by the state or accredited independent schools. They are governed by Article 2(416) of Law no. 247/2007 and at the same time by the resulting Regulation approved by Ministerial Decree no. 249 of 10 September 2010.

[3] The Active Educational Traineeship (AET) is a training course leading to the granting of accreditation for teaching in Italian secondary schools. It was introduced by Ministerial Decree no. 249/2010 and amended by Ministerial Decree no. 81 of 25 March 2013, replacing the Specialisation Schools for Secondary Teaching (SSIS).

and "technical-practical teachers" (TPT) cannot be included in the provincial ERE as the qualification establishing entitlement to teach was issued after the closure to new members of the provincial permanent eligibility ranking lists.

50. However, by Article 5-bis (Provisions governing ERE) of Decree-Law no. 137 of 1 September 2008 (converted with amendments into Law no. 169/2008), the legislature enacted urgent legislation in Article 5-bis allowing for the incorporation into the ERE of the following categories of teacher, already referred to by Article 1(605) of Law no. 296/2006: "*1. Within the time limits and in accordance with the procedures laid down in the measure updating the ERE, which may be used for the 2009-2010 two-year period, pursuant to Article 1(605)(c) and (607) of Law no. 296 of 27 December 2006, as amended, teachers who have attended cycle IX courses at the Specialisation Schools for Secondary Teaching (SSIS) or biennial level-two academic courses specialising in teaching (COBASLID) launched during the 2007-2008 academic year and who have obtained the qualification establishing accreditation shall be included in the above-mentioned ranking lists upon request and shall be placed in the position to which they are entitled on the basis of the scores attributed to the qualifications held. 2. Similarly, teachers who have attended the first level-two biennial course for the training of music teachers in competition classes 31/A and 32/A and the teachers of musical instruments in middle schools in competition class 77/A and who have obtained the respective accreditation shall be included in the above-mentioned ranking lists upon request and shall be placed in the position to which they are entitled on the basis of the scores attributed to the qualifications held. 3. Inclusion in the above-mentioned ranking lists on a reserve basis may also be requested by those who registered during the 2007-2008 academic year for the degree course in Theory of Primary Education and the four-year courses in music teaching; the reserve status shall be removed upon the receipt of accreditation in relation to the above-mentioned degree courses and four-year courses and inclusion in the ranking lists shall be ordered on the basis of the scores attributed to the qualifications held.*".

51. In addition, it was only by Article 6 of Decree-Law no. 137/2008 that the degree in Theory of Primary Education was recognised as establishing accreditation to teach in primary and nursery schools: "*1. The degree examination taken upon conclusion of the courses in Theory of Primary Education established pursuant to Article 3(2) of Law no. 341 of 19 November 1990, as amended, including the assessment of the trainee activity provided for under the associated course programme, shall have the status of a state examination and*

shall establish accreditation to teach in primary schools or in nursery schools, depending upon the specialisation chosen. 2. The provisions of paragraph 1 shall also apply to those who took the final degree examination in courses in Theory of Primary Education during the period falling between the entry into force of Law no. 244 of 24 December 2007 and the date of entry into force of this Decree.".

52. Finally, Article 14(2-ter) of Decree-Law no. 216 of 29 December 2011 (converted with amendments into Law no. 14/2012) provided for an additional band (band IV) for the inclusion of the following categories of teacher in the ERE: "*2-ter. Notwithstanding the fact that the ERE pursuant to Article 1(605)(c) and (607) of Law no. 296 of 27 December 2006, as amended, shall remain closed and limited to teachers who obtained accreditation following attendance of the level-two biennial courses establishing accreditation specialising in teaching (COBASLID), the second and third level-two biennial course for the training of music teachers in competition classes 31/A and 32/A and the teachers of musical instruments in middle schools in competition class 77/A, as well as the degree courses in Theory of Primary Education for the 2008-2009, 2009-2010 and 2010-2011 academic years, an additional band shall be created for the above-mentioned ranking lists. A decree of the Ministry of Education, Universities and Research shall stipulate the time limits for inclusion in the above-mentioned additional ranking lists with effect from the 2012-2013 academic year.*".

The status of primary school teaching certificates in establishing accreditation

53. Incredibly, notwithstanding the fact that ordinary primary school teaching certificates received during or before the 2001-2002 academic year amounted to a qualification establishing accreditation according to law in order to teach in primary and nursery schools,[4] the MEUR has always prevented the holders of such certificates from accessing the permanent ranking lists and the band II institute ranking lists.

54. Notwithstanding the fact that, when transforming the permanent ranking lists into ERE, the Finance Law for 2007 (Law no. 296/2006) expressly provided that **all *"teachers holding***

[4] Cf. Article 53 of Royal Decree no. 1054 of 6 May 1923, in conjunction with Article 197 of Decree-Law no. 297 of 16 April 1994; Inter-ministerial Decree of 10 March 1997; Article 15(7) of Decree of the President of the Republic no. 323 of 23 July 1998; Article 1 of Decree-Law no. 97 of 7 April 2004 and the appended table for the assessment of qualifications establishing accreditation; Article 1(605) of Law no. 296/2006; and, for the purposes of admission to the competition for teaching appointments for respectively 1999 and 2012, Decrees of the Director General of 2 April 1999 and of 24 September 2012.

***accreditation*" as at 1 January 2007 should retain the right to inclusion on the ERE**,[5] the **MEUR did not allow teachers** who had received a primary school teaching certificate establishing accreditation during or before 2001-2002 **to apply for inclusion** on the ERE and in the band II institute ranking lists (inclusion on which is conditional upon the holding of a qualification establishing accreditation) because it stipulated that **primary school teaching certificates received under the new system** (which did not grant accreditation) **were equivalent to primary school teaching certificates** received during or before the 2001-2002 academic year (which by contrast still granted accreditation).[6]

55. However, as noted above, degrees in Theory of Primary Education were only recognised as having the status of establishing accreditation to teach in primary schools and nursery schools by Decree-Law no. 137/2008, which took effect only from 1 September 2008.

The absolute denial by the Italian legislature of protection against abuse for workers in insecure employment in schools administered by the state

56. Following the prohibition on conversion within public sector employment laid down in Article 36(5) of Legislative Decree no. 165/2001 and the failure of the three-year plan for the granting of tenured status to school staff pursuant to Article 1(605) of Law no. 296/2006, the *Tribunale di Rossano Calabro* sent a reference for a preliminary ruling in Case C-3/10 *Affatato* (see **Doc. 9**) concerning the failure to apply Directive 1999/70/EC throughout public sector employment, including schools administered by the state.

57. In its written observations in the *Affatato* Case C-3/10 (see **Doc. 10**), the Italian Government asserted that Legislative Decree no. 368/2001 was entirely applicable to the public administrations.

58. This assertion was included by the European Commission on 10 May 2010 (see **Doc. 11**) in its response to a question by MEP Rita Borsellino. The Commission stated that the Italian Government was applying, in particular, Article 5(4-bis) of Legislative Decree no. 368/2001 and that it transformed the fixed-term contracts of supply teachers in schools into permanent contracts after 36 months.

---

[5] **Article 1(605)(c) of Law no. 296/2006** provides that "*With effect from the date of entry into force of this Law, the **permanent ranking lists** provided for under Article 1 of Decree-Law no. 97 of 7 April 2004, converted with amendments into Law no. 143 of 4 June 2004, **shall be transformed into ERE**. The foregoing shall be **without prejudice to the teachers who are to be included in the said ranking lists** for the 2007-2008 two-year period **who already hold accreditation***".

[6] **By the Decree of 16 March 2007**, as in all subsequent ministerial decrees concerning the inclusion in and/or updating of the ERE, the **MEUR stipulated** that the **degree** in Theory of Primary Education constituted the **sole qualification on the basis of which an application could be filed** for inclusion on the said ranking lists.

59. Consequently, by an order issued in the *Affatato* case on 1 October 2010 (see **Doc. 12**), the Court of Justice of the European Union held in paragraph 48 that the sanction of transformation into a permanent contract pursuant to Article 5(4-bis) of Legislative Decree no. 368/2001 was to be applied as an effective sanction.

60. In order to obstruct the effects of the order issued by the Court of Justice in the *Affatato* case, the Italian legislature intervened once again, enacting Article 10(4-bis) of Legislative Decree no. 368/2001 (by Article 9(18) of Decree-Law no. 70 of 13 May 2011, converted with amendments into Law no. 167/2011), with effect from 13 July 2011, which provided that staff within schools administered by the state were (no longer) to be subject to Legislative Decree no. 368/2001, and in particular that supply teaching appointments could never be transformed into permanent contracts after 36 months' service pursuant to Article 5(4-bis) of Legislative Decree no. 368/2001.

61. Consequently, the *Tribunale di Trento* raised questions concerning the constitutionality of the legislation on the recruitment of supply teachers in schools by two referral orders of 27 September 2001, no. 283 and 284, on the grounds that it lacked appropriate measures to sanction to abuse of fixed-term contracts.

The absolute denial within the case law of the Court of Cassation of protection against abuse for workers in insecure employment in schools administered by the state

62. As a result, in order to avoid the proliferation of the dispute concerning compensation for the abuse of fixed-term contracts within public sector employment, by judgment no. 392/2012 of 13 January 2012 (see **Doc. 13**), the Employment Division of the Court of Cassation laid down the principle of law that it fell exclusively to the worker to prove the loss suffered in the event of the abuse of fixed-term contracts within public sector employment and that Legislative Decree no. 368/2001, including in particular Article 5 on successive contracts, did not apply to public sector workers in insecure employment, and did not convert their contracts into permanent contracts, as had been purportedly confirmed by the *Affatato* order of the Court of Justice, which by contrast asserts the exact opposite.

63. Immediately afterwards, by judgment no. 10127 of 20 June 2012 (see **Doc. 14**), the Court of Cassation asserted that the system of recruitment in schools was a special system compared with that regulated under Legislative Decree no. 368/2001 – legislation which did not apply to supply teaching appointments in schools – and that it was legitimate and compatible with the Community legal order.

64. By judgment no. 10127/2012, the Court of Cassation upheld the non-applicability of Legislative Decree no. 368/2001, disregarding the first sentence of Article 70(8) of Legislative Decree no. 165/2001 and the internal reference to Article 36(2) of the same Decree, thereby concealing the reference to Legislative Decree no. 368/2001 expressly contained in that provision. A technical-professional teacher with more than 36 months' service in a school administered by the state is denied any rights.

65. By judgment no. 10127/2012, the Court of Cassation also instructed the national courts to refrain from referring questions to the Court of Justice of the EU in order to request clarification as, according to paragraphs 65-66 of judgment no. 10127/2012, the judgment of the European Court of Human Rights in *Ullens de Schooten and Rezabek v. Belgium* of 20 September 2011 had accepted the legitimate and justified refusal to make a reference for a preliminary ruling, and the unrestrained use of the EU preliminary reference procedure had led to delays in the resolution of disputes and high socio-economic costs.

The right under the uniform system of EU law of workers in insecure employment in schools to effective protection against abuse within the case law of the merits courts and the Constitutional Court

66. By **report no. 190 of 24 October 2012** (see **Doc. 15**) concerning "Insecure employment within schools and the protection of rights under Community and national case law: the tension between the need for special provision and the principle of equality", **the Case Law Analysis Office of the Court of Cassation** immediately refuted the conclusions reached in judgment no. 10127/2012 of the very same Court, which had commissioned the Research Service of the Court of Cassation to examine precisely the interpretative "coherence" of the judgments made against employees in insecure positions in schools administered by the state: "*The Employment Division of this Court has asked this Office to examine, in the context of the rules governing fixed-term contracts in schools administered by the state, the principles contained in Community case law on the abuse of fixed-term contracts, taking account of the public sector nature of the service, the principle of employment according to public competition and the existence of specific sectoral rules, and on non-discrimination (with particular reference to remuneration and service-based pay increases).*".

67. In fact, the Case Law Analysis Office concluded as follows in report no. 190/2012:

"Based on the examination of Community case law and the national rulings referred to above, and taking account of the critical issues considered in the literature, it would appear that the following conclusions may be drawn.

The general legislation laid down by Legislative Decree no. 368 of 2001 and the Directive is applicable also to fixed-term employment in the public sector and also, except where specific exclusions apply, to fixed-term workers in schools: in this regard, appointments made in breach of mandatory rules cannot give rise to the establishment of permanent employment relations with the public administration (pursuant to Article 36 of Legislative Decree no. 165 of 2001).
However, employment relations for workers in insecure employment in schools are governed by specific (and special) legislation in various respects, including in particular: the definition within the law of the different types of supply appointment, their duration, the manner of their allocation and their contribution to the requirements of continuity of teaching, which are often ongoing and permanent; the establishment of employment relations (also permanent) on the basis of procedures not involving competitions which are focused on permanent eligibility ranking lists (so much so that both the award of temporary teaching appointments and, in most cases, the granting of tenured status occurs with reference to the same eligibility ranking lists); the non-applicability, provided for by law, of the sanction of conversion of a fixed-term employment relationship that has lasted for longer than 36 months into a permanent employment relationship, even in the event that fixed-term relations that were originally lawful persist.
The continuation beyond 36 months of the employment relationship of staff without tenured status who were hired on the basis of their position in the permanent eligibility ranking lists is inherent within the national system, and is formally speaking legal, although it does not appear to be compliant with Community rules, and it is therefore necessary to resolve the conflict between the legal systems according to general principles as highlighted in the indications concerning this issue contained in Community case law.
Leaving aside the scope of clause 5 of the framework agreement (which is applicable vertically in respect of the state and state bodies), the conversion of the employment relationship is not a remedy – required under Community law – for the abuse of a fixed-term contract, as other technical legal instruments may also be adopted by the state in order to achieve the purpose specified under the Community directive, provided however that these are specific instruments intended to prevent and sanction abuse.
In the case under examination, whilst the conversion of the relationship cannot be allowed, the abuse of the fixed term would not de facto result in any sanction as compensation (which is moreover difficult to quantify and demonstrate on a practical level) would not relate to the failure to continue the relationship as a result of the expiry of the time limit but only the different form of loss which may have been suffered in the past (which would be difficult to establish except for periods between one contract and another for staff with regular remuneration), nor could it have the nature of a sanction (as punitive damages are not permitted under our system): it must in any case be noted that clause 5 is applicable vertically to the state and that the conversion of the relationship is the only effective remedy for preventing and sanctioning the abuse of fixed-term contracts by the public administration.
Article 36 of the Consolidated Act on Public Sector Employment referred to above does not appear to preclude such conversion in the event that employment (albeit on a fixed-term basis) occurred lawfully on the basis of the permanent eligibility ranking lists, given that, according to law (to which Article 97(3) of the Constitution refers), it is necessary to draw on these eligibility ranking lists (either in part or, if no competition is held, in full) for the granting of tenured status.
Moreover, other special rules which (naturally from the time they take effect) preclude conversion have been introduced into the rules applicable to schools.
According to a literal interpretation, Article 4(14-bis) of Law no. 124/1999, which was introduced by the 2009 reform, might appear to preclude conversion; moreover, the provision

could be interpreted (where such interpretation does not appear to be forced) in a manner consistent with Community law and read as a provision that excludes – only – the granting of tenured status other than from permanent eligibility ranking lists (whilst accepting the granting of tenured status as a result of the conversion of relations that were established on the basis of the said permanent eligibility ranking lists).
In any case, there is also another special provision (Article 9(18) of Decree-Law no. 70 of 13 May 2011, converted into Law no. 106 of 12 July 2011, introducing Article 10(4-bis) into Legislative Decree 368/2001), which precludes the application of Article 5(4-bis) of Legislative Decree 368 of 2001 (and the conversion of a fixed-term relationship that has lasted for longer than 36 months into a permanent employment relationship) – essentially ensuring that fixed-term workers remain in a position of "lifetime employment insecurity"; this provision – the literal wording of which does not appear to leave any flexibility and does not appear to allow any interpretation in a manner compatible with EU law – is at odds with the legislation laid down by the Community directive, which is directly applicable to the state (and in relation to which situation two infringement procedures initiated by the European Commission are pending against Italy) and yet, since clause 5 does not contain any directly applicable unconditional provisions that could prevail over the internal rule (or over both of the internal rules mentioned above, were the other interpretation of paragraph 14-bis mentioned to be endorsed), the relationship cannot be converted into a permanent one (within relations to which the provision in question is applicable ratione temporis) other than by removing the national rule in conflict with the Community rule through proceedings concerning the constitutionality of the national rule.
As things stand a question is currently pending concerning the constitutionality of Article 4(1) of Law no. 124 of 1999, but not also – due to violation of Articles 11 and 177 of the Constitution in relation to the framework agreement on fixed-term work as an interposed parameter – of Article 10(4-bis) of Legislative Decree 368/2001 or of Article 4(14-bis) of Law no. 124/1999 as provisions (in particular the former, as noted immediately above) which appear to be the only ones capable of preventing the conversion of employment relationships for those that fall within their scope ratione temporis, and give rise to the breach of EU law.
Finally, it must be recalled that the principle of equal treatment, which has direct effect, entails a guarantee – to any fixed-term whose relationship is not converted into a permanent one – under all circumstances of equal pay (compared with permanent workers) and the recognition of service-based pay increases without any restriction under national law, which must be disapplied insofar as at odds with that principle.".

68. Essentially, report no. 190 of 24 October 2012 by the Case Law Analysis Office of the Court of Cassation asserted the applicability of Legislative Decree no. 368/2001 to public sector workers, and the right to employment stability and length of service benefits under the same conditions as private sector workers, including in schools administered by the state, subject to any provisions precluding this outcome (Article 4(14-bis) of Law no. 124/1999 and Article 10(4-bis) of Legislative Decree no. 368/2001), which were to be disapplied by the courts as a result of the vertical effect of Directive 1999/70/EC against the Italian state as the employer, or which were to be subject to constitutional review in order to remove them definitively from the legal order.

69. At the same time, by the judgment in *Valenza and others* of 18 October 2012 (see **Doc. 16**), the Court of Justice of the EU ruled for the first time, referring to Article 97(3) (now paragraph 4) of the Constitution on access to the public administrations (*Valenza* judgment, paragraph 13) as well as the principle of equality pursuant to Article 3 of the Constitution (*Valenza* judgment, paragraph 12), refuting the interpretation proposed by the Council of State in the references for a preliminary ruling and confirmed by the Court of Cassation itself in judgments no. 392/2012 and no. 10127/2012 on the supposed prohibition on conversion within public sector employment as a principle of "Community" level, which was purportedly confirmed by the *Affatato* order of the Court of Justice.

70. The case examined by the Court of Justice in the *Valenza* judgment concerned legislation providing for favourable treatment – Article 75 of Decree-Law no. 112/2008, not converted into law – which had enabled former workers of independent authorities in insecure employment, who received salaries that were much higher than those of other public sector employees with equivalent duties as a result of the financial and regulatory autonomy of the public body, to be stabilised urgently on the basis of an "expansive" application of Article 1(519) of Law no. 296/2006 without either a public competition establishing access or a selective procedure for the purpose of stabilisation, subject to a waiver of the length of service accrued for the period of fixed-term employment, whilst however maintaining the personal salary supplement and the right to retain it in the event of a pay rise.

71. At the same time, having received national information indicating that Community law obligations towards supply staff in schools were not being respected and concerning the inadequate application of Legislative Decree no. 368/2001, after sending a letter of formal notice on 14 March 2011, the European Commission initiated infringement procedure no. 2124/2010 on 25 October 2012, first in respect only of ATA staff, although subsequently extending it by the reasoned opinion of 21 November 2013 to teaching staff due to the failure to apply Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP within the Italian schools sector.

72. By four orders made in January 2013 in Joined Cases C-22/13 *Mascolo* (see **Doc. 17**), C-61/13 *Forni*, C-62/13 *Racca* and C-63/13 *Russo*, the *Tribunale di Napoli* sent references for a preliminary interpretation concerning the compatibility with Directive 1999/70/EC of national legislation on fixed-term contracts in public sector employment, both inside and outside schools.

73. In Case C-22/13 the applicant Raffaella Mascolo, assisted by the undersigned lawyers from the ANIEF, submitted written observations on 6 May 2013 (see **Doc. 18**). The Italian Government also submitted written observations in the *Mascolo* case (see **Doc. 19**), threatening (page 30, paragraphs 52-54) disciplinary action against the *Tribunale di Napoli* as the court making the reference.

74. By **preliminary reference no. 207/2013** in Case C-418/13 *Napolitano and others* (see **Doc. 20**), **the Constitutional Court** also voiced doubts concerning the compatibility with Directive 1999/70/EC of the legislation on recruitment in schools, proposing that an interpretative request be sent to the EU Court of Justice pursuant to Article 267 TFEU for the first time within interlocutory constitutionality proceedings. At the same time, by order no. 206/2013 (see **Doc. 21**) it clarified the applicability of Legislative Decree no. 368/2001 to supply staff in schools, subject to the applicability of preclusionary rules introduced in 2009 (Article 4(14-bis) of Law no. 124/99) and in 2011 (Article 10(4-bis) of Legislative Decree no. 368/01), which could be removed from national law only by the Constitutional Court (as suggested by report no. 190/2012 by the Case Law Analysis Office of the Court of Cassation) through specific constitutional review, which the referring court (the *Tribunale di Trento*) had not sought, with the result that the six referral orders concerning questions of constitutionality were inadmissible.

75. By the *Papalia* order of 12 December 2013 in Case C-50/13 (see **Doc. 22**), the CJEU ruled that Article 36(5) of Legislative Decree no. 165/2001 was incompatible with Directive 1999/70/EC in laying down a prohibition on conversions into permanent contracts of employment within the public sector due to a violation of mandatory statutory provisions because it did not ensure adequate and equivalent preventive protection and protection through penalties, thereby objecting to judgment no. 392/2012 of the Court of Cassation which precluded any type of protection through penalties.

The recognition by the Council of State and the EU Commission of the status of establishing accreditation of the primary school teaching certificate

76. By opinion no. 3813 of 11 September 2013 (**see Doc. 23**) given in relation to the extraordinary appeal by the President of the Republic, **the Council of State** proposed the annulment of ***"Ministerial Decree no. 62 of 2011** insofar as it did not treat teachers who had received the so-called primary school teaching certificate during or before 2001-2002 as*

equivalent to accredited teachers, placing them in band III of the institute ranking list and not in band II".

77. The decree of the President of the Republic of 25 March 2014 accepted opinion no. 3813/2013 of the Council of State. In reality, the Council of State asserted that "*teachers holding accreditation to teach*" must be deemed to include also those who "*received the qualification during or before the 2001-2002 academic year awarded by teacher-training institutes upon conclusion of the three-year courses and the experimental five-year courses leading to the primary school teaching certificate and the four-year courses and experimental five-year courses leading to the teaching certificate (for nursery schools) or upon conclusion of four-year courses and five-year experimental courses at teacher-training institutes (for primary schools)*", thereby confusing the holders of teaching qualifications who had received the qualification establishing accreditation to teach within primary and nursery schools during or before the 2001-2002 academic year following completion of the ordinary four-year course (for primary schools) or the three-year course (for nursery schools) with teachers not accredited to teach holding a qualification awarded by teacher-training institutes upon conclusion of three-year courses and experimental five-year courses leading to the primary school teaching certificate and four-year courses and experimental five-year courses leading to the primary school teaching certificate, for whom accreditation could be obtained only following completion of the annual university course establishing accreditation provided for under Article 2(1)(c-bis) of Decree-Law no. 97/2014.

78. At the same time, **by Communication of 31 January 2014** (see **Doc. 5**, cited above) to the European Parliament, in response to petition no. 567/2011 presented by the holder of a primary school teaching certificate who had requested recognition for the certificate **in accordance with Directive 2005/35/EC**, which had initially been refused by the Italian State, as a qualification establishing accreditation to teach in the United Kingdom**, the European Commission found that the primary school teaching certificate is a full qualification to teach in Italy in nursery and primary schools**. On the basis of the clarifications provided by the Italian Government, the EU Commission found that the competition for a teaching appointment did not amount to an accreditation procedure but only a recruitment procedure to schools administered by the state, without any status of establishing accreditation. Accordingly, the holders of such teaching certificates were recognised as being fully entitled to teach throughout Europe.

79. By **Ministerial Decree no. 353 of 22 May 2014** (see **Doc. 24**), which made provision to update the institute or district ranking lists for the 2014-2015, 2015-2016 and 2016-2017 three-year period, the MEUR implemented the Decree of the President of the Republic of 25 March 2014 accepting opinion no. 3813/2013 of the Council of State, thereby enabling for the first time the inclusion of the holders of pre-2002-2003 primary school teaching certificates in band II (reserved to accredited teachers) of the institute ranking lists.

The failure to include the holders of primary school teaching certificates in the ERE and the exceptional plan for the granting of tenured status in breach of EU law

80. Conversely, by **Ministerial Decree no. 235 of 1 April 2014** (see **Doc. 25**), which made provision to update the ERE, the MEUR did not stipulate primary school teaching certificates received during or before the 2001-2002 academic year as qualifications establishing accreditation for inclusion in band III of the ERE.

81. At the same time, the Italian Government abandoned the ordinary plan for the granting of tenured status to all teaching, educational and ATA staff for all vacant and available positions, including workers who had left the service, as provided for under Article 15(1) of Decree-Law no. 101/2013 for the 2014-2015, 2015-2016, 2016-2017 three-year period.

82. Following the opinion of 17 July 2014 delivered by Advocate General Szpunar in Joined Cases C-22/13 *Mascolo and others* (see **Doc. 26**) concerning insecure public sector employment, above all in schools, which obviously pre-empted the *Mascolo* judgment of the Court of Justice in the manner previously set out by the Constitutional Court by Order no. 207/13 on the incompatibility of the school recruitment system with Directive 1999/70/EC due to the absence of measures to prevent abuse, with regard to teachers on the other hand, as early as **the document drawn up at the end of August 2014 containing "Guidelines on Good Schooling"** (see **Doc. 27**), the Government set out an exceptional plan for the granting of tenured status destined for 148,100 people in order to hire all teachers included in the ERE, which starts from legal premises that are entirely mistaken in the light of applicable legislation, which is clearly ignored.

83. This is in fact set out under point 1.3 on page 26 of the above-mentioned "policy" document containing the **"Guidelines for Good Schooling"**: "*In order to be able to implement a recruitment plan on that scale, which is without precedent in the history of the Republic and which must take account of the historical legacy dating back decades, it will be*

necessary to make some ***changes to the current system for recruiting teachers in schools****. First and foremost, the first change that has to be made is to the rule whereby* ***50% of appointments are made on the basis of competitions and 50% from ERE****. This has been the rule followed for appointing teachers in recent years. On the other hand, under the exceptional plan, 90% of appointments in 2015/2016 will be made from the ERE. This provision in reality represents an exception to the general principle that appointments to public sector employment may be made only on the basis of competitions. For this reason,* ***it is necessary for the appointments of all persons included in the ERE to be made at the same time during the course of one single year (the 2015-2016 academic year)****. Is it possible to do this? Yes, if we change the law, justifying this change as necessary in order to* ***move the system out of the state of emergency*** *and stipulating immediately that* ***in future years, appointments will finally be made solely and entirely on the basis of competitions*** *– something which is moreover natural as nobody would any longer be included on the ERE, which at that stage would have been exhausted not only in name but also in practice. In addition to this, it will be necessary to make some other changes in order to ensure that the appointment of all 148,000 teachers is (a) materially possible and (b) consistent with the type of reinforcement of Italian schools which the Italian government intends to achieve.*"

84. The motivation for the recourse by the Government to an extraordinary procedure *de jure condendo* (in September 2014) for the granting of tenured status to teaching staff as an exception to the principle of public competitions is evidently based on the deliberate disregard of the legislation governing access to tenured status in schools laid down by Articles 399 and 400 of Legislative Decree no. 297/1994, which not only permitted the ordinary appointment of teachers from the ERE also at a level considerably higher than 50% (and even up to 100%) of the positions allocated to permanent recruitment for all "authorised" vacant and available positions, as well as on the desire to exclude <u>definitively</u> from the ERE all accredited teaching staff, such as the holders of primary school teaching certificates obtained under the old system during or before the 2001-2002 academic year, who were not already included in the ERE.

85. In fact, page 31 of the MEUR document drawn up at the end of August 2014 containing the <u>**"Guidelines for Good Schooling"**</u> identifies the following categories of accredited teacher who are not included in the ERE, to which the Government intends to grant only the possibility to participate in a competition to be held before the end of 2015, after having

implemented the exceptional plan for the granting of tenured status to staff already included in the ERE:

• 8,900 **graduates in Theory of Primary Education** (according to the old system) who were awarded the degree after 2010-2011

• 55,000 **holders of primary school teaching certificates** "which have been recognised by the Council of State as having the status of establishing accreditation"

• 69,000 **SPQ** teachers with a length of service of at least three years and who have gained accreditation through Special Qualifying Pathways

• 10,500 **cycle 1 AET** teachers, who have gained accreditation through the 2012-2013 Active Educational Traineeship.

The failure to include the holders of primary school teaching certificates in the ERE and the challenges pending before the administrative courts

86. Since the qualification could not be considered to establish accreditation for the purposes of inclusion on the institute ranking lists or to establish accreditation for the purposes of inclusion on the ERE, **numerous holders of primary school teaching certificates challenged Ministerial Decree no. 235/2014 updating the ERE** before the administrative courts insofar as it did not include in the ranking lists the holders of primary school teaching certificates who had received the qualification during or before **the 2001/2002 academic year**.

The Mascolo judgment of the Court of Justice of the EU

87. As could have been foreseen, in the *Mascolo* judgment of 26 November 2014 (**Doc. 28**) in Joined Cases C-22/13 (*Mascolo v. MEUR*), C-61/13 (*Forni v. MEUR*), C-62/13 (*Racca v. MEUR*), C-63/13 (*Russo v. Comune di Napoli*) and C-418/13 (*Napolitano and others v. MEUR*), the Court of Justice finally ruled that the system used for recruiting supply staff in schools administered by the state was incompatible with Directive 1999/70/EC, indirectly asserting that the sanction of stable employment provided for under Legislative Decree no. 368/2001 should be applied as an adequate sanction to public sector employment outside of schools (paragraph 55),[7] as its correct application by the *Tribunale di Napoli* in the *Racca*

---

[7] In paragraph 55 of the *Mascolo* judgment the Court of Justice stated as follows: *"The Tribunale di Napoli itself finds, in its order for reference in Case C-63/13, that* ***the applicant in the main proceedings, unlike the applicants in the main proceedings in Cases C-22/13, C-61/13 and C-62/13, can benefit from Article 5(4a) of Legislative Decree No 368/2001, which provides for the conversion of successive fixed-term contracts exceeding a duration of 36 months into an employment contract of indefinite duration****. and which is correctly*

case amounted to an act of loyal co-operation with the EU institutions (paragraphs 59-61),[8] thereby objecting to the position taken by the Court of Cassation in judgment no. 10127/2012.

88. In paragraph 14 of the *Mascolo* judgment the Court of Justice acknowledged that, according to all of the references for a preliminary ruling, Legislative Decree no. 368/2001 applied to the schools sector, whilst stressing in paragraph 89 that the ERE included teachers who had completed courses leading to the award of a qualification by secondary teaching specialisation schools without any public competition, thereby obtaining qualifications equivalent to the SPQ or AET. The court noted in paragraphs 114[9] and 115[10] of the *Mascolo* judgment that, although the prohibition of conversion into permanent employment did not apply within public sector employment and no compensation was payable in the event of a breach of mandatory statutory provisions, pursuant to Article 36(5) of Legislative Decree no. 165/2001, it was not possible to transform insecure employment into permanent employment for workers in insecure employment in the schools sector due to the presence of

---

referred to by that court as constituting a measure which is consistent with the requirements resulting from EU law in that it prevents the misuse of such contracts and results in definitive elimination of the consequences of the misuse (see, inter alia, judgment in Fiamingo and Others, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraphs 69 and 70 and the case-law cited).".

[8] In paragraphs 59-61 of the *Mascolo* judgment the Court of Justice stated as follows: "59 *Furthermore, the Comune di Napoli, the Italian Government and the European Commission call into question the admissibility of the fourth question in Cases C-22/13, C-61/13 and C-62/13 and the third question in Case C-63/13, essentially on the ground that the answer to those questions is, in whole or in part, not relevant to the disputes in the main proceedings. 60* ***Those questions, whose wording is identical, are, as has already been stated in paragraph 32 of this judgment, based on the premiss that the interpretation of national law put forward by the Italian Government in the case which gave rise to the order in Affatato (EU:C:2010:574, paragraph 48), to the effect that Article 5(4a) of Legislative Decree No 368/2001 is applicable to the public sector, is incorrect and therefore amounts to an infringement by the Member State concerned of the principle of sincere cooperation****.* *61* ***As is apparent from paragraphs 14 and 15 of this judgment, that interpretation corresponds, however, in all respects to the interpretation which has been presented in this instance by the Tribunale di Napoli*** *and in the light of which – in accordance with settled case-law – the Court must consider the present references for a preliminary ruling (see, inter alia, judgment in Pontin, C-63/08, EU:C:2009:666, paragraph 38).* ***The Tribunale di Napoli in fact states explicitly in its orders for reference that, in its view, the national legislature did not intend to exclude application of Article 5(4a) of Legislative Decree No 368/2001 to the public sector****.*".

[9] In paragraph 114 of the *Mascolo* judgment the Court of Justice stated as follows: "*So far as concerns the existence of measures intended to punish the misuse of successive fixed-term employment contracts or relationships, it should be noted first of all that it is clear from the orders for reference that, as the Corte costituzionale expressly states in the second question referred by it in Case C-418/13, the national legislation at issue in the main proceedings excludes any right to compensation for the damage suffered on account of the misuse of successive fixed-term employment contracts in the education sector.* ***In particular, it is common ground that the regime laid down in Article 36(5) of Legislative Decree No 165/2001 for misuse of fixed-term employment contracts in the public sector cannot confer such a right in the main proceedings****.*".

[10] In paragraph 115 of the *Mascolo* judgment the Court of Justice stated as follows: "*Nor is it in dispute, as paragraphs 28 and 84 of this judgment make clear, that* ***the national legislation at issue in the main proceedings likewise does not permit the successive fixed-term employment contracts to be converted into an employment contract or relationship of indefinite duration, as application of Article 5(4a) of Legislative Decree No 368/2001 to schools administered by the State is precluded****.*"

provisions that precluded the protection provided for under Legislative Decree no. 368/2001, referring to paragraphs 28[11] and 84[12] of that judgment.

89. Consequently, by the *Mascolo* ruling the Court of Justice remitted to the national courts that had made the preliminary references (the *Tribunale di Napoli* and the Constitutional Court) the power/duty to ensure effective protection to supply staff in schools, and to remove the provisions that precluded the application of Legislative Decree no. 368/2001 and the guarantee of full effect to Directive 1999/70/EC, either by disapplication (the *Tribunale di Napoli*) or by a declaration of unconstitutionality (Constitutional Court).

The Council of State recognises the right of holders of primary school teaching certificates to be included in the ERE for the purposes of the granting of tenured status

90. **By judgment no. 1973 of 16 April 2015** (see **Doc. 29), the 6th Division of the Council of State annulled ministerial decree no. 235/2014** insofar as it did not authorise teachers holding primary school teaching certificates establishing accreditation (on the grounds that they had been received during or before the 2001-2002 academic year) to be included in addition on the ERE on the grounds that **Law no. 296/2006 obliges the MEUR to insert into the ERE any "*teachers already holding accreditation*" at the time of the transformation of the permanent ranking lists into ERE**.

91. More specifically, **according to the judgment of the Council of State cited**, "***the criteria laid down by Ministerial Decree no. 235/2014 are unlawful and must be annulled***

[11] In paragraph 28 of the *Mascolo* judgment the Court of Justice stated as follows: "*According to the Tribunale di Napoli, that legislation does not contain any preventive measure for the purposes of clause 5(1)(a) of the Framework Agreement, since the legislation does not enable it to be verified specifically, in an objective and transparent manner, whether there is a genuine need for temporary replacement and, as Article 4(1) of Law No. 124/1999 expressly provides, authorises the renewal of fixed-term employment contracts in order to fill actual vacant posts. Nor does that legislation contain any preventive measures for the purposes of clause 5(1)(b) of the Framework Agreement.* ***Article 10(4a) of Legislative Decree No 368/2001 henceforth excludes the application to schools administered by the state of Article 5(4a) of that decree, which provides that fixed-term employment contracts exceeding a duration of 36 months are converted into employment contracts of indefinite duration****. Moreover, that legislation does not contain preventive measures for the purposes of clause 5(1)(c) of the Framework Agreement*."

[12] In paragraph 84 of the *Mascolo* judgment the Court of Justice stated as follows: "*So far as concerns the existence of measures preventing the misuse of successive fixed-term employment contracts as referred to in clause 5(1) of the Framework Agreement, it is common ground that the national legislation at issue in the main proceedings enables teachers to be recruited under successive fixed-term employment contracts in order to provide temporary replacements, without laying down any measure limiting the maximum total duration, or the number of renewals, of those contracts, within the meaning of clause 5(1)(b) and (c).* ***In particular, the Tribunale di Napoli states in that regard, as is apparent from paragraph 28 of this judgment, that Article 10(4a) of Legislative Decree No 368/2001 excludes the application to schools administered by the state of Article 5(4a) of that decree, which provides that fixed-term employment contracts exceeding a duration of 36 months are converted into employment contracts of indefinite duration, thus permitting an unlimited number of renewals of such contracts****. Nor is it in dispute that the national legislation at issue in the main proceedings does not contain any measure equivalent to those set out in clause 5(1) of the Framework Agreement*.".

insofar as they prevented teachers holding a primary school teaching certificate received during or before the 2001-2002 academic year to be included on the permanent provincial ranking lists, which are now to be drawn upon until exhaustion" since "there does not appear to be any doubt whatsoever that the holders of primary school teaching certificates received during or before the 2001-2002 academic year **already held a qualification establishing accreditation at the time the ranking lists were transformed from permanent ranking lists into ERE**.

92. By the later judgments no. 3628 of 21 July 2015 (see **Doc. 30**), nos. 3673 (see **Doc. 31**) and 3675 (see **Doc. 32**) of 27 July 2015, no. 3788 of 3 August 2015 (see **Doc. 33**), no. 4232 of 10 September 2015 (see **Doc. 34**) and no. 5439 of 2 December 2015 (see **Doc. 35**), the 6th Division of the Council of State reiterated the unlawful status of Ministerial Decree no. 235/2014 and in turn confirmed that Law no. 296/2006 required the inclusion on the ERE of the holders of primary school teaching certificates received under the old system because "*the holders of primary school teaching certificates received during or before the 2001-2002 academic year were to be regarded as holding a qualification establishing accreditation at the time the ranking lists were transformed from permanent ranking lists into ERE."*[13]

93. In practice, the 6th Division of the Council of State has issued seven judgments with identical content recognising the right of holders of primary school teaching certificates awarded under the old system constituting qualifications establishing accreditation during or before the 2001-2002 academic year to inclusion in band III of the ERE, with the court comprised as follows:

• **Judgment no. 1973 of 16 April 2015, President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Carlo Mosca, **other members of the court** Mr Sergio De Felice, Mr Claudio Contessa, Mr Giulio Castriota Scanderbeg;

• **Judgment no. 3628 of 21 July 2015, President** Mr Luciano Barra Caracciolo, **Author of the Judgment** Mr Carlo Mosca, **other members of the court** Mr Roberto Giovagnoli, Ms Gabriella De Michele, Mr Bernhard Lageder;

[13] In the six subsequent decisions with identical content, which were all consistent with the first judgment no. 1973/2015, the 6th Division of the Council of State moreover stressed that "*In referring to the definition of a three-year plan for fixed-term appointments for the purpose of providing a solution to the phenomenon of insecure employment,* ***Article 1(605)(c) of the above-mentioned Law no. 296/2006*** *expressly* ***allows for the inclusion ... of teachers already holding accreditation, whilst however excluding the possibility of new inclusions****. This Court therefore finds that, at the time of the transformation of the ranking lists, the original applicants and current appellants already held accreditation and* ***WERE NOT NEWLY ACCREDITED INDIVIDUALS*** *who were to be precluded from inclusion in the above-mentioned ranking lists"*.

• **Judgment no. 3673 of 27 July 2015, President** Mr Luciano Barra Caracciolo, **Author of the Judgment** Mr Carlo Mosca, **other members of the court** Mr Roberto Giovagnoli, Ms Gabriella De Michele, Mr Bernhard Lageder;

• **Judgment no. 3675 of 27 July 2015, President** Mr Stefano Baccarini, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Mr Sergio De Felice, Mr Roberto Giovagnoli, Mr Carlo Mosca;

• **Judgment no. 3788 of 3 August 2015, President** Mr Luciano Barra Caracciolo, **Author of the Judgment** Mr Carlo Mosca, **other members of the court** Mr Roberto Giovagnoli, Ms Gabriella De Michele, Mr Bernhard Lageder;

• **Judgment no. 4232 of 10 September 2015, President** Mr Luciano Barra Caracciolo, **Author of the Judgment** Mr Carlo Mosca, **other members of the court** Mr Roberto Giovagnoli, Ms Gabriella De Michele, Mr Bernhard Lageder;

• **Judgment no. 5439 of 2 December 2015, President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Giulio Castriota Scanderbeg, **other members of the court** Mr Claudio Contessa, Mr Vincenzo Lopilato, Mr Marco Buricelli.

94. The 6th Division of the Council of State has also issued numerous interim orders with identical content recognising the right of holders of primary school teaching certificates awarded under the old system constituting qualifications establishing accreditation during or before the 2001-2002 academic year to inclusion in band III of the ERE, with the court comprised as follows:

• **Order no. 4834 of 22 October 2014**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Carlo Mosca, **other members of the court** Mr Maurizio Meschino, Mr Vincenzo Lopilato, Mr Marco Buricelli;

• **Order no. 428 of 28 January 2015**, **President** Mr Giuseppe Severini, **Author of the Judgment** Mr Sergio De Felice**, other members of the court** Ms Roberta Vigotti, Mr Vincenzo Lopilato, Mr Marco Buricelli;

• **Order no. 1089 of 11 March 2015**, **President** Mr Stefano Baccarini, **Author of the Judgment** Mr Sergio De Felice, **other members of the court** Mr Roberto Giovagnoli, Mr Carlo Mosca, Mr Bernhard Lageder;

• **Order no. 1808 of 29 April 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Giulio Castriota Scanderbeg, **other members of the court**

Mr Sergio De Felice, Mr Claudio Contessa, Ms Roberta Vigotti;

• **Order no. 4334 of 22 September 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Marco Buricelli, **other members of the court** Mr Claudio Contessa, Mr Giulio Castriota Scanderbeg, Ms Roberta Vigotti;

• **Order no. 3900 of 31 August 2015**, **President** Mr Stefano Baccarini, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Roberta Vigotti, Mr Marco Buricelli, Ms Maddalena Filippi;

• **Order no. 3901 of 31 August 2015**, **President** Mr Stefano Baccarini, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Roberta Vigotti, Mr Marco Buricelli, Ms Maddalena Filippi;

• **Order no. 3951 of 31 August 2015**, **President** Mr Stefano Baccarini, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Roberta Vigotti, Mr Marco Buricelli, Ms Maddalena Filippi;

• **Order no. 3952 of 31 August 2015**, **President** Mr Stefano Baccarini, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Roberta Vigotti, Mr Marco Buricelli, Ms Maddalena Filippi;

• **Order no. 5445 of 4 December 2015**, **President** Mr Stefano Baccarini, **Author of the Judgment** Mr Vincenzo Lopilato, **other members of the court** Mr Roberto Giovagnoli, Mr Andrea Pannone, Mr Marco Buricelli;

• **Order no. 5540 of 16 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Gabriella De Michele, Mr Bernhard Lageder, Ms Maddalena Filippi;

• **Order no. 5541 of 16 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Gabriella De Michele, Mr Bernhard Lageder, Ms Maddalena Filippi;

• **Order no. 5542 of 16 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Gabriella De Michele, Mr Bernhard Lageder, Ms Maddalena Filippi;

• **Order no. 5555 of 16 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, **other members of the court** Ms Gabriella De Michele, Mr Bernhard Lageder, Ms Maddalena Filippi;

• **Order no. 5647 of 17 December 2015**, **President** Mr Luciano Barra Caracciolo, **Author of the Judgment** Mr Andrea Pannone, **other members of the court** Mr Roberto Giovagnoli, Mr Giulio Castriota Scanderbeg, Mr Vincenzo Lopilato;

• **Order no. 247 of 22 January 2016, President** Mr Luciano Barra Caracciolo, **Author of the Judgment** Mr Francesco Mele, **other members of the court** Mr Roberto Giovagnoli, Mr Marco Buricelli, Mr Bernhard Lageder;

• **Order no. 428 of 5 February 2016**, **President** Mr Sergio Santoro, **Author of the Judgment** Marco Buricelli, **other members of the court** Mr Roberto Giovagnoli, Mr Bernhard Lageder, Mr Francesco Mele.

95. The 6th Division of the Council of State has also accepted within administrative enforcement proceedings the applications filed by teachers who received a primary school teaching certificate during or before the 2001-2002 academic year by the following orders, with the court comprised as follows:

• **Order no. 5490 of 3 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, other members of the court Ms Gabriella De Michele, Mr Giulio Castriota Scanderbeg, Mr Marco Buricelli;

• **Order no. 5493 of 3 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, other members of the court Ms Gabriella De Michele, Mr Giulio Castriota Scanderbeg, Mr Marco Buricelli;

• **Order no. 5497 of 3 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, other members of the court Ms Gabriella De Michele, Mr Giulio Castriota Scanderbeg, Mr Marco Buricelli;

• **Order no. 5495 of 3 December 2015**, **President** Mr Filippo Patroni Griffi, **Author of the Judgment** Mr Claudio Contessa, other members of the court Ms Gabriella De Michele, Mr Giulio Castriota Scanderbeg, Mr Marco Buricelli.

96. In order to avoid the adverse consequences resulting from the *erga omnes* effect of Council of State judgment no. 1973/2015 annulling the regulatory provision set forth in Ministerial Decree no. 235/2014, **by Ministerial Decree no. 325 of 3 June 2015** (see **Doc. 36**) the MEUR, entirely unlawfully, revived in Article 5 **the criteria for updating** the ranking lists resulting from the **provisions** "***contained in Ministerial Decree 235 of 1 April 2014, of which this measure constitutes an integral part"***, thereby resulting in the

new exclusion from the ERE of all teachers holding a primary school teaching certificate, even if received during or before the 2001-2002 academic year.

97. In addition, by Article 55(1)(b) of Legislative Decree no. 81 of 15 June 2015, the legislature repealed Legislative Decree no. 368/2001 in its entirety without replacing it with any other legislation to implement Directive 1999/70/EC for fixed-term workers in public sector employment.

98. In fact, Article 29(2)(c) and (d) of Legislative Decree no. 81/2015 provides for the exclusion of the protection granted under clauses 4 and 5 of the framework agreement on fixed-term work in respect of supply teaching and ATA staff in schools (sub-paragraph c), reproducing in one single provision the protection laid down by Article 10(4-*bis*) of Legislative Decree no. 368/2001. In a contradictory manner, and again with the aim of negating any protection against abuse, Article 29(4) of Legislative Decree no. 81/2015 in addition provides that "*the foregoing shall be without prejudice to Article 36 of Legislative Decree no. 165 of 2001*", which still refers to paragraphs 2, 5-*bis* and 5-ter for the purpose of the application of the repealed Legislative Decree no. 368/2001.

99. As regards the Schools Branch, having decided not to apply the ordinary three-year plan for the granting of tenure provided for under Article 15(1) of Decree-Law no. 104/2013, by enacting Article 1(95) et seq of Law no. 107 of 13 July 2015 (laying down provisions on the "Reform of the *national education and training system and delegation of authority to reorganise applicable legislative provisions"*), the Italian government made provision for an extraordinary plan for the hiring of permanent staff with effect from the 2015-2016 academic year, which was **directed exclusively at teaching staff in schools administered by the state included in the ERE without any minimum length of service requirement** and disregarding the employment plan for SPQ and AET qualified teachers, graduates in Theory of Primary Education and the holders of primary school teaching certificates not included in the ERE.

100. In particular, a circular email of 11 November 2015 (see **Doc. 37**) informed the individual teachers concerned of the completion of reinforcement phase C of the exceptional plan for the granting of tenured status provided for under Law no. 107/2015, with legal effect from 1 September 2015.

101. On the other hand, although the teachers falling under phase "B" of Law no. 107/2015 had been included in the ERE for many years with a high service history score in view of the

many years of insecure employment in schools administered by the state, they were appointed according to a secret computerised procedure and forced to accept via electronic means a total of **8,776** positions according to a "reserved" proposal, hundreds of kilometres from the place of residence and the ERE province in which they were registered, without any opportunity to choose between the very large number of schools with vacancies, which were not indicated, and without any opportunity to ascertain whether the proposal "selected" by the secret algorithm of the system managed centrally by the MEUR was appropriate.

102. It is perfectly clear that the MEUR was fully able to identify the vacant positions and the availability among the permanent teachers as a "matter of historical fact" long before the approval of Law no. 107/2015, and hence there was no need or logical reason to break down the appointments into three distinct phases (A, B and C) for the same type of appointment among the permanent teachers. In fact, by Decree of the Director General no. 105 of 23 February 2016, the MEUR announced a competition based on qualifications and examinations for the recruitment of teaching staff to ordinary posts within the notional workforce of nursery schools (6,933 positions) and primary schools (17,299 positions), highlighting the existence of a total of 24,232 available positions within nursery schools and primary schools available for stable appointments during the 2015-2016 academic year.

The sudden "rethink" by the Council of State of the right of the holders of primary school teaching certificates to be included in the ERE

103. Unexpectedly, on 29 January 2016, order-judgment no. 364/2016 (see **Doc. 38**) of the 6th Division of the Council of State was issued after two sittings of the court in chambers on 17 November 2015 and on 16 December 2015, with Mr Filippo Patroni Griffi as President, Mr Gabriella De Michele as Author of the Judgment, and Mr Giulio Castriota Scanderbeg, Mr Claudio Contessa and Mr Marco Buricelli as the other members of the court.

104. In order-judgment no. 364/2016, the 6th Division of the Council of State first dismissed the appeal brought by certain teachers holding an SPQ, AET or a degree in Theory of Primary Education as qualifications establishing accreditation due to the failure to include them on the band III ERE, given the ban on the inclusion of new candidates in permanent ranking lists, subject to certain exceptions, following their transformation into ERE pursuant to Article 1(605) of Law no. 296/2006.

105. Moreover, in relation to this matter, the Council of State held that the different treatment reserved to the holders of primary school teaching certificates due to the recognition of the

qualification establishing accreditation pursuant to the Decree of the President of the Republic of 25 March 2014, based on opinion no. 3818/2013 of the Council of State was not applicable on the basis of the principle of non-discrimination laid down in clause 4 of the Framework Agreement on Fixed-Term Work implemented by Directive 1999/70/EC.

106. On the other hand, as regards the request for the inclusion of certain appellants holding primary school teaching certificates establishing accreditation which had been obtained under the old system during or before the 2001-2002 academic year, order no. 364/2016 of the 6th Division of the Council of State preferred to refer the question concerning the "reopening of the ERE" to a plenary hearing pursuant to Article 99 of the Code of Administrative Procedure, **entirely disregarding the seven definitive decisions of the 6th Division of the Council of State itself, issued in judgments no. 1973/2015, no. 3628/2015, no. 3673/2015, no. 3675/2015, no. 3788/2015, no. 4232/2015 and no. 5439/2015 and the fact that Ministerial Decree no. 235/2014**, which precluded the holders of primary school teaching certificates from the opportunity to be included in the ERE, **had been annulled by the first judgment no. 1973/2015, which has the status of a final administrative judgment that has definitively revoked a general administrative act**.

107. The serious amnesia of the members of the court that issued judgment-order no. 364/2016 is particularly surprising since the President Mr Filippo Patroni Griffi and the three members of the Court, Mr Giulio Castriota Scanderbeg, Mr Claudio Contessa and Mr Marco Buricelli, made up 4/5 of the court that issued Judgment no. 5439/2015 filed on 2 December 2015, i.e. between the first and second sitting in chambers to decide on order no. 364/2016, and that the member of the court and author of the order no. 364/2016 of the 6th Division of the Council of State, Ms Gabriella De Michele, was a member of the court that that had decided in favour of the holders of primary school teaching certificates and their inclusion in the ERE by Judgment no. 4232/2015 of 10 September 2015.

108. The doubt/rethink is also "strange" due to the fact that on 16 December 2015, in parallel with the second and decisive sitting in chambers that decided on order-judgment no. 364/2016, three fifths of the court that decided on order no. 364/2016 (President Mr Filippo Patroni Griffi, Author of the Judgment Ms Gabriella De Michele, other member Mr Claudio Contessa) accepted the application for suspensory effect filed by the holders of primary school teaching certificates, enabling them to be included in the ERE, **by four interim orders, nos. 5540, 5541, 5542 and 5555 of 16 December 2015** (see **Doc. 39**).

109. The State Counsel even filed an appeal pursuant to Article 362 of the Code of Civil Procedure against order-judgment no. 364/2016 of the Council of State, arguing that it was flawed insofar as it had ruled the administrative courts to have competence, and not the ordinary courts, over the recognition of the right of the holders of primary school teaching certificates to be included in the ERE, thereby making even clearer the refusal by the MEUR to apply the seven judgments of the Council of State which had ordered, with the effect of a final administrative judgment, the annulment of Ministerial Decree no. 235/2014 insofar as that general administrative act did not provide for the inclusion of the holders of primary school teaching certificates in the ERE.

110. The spurious appeal filed by the MEUR against order-judgment no. 364/2016 of the Council of State was ruled inadmissible by the **Joint Divisions of the Court of Cassation by Judgment no. 18890/2017 of 31 July 2017** (see **Doc. 40**), in the wake in any case of the settled case law of the **Joint Divisions of the Court of Cassation in orders nos. 25839/2016** (see **Doc. 41**) **and 25840/2016 of 15 December 2016** (see **Doc. 42**) on the dual competence of the administrative courts and the ordinary (employment) courts over the problem of the inclusion of the holders of primary school teaching certificates in the ERE following Judgment no. 1973/2015 of the Council of State annulling Ministerial Decree no. 235/2014: "*As the jurisdiction of the ordinary courts over contractualised public sector employment is secondary to the general jurisdiction of the administrative courts in the event of challenges to organisational acts with general content by which the public administrations define, according to general principles laid down by law, the fundamental policy governing the organisation of offices or identify the offices of greater significance and the arrangements governing appointments to such offices or determine overall staffing levels pursuant to Article 2(1) of Legislative Decree no. 165 of 2001 (cf. Court of Cassation, Joint Divisions, judgment no. 22779 of 2010), the administrative courts must all the more so have jurisdiction where the proceedings concern a challenge to a regulatory act of secondary legislation; regarding this matter, see Constitutional Court Judgment no. 41 of 2011 which, having been seized by an interlocutory constitutional reference from the Regional Administrative Court for Lazio during the course of an analogous dispute, observed that the referring court may rule on the legality of administrative acts determining the criteria applicable to the creation of ranking lists (permanent ranking lists for schools). Furthermore, Article 5(1) of Legislative Decree no. 165 of 2001 expressly provides that the public administrations shall act, albeit with the capacity and powers of a private employer, but* ***in accordance with the laws and***

within the ambit of the organisational acts provided for under Article 2(1), which are first and foremost acts governing the relationship*. Such acts are an expression of the organisational power of the public administration as an employer, on an equal footing with the power of instruction of a private sector employer,* ***whilst the former may be traced back to the regulatory power of the government or ministers, or the power to issue general administrative acts of a non-regulatory status and with a content covered by Article 2(1), cited above. Where such acts are genuine acts of secondary legislation, and hence have regulatory status, the administrative courts have general jurisdiction to review their legality in the event that an action is brought seeking their annulment by any party with standing on the grounds that he/she has a legitimate interest. In cases involving administrative acts with general and abstract content that do not however have regulatory status, as is on some occasions expressly stipulated, the administrative courts also have general jurisdiction to review legality in the event that an action is brought seeking their annulment where their contents fall under Article 2(1) of Legislative Decree no. 165 of 2001.*** *3.3. – It follows that, for the purposes of identifying which court has jurisdiction over disputes concerning the right to inclusion in a ranking list to be drawn upon until exhaustion (formerly permanent), it is therefore necessary to consider the substantive remedy sought within the proceedings. If the action seeks the annulment of the general or legislative administrative act, and only as an effect of the cancellation of that act – which in itself precludes the satisfaction of the teacher's claim to inclusion on a particular ranking list – the recognition of the appellant's right to inclusion on that ranking list, jurisdiction must lie with the administrative courts, as the action brought directly sought the annulment of an administrative act. If on the other hand the claim filed with the court specifically seeks recognition of the right of the individual teacher to be included on the ranking list on the grounds that such a right results directly from primary legislation, evidently subject to the disapplication of the administrative act that could preclude such inclusion, jurisdiction will lie with the ordinary courts*."

111. In particular, within the proceedings concluded by order no. 25839/2016 of the Joint Divisions of the Court of Cassation, the Supreme Court held that the ordinary courts had jurisdiction due to the procedural reason that "*the appellant points out that the object of the proceedings is the request that a permanent employment contract be concluded, and therefore that the remedy sought pertains to an individual right, the recognition of which falls without doubt within the jurisdiction of the ordinary courts. The appellant goes on to note that the Regional Administrative Court for Lazio had acknowledged that Ministerial Decree no. 235*

of 2014, which was referred to by Ministerial Decree no. 325 of 2015, was annulled by judgment of the Council of State no. 1973 of 2015, which concluded that two disputes with an identical object to the present one fell within the jurisdiction of the ordinary courts."

112. On the other hand, within the proceedings concluded by order no. 25840/2016 of the Joint Divisions of the Court of Cassation, the Supreme Court held that the administrative courts had jurisdiction due to the procedural reason that "*In this case, the applicants' claim clearly seeks the annulment of Ministerial Decree no. 325 of 2015, of which Ministerial Decree no. 235 of 2014 is an integral part, and consequently an act with general status representing the exercise of the authoritative power to identify the criteria governing inclusion on the ranking lists, which were moreover reiterated even after those laid down in Ministerial Decree no. 235 of 2014 were held to be unlawful precisely due to the failure to make provision for the inclusion of the holders of primary school teaching certificates obtained during or before the 2001-2002 academic year by the Council of State by Judgment no. 1973 of 2015.* ***Therefore, the administrative courts also have jurisdiction in this case, as the violation of the final judgment contained in Decision no. 1973 of 2015 has been averred***."

The Court of Cassation refuses to apply the sanction of stable employment to public sector workers in insecure situations, including school staff

113. In parallel with the "rethink" by the Council of State concerning the holders of primary school teaching certificates and after the *Mascolo* judgment of the Court of Justice, the approach of the Court of Cassation in 2016 was characterised by decisions that have seriously violated the fundamental rights of public sector workers in insecure employment, both within the schools sector and within non-school public sector employment, in keeping with the choices set out by the government in Legislative Decree no. 81/2015 and Law no. 107/2015.

114. In fact, by four identical judgments (nos. 4911, 4912, 4913 and 4914 of 14 March 2016, the Joint Divisions of the Court of Cassation (see **Doc. 43**) accepted four identical appeals filed by the Municipality of Massa against four identical judgments of the Genoa Court of Appeal, which had awarded compensation of 20 months' salary to public sector workers in insecure employment as damages for the abuse of fixed-term contracts, annulling the decisions insofar as the grounds of appeal were accepted and remitting the proceedings to the Genoa Court of Appeal, composed of different judges, asserting the principle of law that the workers were entitled only to compensation of between 2.5 and 12 months' salary, according

to an application by analogy of Article 32(5) of Law no. 183/2010. That provision was however repealed with effect from 25 June 2015 by Article 55 of Legislative Decree no. 81/2015 and ruled incompatible with Directive 1999/70/EC by the Court of Justice in the *Carratù* judgment of 12 December 2013 where it is applied retroactively in favour of the state and the public administrations (see **Doc. 44**).

115. Judgments 4911, 4912, 4913 and 4914 of 2016 of the Joint Divisions do not contain any reasons in support of the argumentation set forth in the decision, regarding which reference is made to a decision – no. 5072/2016 (see **Doc. 45**) – filed on the following day – 15 March 2016 – concerning the *Marrosu-Sardino* case to which the judgment of the Court of Justice was applied. Judgments nos. 4911, 4912, 4913 and 4914 of 2016 did not contain any reasons in support also of the refusal to make a preliminary reference pursuant to Article 267(3) TFEU in response to the preliminary request made by the workers in their written statements filed pursuant to Article 378 of the Code of Civil Procedure.

116. The "parent" judgment no. 5072/2016 of the Joint Divisions of the Court of Cassation of 15 March 2016 asserted - in contrast with the *Mascolo* judgment of the Court of Justice and Judgment no. 260/2015 of the Constitutional Court (see **Doc. 46**) – that public sector workers who have been employed under fixed-term contracts in a manner that constitutes an abuse cannot be given permanent status in accordance with the various provisions laid down in Legislative Decree no. 368/2001, which is applicable in any case to all public administrations, including schools,[14] because a public competition is necessary in order to access public sector employment and, given the lack of any provisions laying down sanctions for public sector employment and since the equivalent sanctions regime to which private persons are subject cannot be applied, the damages awarded do not compensate the loss of the job but rather the so-called "Community" damage of between 2.5 and 12 months' salary.

117. The following principle of law was asserted by the Joint Divisions of the Court of Cassation by Judgment no. 5072/2016: "*Under the regime applicable to public sector employment, in the event of the abuse of fixed-term contracts by a public administration, an*

[14] In fact, the Joint Divisions of the Court of Cassation held as follows in Judgment no. 5072/2016 concerning the application of Legislative Decree no. 368/2001 to all public administrations: "*Even more recently, two paragraphs were introduced into Article 36 of Legislative Decree no. 165 of 2001 (paragraphs 5-ter and 5-quater) by Article 4(1)(b) of Decree-Law no. 101 of 31 August 2013, converted into Law no. 125 of 30 October 2013, which - reiterating the provisions laid down in Legislative Decree no. 368 of 2001, apply to the public administrations notwithstanding the prohibition on the transformation of fixed-term contracts into permanent contracts and the employee's right to compensation - stipulated that fixed-term contracts concluded in breach of that provision are void and give rise to liability on the part of the state, and also confirmed the liability of directors who act in breach of the law, adding that the director responsible for any irregularity in the recourse to flexible work cannot be paid the performance element of his/her remuneration.*"

employee whose employment status has been unlawfully rendered insecure is entitled, notwithstanding the prohibition on the transformation of the employment contract from fixed-term into permanent as laid down by Article 36(5) of Legislative Decree no. 165 of 30 March 2001, to compensation of damages as provided for under that provision and is exempt from the requirement to furnish proof within the limits laid down by Article 32(5) of Law no. 183 of 4 November 2010, and accordingly in an amount equal to an all-inclusive indemnity of between a minimum of 2.5 and a maximum of 12 monthly payments of the last global de facto remuneration, having regard to the criteria indicated in Article 8 of Law no. 604 of 15 July 1966."

The Constitutional Court and the EU Court of Justice reiterate the right of public sector workers in insecure employment to stabilisation in the event of the abuse of fixed-term contracts

118. On the other hand, entirely disregarding Judgment no. 5072/2016 of the Joint Divisions of the Court of Cassation, by Judgment no. 187 of 20 July 2016 (see **Doc. 47**) the Constitutional Court declared unconstitutional Article 4(1) of Law no. 124/1999 (the only provision subject to constitutional review) on annual supply appointments with effect *ex tunc*, further specifying that permanent stabilisation is the only sanction capable of resolving the consequences of the contractual abuse. At the same time, the Constitutional Court expressly held that the *Mascolo* judgment constituted a *ius superveniens* within national law (see orders no. 194 and 195 of 2016, **Doc. 48**).

119. Following judgment no. 187/2016 of the Constitutional Court, which held that only adequate sanction for punishing the abusive use of fixed-term contracts was stabilisation of public sector workers in insecure employment and not the payment of mere damages, on 5 September 2016 in Case C-494/16 (see **Doc. 49**), acting contrary to the solution of Community damage laid down by the Joint Divisions of the Court of Cassation in judgment no. 5072/2016, the *Tribunale di Trapani* sent two new references for a preliminary ruling to the CJEU concerning the principle of equivalence and the efficacy of the sanction laid down Article 32(5) of Law no. 183/2010 which provides only for the payment of compensation: "*1) Is the granting of compensation in the amount of between 2,5 and 12 monthly payments of the last overall salary payment (Article 32(5) of Law No 183/2010) to a public employee, who is a victim of the unlawful successive renewal of fixed-term contracts, who may obtain full compensation only by proving the loss of other work opportunities or by proving that, if he or she had participated in an open competition, he or she would have been successful, an*

equivalent and effective measure within the meaning of the judgments of the Court of Justice in Mascolo [and Others (C-22/13, C-61/13 to C-63/13 and C-418/13)] and Marrosu [and Sardino] (C-53/04)? 2) Must the principle of equivalence referred to by the Court of Justice (inter alia) in those judgments, be interpreted as meaning that, when the Member State decides not to apply the conversion of the employment relationship (as awarded in the private sector) to the public sector, it must nevertheless provide the worker with the same benefit, if necessary through compensation which must relate to the value of the employment contract of indefinite duration?".

120. By the judgment in *Martínez Andrés and Castrejana López* (see **Doc. 50**) of 14 September 2016, issued with reference to judgment no. 187/2016 and orders nos. 194 and 195 of 2016 of 20 July 2016 of the Constitutional Court, the Court of Justice made a finding of full equivalence in terms of sanctions between the public and private sectors, concluding as follows: "*1) Clause 5(1) of the framework agreement on fixed-term work, concluded on 18 March 1999, which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, from being applied by the national courts of the Member State concerned in such a manner that, in the event of abuse resulting from the use of successive fixed-term employment contracts, a right to maintain the employment relationship is granted to persons employed by the authorities under an employment contract governed by the rules of employment law, but that right is not conferred, in general, on staff employed by those authorities under administrative law, unless there is another effective measure in the national law to penalise such abuses with regard to the latter staff, which it is for the national court to determine. 2) The provisions of the framework agreement on fixed-term work which is set out in the annex to Directive 1999/70, read in conjunction with the principle of effectiveness, must be interpreted as precluding national procedural rules which require a fixed-term worker to bring a new action in order to determine the appropriate penalty where abuse resulting from the use of successive fixed-term employment contracts has been established by a judicial authority, to the extent that it results in procedural disadvantages for that worker, in terms, inter alia, of cost, duration and the rules of representation, liable to render excessively difficult the exercise of the rights conferred on him by EU law.*".

The Court of Cassation insists in denying any effective protection to workers in insecure employment in schools, refusing to hold that any contractual abuse has been committed

121. On the other hand, in the "serial" decisions from 2016 on schools, discussed in the hearing held on 18 October 2016 following judgment no. 187/2016 of the Constitutional Court, the Employment Division of the Court of Cassation has continued to refuse any effective protection to workers in insecure employment in schools, starting from the unusual manner in which the hearing was organised with the State Counsel, which is defending the MEUR, being requested outside of the trial to provide an Excel list of all of the workers involved in the proceedings, including teachers and ATA staff, along with an indication as to whether they had been granted tenured status and in what manner (ordinary recruitment or Law no. 107/2015). This is information that could be obtained within proceedings before the Court of Cassation except in line with ordinary arrangements, i.e. along with the case file (appeal and response) and the related party submissions; by contrast, the President of the Employment Division allowed it to be acquired outside of the proceedings, thereby providing explicit indications *by implicit or tacit consent* concerning the outcome of the disputes.

122. Also in these disputes the representatives of the workers asked the Court of Cassation in their respective written statements filed pursuant to Article 378 of the Code of Civil Procedure to refer references for a preliminary ruling to the CJEU concerning the equivalence in sanctions between public sector and private sector employment in order to enable the three precedents of the Court of Cassation to be disregarded, which had already been objected to by the Court of Justice either directly or indirectly, as moreover an identical preliminary reference had been sent by the *Tribunale di Trapani* by the order of 5 September 2016 in Case C-494/16.

123. Conversely, by six identical judgments of 7 November 2016 on workers in insecure employment in schools – nos. 22552, 22553, 22554, 22555, 22556 and 22557 (see **Doc. 51**) – the Court of Cassation:

• rejected the request for a preliminary reference to the CJEU (paragraph 105 of the identical judgments) based precisely on the judgment of the Court of Justice in *Martínez Andrés and Castrejana López* of 14 September 2016 and pending the outcome of the references for a preliminary ruling made by the *Tribunale di Trapani* by the order of 5 September 2016 in Case C-494/16;

• upheld as well founded the arguments contained in judgment no. 10127/2012 of the same Court and reiterated once again, and in the face of the literal provision of the legislation, that Legislative Decree no. 368/2001 does not apply to schools administered by the state;

• ruled that the conduct of the MEUR in granting up to three annual supply appointments was lawful pursuant to Article 4(1) of Law no. 124/1999, despite having been ruled unconstitutional by the Constitutional Court in judgment no. 187/2016;

• ignored the *Mascolo* judgment of the Court of Justice, asserting that it did not wish to depart from judgment no. 10127/2012 of the Court of Cassation;

• disregarded also judgment no. 5072/2016 of the Joint Divisions of the Court of Cassation along with the principle laid down therein of compensation of between 2.5 and 12 months' salary pursuant to Article 32(5) of Law no. 183/2010 without imposing any burden of proof on the public sector worker employed under fixed-term contracts in a manner that constitutes an abuse, a principle which had been laid down for all public sector employment, including within schools, on the assumption that Legislative Decree no. 368/2001 applied to all public sector employment, including within schools;

• deprived the NCLA of 29 November 2007 of any normative content, specifying in paragraph 108 that "in providing that the contract may only be transformed only in accordance with 'specific legislative provisions', Articles 40 and 60 of the NCLA of 29 November 2007 must inevitably relate to the statutory rule, which cannot be derogated from in this regard, resulting from the restriction imposed by Article 97 of the Constitution, which has been laid down for the schools sector".

124. According to the position adopted by the Court of Cassation in the judgments of 7 November 2016 on insecure employment within schools, based on an essentially "retroactive" and co-ordinated application of Article 1(131) of Law no. 107/2015, if – and only if – the teacher or ATA staff member has been employed under four annual supply appointments this will constitute a contractual abuse (as supply appointments until 30 June are lawful, unless proven otherwise by the worker). Consequently, even though tens of thousands of supply teachers in schools holding an SPQ or AET qualification to teach had more than 36 months' service, this does not constitute an abuse of fixed-term contracts and these workers will have no right either to compensation or to stabilisation, as Article 5(4-bis) of Legislative Decree no. 368/2001 does not apply.

125. At the same time as the judgments adopted by the Court of Cassation in breach of the position stated by the Constitutional Court and the Court of Justice, in an unprecedented communication of 7 November 2016 (ref. no. 0022549 (see **Doc. 52**)) concerning "disputes involving workers in insecure employment in schools" addressed to all court of appeal

presidents, the First President of the Court of Cassation instructed all employment judges in all courts and courts of appeal throughout the country to give effect "as a matter of priority" to the judgments of the Court of Cassation on insecure employment in schools: **"***Please find the enclosed copy of the press release announcing that the Employment Division of this Court has published several judgments concerning the dispute regarding fixed-term contracts of workers in insecure employment in schools (teachers and ATA staff). I am therefore informing you of the position adopted regarding this matter by the Court of Cassation in order that you may bring it to the attention of the merits courts as a matter of priority.*". All courts at first and second instance have been complying with the judgments of the Court of Cassation, copying them in their entirety and rejecting workers' claims.

126. The judgments of the Court of Cassation concerning insecure employment within schools have been challenged due to the highly serious violation of the substantive and procedural rules applicable to such matters before the CJEU (order of the Employment Division of the Trento Court of Appeal of 17 July 2017 in Case C-494/17 *Rossato*, in **Doc. 53**), before the European Court of Human Rights (application no. 22417, *Billeci and others*, in **Doc. 54** and no. 69611/2017 *Tenore and ANIEF*, in **Doc. 55**) and before the European Committee of Social Rights (ANIEF collective complaint no. 146/2017), due to the violation of EU law, the provisions of the ECHR, the European Social Charter and – it should be added – also and above all the national Constitution (Article 117(1) and Article 139) and internal legislation (Legislative Decree no. 368/2001).

127. In particular, it is important to point out the persuasive viewpoint adopted by the European Commission in its written observations in Case C-331/17 *Sciotto* (see **Doc. 56**) in a case involving public sector workers of operatic and orchestral foundations in insecure employment to whom the sanction of the transformation or conversion into permanent employment contracts provided for both by Article 1(2) of Legislative Decree no. 368/2001 with regard to the prohibition laid down by Article 3(6) of Decree-Law no. 64/2010 and by Article 5(4-bis) of Legislative Decree no. 368/2001 with regard to the prohibition laid down by Article 11(4) of Legislative Decree no. 368/2001 does not apply, following a preliminary reference raised by the Trento Court of Appeal by the order of 15 May 2017 in which it invoked the "living law" [i.e. the uniform and settled case law] of the Court of Cassation on precarious workers in schools.

128. The EU Commission asserts as follows in its written observations in Case C-331/17 *Sciotto*, paragraphs 27-28 and 32: "*27. .....an abuse is committed whenever successive*

fixed-term contracts are used without any objective justifications. 28. In the above-mentioned judgment in Commission v. Luxembourg concerning casual workers in the performing arts sector, the Court recalled in this regard the objective of clause 5(1) of the framework agreement, which is to limit the use of successive fixed-term employment contracts or relationships, which are considered as a potential source of abuse of workers, specifically by laying down a certain number of provisions offering 'minimum protection' with the aim of avoiding the creation of a situation of insecurity for employees……………. 32. In the judgment cited, the Court concluded that national legislation that does not subject the employment of fixed-term staff to specific legal requirements related to the nature of the activity carried out, but that allows for that employment option in a general and abstract manner, so much so as to enable such workers to be hired under fixed-term contracts also for tasks that, on account of their nature, are not temporary, is not compatible with clause 5 of the framework agreement." [Unofficial translation]

129. The Commission continues as follows in paragraphs 35-38 of its written observations in the *Sciotto* case C-331/17 regarding the need for temporary objective reasons in order to justify the inclusion of a term in an employment contract, as is apparent from judgments nos. 260/2015 and 187/2016 of the Constitutional Court: "*35. However, in the first place, as indicated by the referring court, the legislation applicable within the main proceedings does not provide for the specification of 'technical reasons, or reasons connected to production, organisation or replacement', which are by contrast required for fixed-term contracts, initially by Article 1(1) of Legislative Decree no. 368/2001 and now by Article 1(1) of Legislative Decree no. 81/2015. The removal of the requirement to state those reasons results from the wording of Article 3(6) of Decree-Law 64/2010, as converted. 36. There is therefore no indication apparent under national legislation that could enable any specific requirements pertaining to work at operatic and orchestral foundations to be identified that would be such as to justify the repeated use of fixed-term contracts. 37. In particular, according to the account of the facts of the case provided by the referring court, Ms Sciotto was employed by the Teatro dell'Opera in Rome for around four years in clearly defined roles, the purpose of which remained unchanged as she always performed the same tasks. 38. Under circumstances of this type, it must further be added that, on the basis of the findings made by the referring court it appears possible to conclude that fixed-term contracts were used in order to cover requirements of a recurring and ongoing nature. It therefore constitutes an abuse pursuant to clause 5 of the framework agreement.*" [Unofficial translation]

130. Finally, in paragraphs 46-51 of its written observations in *Sciotto* Case C-331/17, the European Commission refers in particular to the *Diego Porras* (C-596/14, EU:C:2016:683, paragraphs 21, 25, 30-32 in **Doc. 57**) and *Impact* (C-286/06, EU:C:2008:223, paragraphs 59-60 in **Doc. 58**) judgments of the Court of Justice in order to object to the discrimination against workers **between fixed-term workers employed by operatic and orchestral foundations and workers employed by other employers, for whom recourse to fixed-term contracts must be justified by objective justifications**:

"*46. Fourthly and finally, alongside the evident breach of the requirements of clause 5 of the framework agreement and the objective of regulating the recourse to fixed-term employment, it must also be pointed out that the legislation at issue in the main proceedings gives rise to clear discrimination between the fixed-term workers employed by operatic and orchestral foundations and workers employed by other employers, for whom recourse to fixed-term contracts must be justified by objective reasons and, where it continues beyond thirty-six months, results automatically in a permanent employment contract, whilst also establishing a right of the interested party to compensation.*

47. The Commission takes the view that a difference in treatment of this type is not justified by any objective reason and, as such, runs entirely contrary to the principle of non-discrimination, which constitutes a further objective of the framework agreement, namely of guaranteeing equality of treatment between fixed-term workers, as provided for also under clause 1(a) of the framework agreement.

48. This difference in treatment also breaches clause 4(1) of the framework agreement, which is applicable to the present case insofar as, in the first place, the Italian legislature failed to state objective reasons for the distinction between the category of workers employed by operatic and orchestral foundations and the category of other employee workers (paragraphs 35 and 38 of these written observations) and secondly persons working under fixed-term contracts as employees of subjects other than such foundations have the opportunity to become permanent employees after thirty-six months (paragraphs 42 to 54 of these written observations) [and] therefore become 'comparable permanent workers' within the meaning of clause 4(1) of the framework agreement.

49. Accordingly, clause 4(1) of the framework agreement prohibits discrimination in respect of 'employment conditions', which the Court held in the Diego Porras case to include 'compensation' paid for termination of a contract of employment, holding that the provision of compensation for certain workers but not for others ran contrary to the clause in question of the framework agreement.

50. The Commission takes the view that the payment of compensation for the abuse of fixed-term contracts brought about first by Article 32(5) of Law no. 183 of 2010 and subsequently by Article 28(2) of Legislative Decree no. 81 of 2015 may also be considered to be an employment condition within the meaning of clause 4(1) of the framework agreement considering that it is paid, moreover on a lump-sum basis and by an order to pay 'all-inclusive compensation', following the occurrence of a particular circumstance affecting the existence of the employment relationship, namely the fact that the said fixed-term relationship continues beyond thirty-six months, transforming into a permanent relationship.

51. In this regard, ***since clause 4(1) of the framework agreement is a provision with a sufficiently precise and unconditional content in order to be relied upon before the national***

courts, as held by the Court in the Impact judgment, in this case Ms Sciotto is able to rely on that clause directly before the national courts, with the result at least of disapplying the national provisions that, without any objective justification, significantly limit the protection for fixed-term workers of operatic and orchestral foundations compared to that stipulated for persons employed by subjects other than such foundations." [Unofficial translation]

131. It therefore follows that **the "*remedy*" developed by the Italian State** set out in the *"Good Schooling"* guidelines, in spite of the statements of policy and principle contained in them, in actual fact **entirely lacks the "preventive", "effective" and "sufficiently dissuasive" scope required under EU law** in view of the refusal by the Italian State, the MEUR and the Court of Cassation in the judgments on insecure employment in schools to apply the provisions on relief through sanctions contained in Legislative Decree no. 368/2001, legislation implementing Directive 1999/70/EC, now replaced by provisions of identical content (see the written observations of the EU Commission in Case C-331/17, paragraphs 7-8) laid down by Legislative Decree no. 81/2015.

The memorandum of 15 May 2017 of the Presidents of the Supreme Courts and the judgment of 20 December 2017 of the Council of State in plenary session concerning the holders of primary school teaching certificates

132. **On 15 May 2017**, the then (now former) First President of the Court of Cassation, the President of the Council of State, the then (now former) President of the Court of Auditors, the then (now former) Public Prosecutor General at the Court of Cassation and the then (now former) Public Prosecutor General at the Court of Accounts signed **a memorandum** (see **Doc. 59**) proposing nine objectives for interaction between the senior bodies of the highest courts (Joint Divisions of the Court of Cassation; Council of State; Court of Auditors) with reference to the co-ordination of the uniform and settled interpretation of the law, amongst which the fourth objective, concerning the incorporation into existing courts (in particular into the Joint Divisions of the Court of Cassation with regard to questions of jurisdiction) of a minority of members originating from other courts, raises serious doubts as to its compatibility with the internal constitutional order and concerning the possible violation of the principle of the independence and impartiality of the judiciary.

133. In particular, the memorandum of 15 May 2017 appears to be directed at thwarting the attempt by the Joint Divisions of the Court of Cassation in the order of 17 November 2015 (no. 107/2016 in the register of orders, see **Doc. 60**) to allow for appeals to the highest body of the Court of Cassation, on the grounds of *ultra vires* judicial acts pursuant to Article 111(8)

of the Constitution, against decisions of the Council of State in plenary session that, as the supreme court for administrative matters, commit serious violations of EU law or the European Convention on Human Rights, as is apparent from the *Puligienica* judgment of 5 April 2016 of the Grand Chamber of the Court of Justice (see **Doc. 61**) and in the *Mottola* judgment of 4 February 2014 of the European Court of Human Rights (see **Doc. 62**).

134. By judgment no. 11 of 20 December 2017 (see **Doc. 3, cited above**) of the Council of State in plenary session, the court rejected the principles of law set forth in seven judgments of the 6th Division of the Council of State recognising the right of holders of primary school teaching certificates to be included in the ERE, and laid down the following opposing principles of law: "1. *The time limit for challenging the administrative measure starts to run from the time the individual becomes fully aware of the act and its harmful effects, and the claimant's mistaken subjective conviction that his or her claim is unfounded is not of any relevance and does not have the effect of deferring the start date for the said time limit. It must therefore be concluded that, except in cases involving multiple acts with inseparable effects, the supervening annulment by the courts of an administrative act cannot be relied on by other interested parties who did not file a challenge in time, who are therefore unable to file a challenge, with the resulting 'exhaustion' of the legal relationship in question*. 2. *The mere possession of a primary school teaching certificate, albeit obtained during or before the 2001-2002 academic year, does not constitute a sufficient basis for inclusion on the ERE of teaching and educational staff established pursuant to Article 1(605)(c) of Law no. 296 of 27 December 2006*.".

135. By judgment no. 11/2017, the Council of State in plenary session rejected the final administrative ruling contained in judgment no. 1973/2015, which annulled **Ministerial Decree no. 235/2014**, advancing the peculiar argument that this measure **(which is mistakenly referred to in the judgment of the plenary session as no. 234/2014**) did not have the status of an administrative act of general application in excluding the holders of primary school teaching certificates, who should have challenged their exclusion from the ERE following the publication of the Ministerial Decree of 16 March 2007 within the time limit of 60 days, thereby branding as incompetent seven (i.e. the majority) of the thirteen members of the Court in plenary session (Division Presidents Mr Filippo Patroni Griffi, Mr Sergio Santoro, Mr Giuseppe Severini; Judges Mr Roberto Giovagnoli (author of the judgment), Mr Claudio Contessa, Mr Bernhard Lageder and Mr Silvestro Maria Russo), who had previously adopted judgments or interim orders that had been favourable to the inclusion

of the holders of primary school teaching certificates in the ERE without noticing the existence of that forfeiture of rights, and in fact finding that no rights had been forfeit.

136. According to judgments nos. 4232/2015 and 5439/2015 of the 6th Division of the Council of State, which include all five members of the Court that adopted order no. 364/2016 (President Filippo Patroni Griffi, judges Ms Gabriella De Michele, Mr Giulio Castriota Scanderbeg, Mr Claudio Contessa, Mr Marco Buricelli) remitting the proceedings to the plenary session, although not on the grounds of any discrepancy within the case law, "*There does not moreover appear to be any doubt whatsoever that the holders of primary school teaching certificates obtained during or before the 2001-2002 academic year were to be deemed to hold a qualification establishing accreditation at the time the ranking lists were transformed from permanent lists into lists to be drawn upon until exhaustion.* ***The fact that this qualification was only recognised as eligible in 2014, following the opinion of the Council of State referred to above, cannot prevent such recognition from having effects for the purposes of inclusion on the above-mentioned ranking lists reserved for teachers who have been accredited as such, as that ruling was interpretative in nature (the above-mentioned opinion of this body, which definitively clarified, pursuant to Article 53 of Royal Decree no. 1054 of 6 May 1923 and Article 197 of Decree-Law no. 297 of 16 April 1994, the status of primary school teaching certificates obtained prior to the launch of the degree course in Educational Theory as establishing accreditation) and concerned the relevant legislative framework, and as such applies erga omnes (subject to the exhaustion of the effects and liability to challenge before the courts of the administrative relationship with each interested party).*** *Consequently, the above-mentioned requests for inclusion were filed (in 2014) validly, having been presented within the time limits commencing from the time the original claimants became effectively aware of the harmful nature of the contested act. In addition, the claim seeking inclusion in band III of the ranking lists, the same band in which the current appellants should have been included had their qualification establishing accreditation been previously recognised by the MEUR, is well-founded; however, even after granting recognition, the MEUR has continued to refuse to recognise it as a basis for inclusion on such ranking lists and has recognised it only for the purposes of inclusion on the institute ranking lists, which are valid for the granting of short-term supply appointments and not for permanent appointments. This Division has already ruled to this effect in judgment no. 1973 of 16 April 2015, from which this Court does not intend to depart. 5. – Moreover, in contrast to the assertions of the Administration, the*

argument based on the difference between the efficacy of a primary school teaching certificate obtained during or before the 2001-2002 academic year as a qualification establishing accreditation and the right to accredited teachers to be included on the ERE cannot be endorsed. This is because, under current legislation, the holding of accreditation to teach is a sufficient prerequisite for such inclusion. Moreover, the table for the assessment of qualifications from the above-mentioned band three IIIof the ERE of teaching staff in schools and institutes of every type and level – cf. table referred to in Article 1 of Decree-Law no. 97/2004, converted into Law no. 143/2004, supplemented by Law no. 186/2004 and amended by Law no. 296/2006 – refers inter alia under point a), entitled 'qualifications establishing eligibility for inclusion on the ranking list', to qualifications establishing accreditation held on any grounds, such as the primary school teaching certificates cited, which therefore constitute a valid basis for such inclusion. Article 1(605)(c) of Law no. 296/2006 is expressly without prejudice – when referring to the definition of a three-year plan for permanent appointments with the aim of providing a solution to the phenomenon of insecure employment – to the inclusion of teachers already holding accreditation, whilst excluding the possibility of new inclusions, for the 2007-2008 two-year period, within the ranking lists transformed from permanent lists into ERE, which are to be drawn upon, in part, for the purposes of appointments. 6. – This Court therefore finds that, at the time of the transformation of the ranking lists, the original applicants and current appellants already held accreditation and were not newly accredited individuals who were to be precluded from inclusion on the above-mentioned ranking lists. In this regard, the criteria laid down by Ministerial Decree no. 235 of 2014 are unlawful and must be annulled insofar as they prevented the teachers holding a primary school teaching certificate obtained during or before the 2001-2002 academic year from being included on the provincial ERE."

137. By contrast, according to judgment no. 11/2017 of the Council of State in plenary session, which included seven of the division presidents and judges on the Council of State (including the author of the judgment Mr Giovagnoli) who had already resolved in favour of the holders of primary school teaching certificates in the manner specified in the two judgments nos. 4232/2015 and 5439/2015, "*the question concerning the efficacy erga omnes of Ministerial Decree no. 234 of 2014, and consequently of the annulment of judgment no. 1973/2015 of the 6th Division of the Council of State. 20. Moreover, even leaving aside the decisive considerations set out above, judgment no. 1973/2015 cannot be argued to have erga omnes effect also for other reasons. 21. In the first place, it is not possible to endorse the*

argument that Ministerial Decree no. 234/2014 has legislative status (and consequently erga omnes effect) considering that this decree is directed exclusively at persons who are already included on the ERE (either with full entitlement, or subject to reservations), and governs continuing inclusion, updating and confirmation of inclusion following the removal of the reservation for those included in the ranking list subject to reservation and the resulting update. The decree is consequently directed at specific persons, or in any case at persons who are readily identifiable, and already in this regard lacks an essential feature of a legislative act, namely the indeterminability of the addressees, which is a natural corollary of the general and abstract nature of legislative provisions, which by contrast the decree under examination lacks (cf. plenary hearing, no. 9 of 4 May 2012). This does not alter the fact that it is in any case an administrative act of macro-organisation, and as such amenable to establish the jurisdiction of the administrative courts, as has been recognised by the Joint Divisions of the Court of Cassation in upholding such jurisdiction (cf. Joint Divisions, order no. 25840 of 14 December 2016). 22. In that regard, it must also be pointed out that the annulment of Ministerial Decree no. 234/2014 'insofar as it did not enable the holders of primary school teaching certificates (obtained during or before the 2001-2002 academic year) to be included on the ERE' is based on arguments that cannot be endorsed as they presuppose – in contrast to what is objectively apparent from an analysis of the contents of the Ministerial Decree – that it is the act through which the criteria for inclusion on the ranking list are governed and the related prerequisites are identified. On the contrary, as has been pointed out, that Ministerial Decree is directed only at persons already included on the ranking list, and does not deal in any way with the position of those who seek inclusion. It was not (and is not) therefore Ministerial Decree no. 234/2014 that prevents the inclusion of the holders of primary school teaching certificates on the ERE.

The start date for the period during which challenges may be filed must be identified at most (even disregarding the exclusion otherwise resulting from the failure to present the request for inclusion within the applicable time limits) as the date on which the Ministerial Decree of 16 March 2007 was published whereupon, according to Article 1(605) of Law 296/2006 (Finance Law for 2007) the first updating of the permanent ranking lists was ordered, which the Finance Law for 2007 had 'closed' with the stated aim of transforming them into lists to be drawn upon until exhaustion. In surveying the legislative provisions applicable in the area, the above-mentioned Ministerial Decree identified the prerequisites for access to the ranking lists, without including primary school teaching certificates obtained during or before the

2001-2002 academic year. This is therefore the time when the violation of the rights of the appellants (hypothetically) occurred as the Ministerial Decree of 16 March 2007 was the last measure providing for the supplementing and updating of the ERE prior to their definitive closure to the inclusion of new individuals, in accordance with an express statutory provision. Therefore, as the appellants have not challenged that Ministerial Decree (and have not filed any request for inclusion in accordance with the terms set forth therein), they must now be deemed to have forfeited any rights. 23. Moreover, ***even if a harmful measure were deemed to consist in Ministerial Decree no. 234/2014, the fact that, whilst annulling that Ministerial Decree insofar as it did not allow the inclusion of the holders of primary school teaching certificates obtained during or before the 2001-2002 academic year, judgment no. 1973/2015 of the 6th Division expressly limits the effect of that annulment to the persons who had filed the appeal allowed by that. That explicit and literal limitation of the subjective scope (which is clearly apparent from the operative part of the judgment) means that it cannot have erga omnes effect****.*"

138. As far as the status of establishing accreditation of primary school teaching certificates is concerned, in judgment no. 11/2017, repudiating all precedents regarding this matter, the Council of State in plenary session asserted the "bi-phasic" or bivalent nature of primary school teaching certificates obtained during or before the 2001-2002 academic year, which are valid for the purposes of establishing accreditation to participate in public competitions and for inclusion on institute band II ranking lists, although they are not valid for the purposes of inclusion on the ERE, offering a systematic interpretation of the legislation starting from the evident confusion between primary school teaching certificates obtained under the old system during or before the 2001-2002 academic year, which according to law have the status of establishing accreditation, and three-year, four-year or five-year qualifications received from teacher-training institutes according to the experimental scheme, which do not have the status of establishing accreditation to teach in primary and nursery schools. Only for the latter (in contrast to the former) Article 2(1)(c-bis) of Decree-Law no. 97/2004 provided for accreditation through a one-year university course, which requirement the Court sitting in plenary session mistakenly imposed also on the holders of primary school teaching certificates who obtained the qualification under the old system.

139. As had already been done by the Court of Cassation in judgment no. 10127/2012 and in the judgments of 7 November 2016 on workers in insecure employment in schools, following order-judgment no. 364/2016 of the 6th Division of the Council of State remitting the

proceedings to the Court in plenary session, in judgment no. 11/2017 the Council of State in plenary session held that there was no problem of compatibility between Directive 1999/70/EC and the school legislation providing protection against abuses in the use of successive fixed-term contracts along with the administrative practice of the MEUR of excluding the holders of primary school teaching certificates establishing accreditation to teach from inclusion on the ERE, whereas by contrast clause 4 of the framework agreement on fixed-term work on non-discrimination appears to have been clearly violated in that supply teachers holding primary school teaching certificates who are not included "stably" on the ERE (but only provisionally and subject to reservation) are denied the opportunity to establish a permanent employment relationship with the MEUR, which is by contrast guaranteed to comparable permanent workers, i.e. to the approximately 2,600 holders of primary school teaching certificates who, thanks to the judgments of the Administrative Regional Court and the Council of State that have become final, were first definitively included on the ERE and subsequently granted tenured status as employees of the state schooling system.

140. To complete the framework, according to the data provided by the MEUR (see **Doc. 63**), as a consequence of judgment no. 11/2017 of the Council of State in plenary session the overall number of holders of primary school teaching certificates who have initiated court action (either before the Regional Administrative Court or the Council of State) is **50,203**, of whom 6,669 have been granted tenured status subject to reservation and 43,534 have been included on the ERE subject to reservation "pending the definitive judgment", and of this number 23,356 received appointments up to 30 June 2018 or 31 August 2018 during the 2017-2018 academic year and 20,110 were granted short supply appointments as replacement teachers.

141. The judgment will apply immediately to the 6,669 teachers who were granted tenured status subject to reservation, resulting in the termination of their permanent contracts, and also to the 43,534 holders of primary school teaching certificates who are currently working under annual supply appointments until 31 August 2018 or until the end of teaching activity on 30 June 2018 or under temporary supply appointments, whose fixed-term employment relations will end along with their exclusion from the ERE on which they had been included subject to reservation.

142. Conversely, for the approximately 2,600 teachers holding primary school teaching certificates who have benefited from judgments that have now become final (either of the

Council of State or the Regional Administrative Court), judgment no. 11/2017 of the Council of State in plenary session will not have any effect.

143. In order to render even more absurd and discriminatory the situation of the holders of primary school teaching certificates who were still stably included on the ERE or who had even been granted tenured status, by judgment no. 217 of 16 January 2018 (see **Doc. 64**), after sitting in chambers on 20 July 2017 (President Mr Sergio Santoro, Author of the Judgment Mr Silvestro Maria Russo, Judges Mr Bernhard Lageder, Mr Vincenzo Lopilato and Mr Marco Buricelli), the 6th Division of the Council of State upheld the previous ruling in favour of the holders of primary school teaching certificates, refuting all of the arguments contained in judgment no. 11/2017 adopted in plenary session, without at any point citing it, having adopted the decision in chambers prior to 8 November 2017 when the latter judgment was adopted by the supreme court in administrative matters.

144. In addition, by Legislative Decree no. 59 of 13 April 2017, a new system of initial training and recruitment was approved, although only for secondary schools from levels one and two, with a transitory phase involving reserved competitions which excluded staff holding primary school teaching certificates.

145. Finally, in accordance with the guidelines set forth in the memorandum of 15 May 2017 endorsed by the former First President of the Court of Cassation and the current President of the Council of State, in order to preclude the possibility of appeals to the Joint Divisions of the Court of Cassation pursuant to Article 111(8) of the Constitution against judgment no. 11/2017 of the Council of State in plenary session due to the flagrant violation of EU law and/or the ECHR, by judgment no. 30301 of 18 December 2017 (see **Doc. 65**) the Joint Divisions of the Court of Cassation ruled inadmissible the appeal filed against judgment no. 813/2016 of the Council of State, notwithstanding the documented violation objected to of EU law, in the light of the case law of the Court of Justice.

146. In parallel with the filing of judgment no. 11/2017, by judgment no. 12/2017 of 20 December 2017 (see **Doc. 66**) the Council of State, also in plenary session, ruled inadmissible the appeal seeking the revocation of judgment no. 4/2007 of the Court in plenary session in the "Mottola" case, thereby refusing to give effect to the judgment of 4 February 2014 of the European Court of Human Rights.

****

The violations of the European Social Charter regarding which the European Committee of Social Rights is requested to make a finding

147. The right to work and to fair and dignified working conditions has been enshrined by Italian law at constitutional level and is widely recognised and protected by the European Social Charter.

148. The ANIEF is entitled as a trade union association to take action to protect the employment interests of its members, including within national proceedings, as it has done (see European Court of Human Rights, *Unison v. United Kingdom*, judgment of 10 January 2002, application no. 53574/99).

149. The fixed-term recruitment of teaching staff in schools administered by the state was governed by Article 4 of Law no. 124/1999, a provision introduced prior to the entry into force of Legislative Decree no. 368/2001, the legislative decree that implemented Directive 1999/70/EC on fixed-term work. Articles 40 and 60 of the 2007 NCLA for the Schools Branch expressly provided that specific statutory provisions – such as those contained in Legislative Decree no. 368/2001, Article 1(1) and (2) of which lays down a requirement to state the temporary objective reasons justifying the inclusion of a specified period, with Article 5 applying the successive fixed-term contracts – shall allow for the transformation of supply appointments for schools staff into permanent contracts.

150. The application of Legislative Decree no. 368/2001 also to the public administrations responsible for schools has not only been established by the collective labour agreements for the Branch and Articles 36(2) and (5-ter) and 70(8), no. 1 of Legislative Decree no. 165/2001 but has also been asserted by the Italian State before the EU institutions (Court of Justice and Commission). It was therefore an undisputed issue concerning now established rights to stability of employment, at least until the Italian State introduced two provisions, the first with effect from 25 November 2009 pursuant to Article 4(14-bis) of Legislative Decree no. 124/1999 and the latter with effect from 6 July 2011 pursuant to Article 10(5-bis) of Legislative Decree no. 368/2001, without any express retroactive effect, which prohibit the transformation of supply appointments into permanent contracts as provided for under Articles 1 and 5 of Legislative Decree no. 368/2001.

151. Following the *Mascolo* judgment of the CJEU, tens of thousands of qualified supply teachers with a primary school teaching certificate were entitled, if the provisions precluding that outcome were disapplied [Article 4(14-bis) of Law no. 124/1999, with effect from

25 September 2009 until the present time; Article 10(4-bis) of Legislative Decree no. 368/2001 from 6 July 2011 until 24 June 2015; Article 36(5-ter) of Legislative Decree no. 165/2001 with effect from 1 September 2013 until the present time; Article 29(2)(c) of Legislative Decree no. 81/2015 from 25 June 2015 until the present time], to the same protection as that provided for private sector fixed-term workers, i.e. conversion into a permanent employment relationship pursuant to Articles 1 and 5 of Legislative Decree no. 368/2001.

152. By the Decree of the President of the Republic of 25 March 2014, following an extraordinary appeal to the Head of State, the President of the Republic endorsed opinion no. 3818/2013 of the Council of State and ordered that primary school teaching certificates obtained during or before the 2001-2002 academic year shall be treated as qualifications establishing accreditation to teach in primary and nursery schools and shall establish entitlement to inclusion in band II of the institute ranking lists.

153. By seven judgments – no. 1973/2015, no. 3628/2015, no. 3673/2015, no. 3675/2015, no. 3788/2015, no. 4232/2015 and no. 5439/2015 – the 6th Division of the Council of State annulled Ministerial Decree no. 235/2014 insofar as it denied the holders of primary school teaching certificates obtained during or before the 2001-2002 academic year under the old system the right to inclusion in band III of the ERE, as was by contrast provided for under Article 1(605) of Law no. 296/2006 and Article 1(1) Decree-Law no. 97/2004 (and the appended table for the assessment of qualifications), thereby enabling around 2,600 teachers holding primary school teaching certificates to be included in the ERE and to be appointed under permanent contracts with effect from school year 2015/2016, in accordance with the judgments of the Council of State or the Lazio Regional Administrative Court that had become definitive and final.

154. The Italian Government has in fact never complied at administrative level, spontaneously and with *erga omnes* effect for all holders of primary school teaching certificates with the terms of the seven judgments of the Council of State referred to above, and in fact by Law no. 107/2015 made provision for an incredible exceptional plan for the granting of tenured status only to teaching staff, which was entirely focused on “emptying” the ERE according to a reserved and secret procedure, notwithstanding Article 399 of Legislative Decree no. 297/1994, which moreover penalised a considerable number of teachers, in insecure employment who, despite their many years of service, preferred not to participate in the lottery for allocating stable positions, which were available as of right within the province of

residence and inclusion on the ERE, in order to avoid running the “certain” risk of being transferred to hundreds of kilometres away from their place of residence and the province of inclusion on the ERE.

155. On the other hand, the Government has favoured many thousands of people who, despite having decided years ago to abandon the idea of teaching in schools administered by the state, have received an offer of permanent employment without ever having worked even for one day as a teacher, having been allocated a tenured position in their province of residence and inclusion on the ERE. For example, more than 8,000 permanent tenured positions have been allocated in competition class A019 (legal and economic disciplines in level II secondary schools) within phase C of the exceptional plan for the granting of tenured status pursuant to Article 1(98) of Law no. 107/2015, whereas the number of positions effectively vacant and available throughout the country is fewer than one hundred, thereby creating positions in the notional workforce as per table 1 appended to Law no. 107/2015 without any organisational requirement and solely for the purpose of giving a job in their province of origin under the ERE to the teachers still included on the ERE. In this way, thousands of professionals (such as lawyers and chartered accountants) have received an offer of permanent employment without ever having worked in a school administered by the state or after having ceased supply teaching work for a long time in order to dedicate themselves to self-employed work.

156. In contrast, the Italian Government has literally hidden tens of thousands of tenured posts for vacant and available positions (annual supply appointments until 31 August pursuant to Article 4(1) of Law no. 124/1999), transforming them into the “*de facto* workforce” until the end of teaching activity (30 June) in order to prevent the implementation of the three-year plan for stabilising “historic” workers in insecure employment which the Government had put in place pursuant to Article 15 of Decree-Law no. 104/2013.

157. It is a matter of fact that the notice contained in Decree of the Director General of the MEUR no. 105 concerning a competition based on qualifications and examinations issued on 23 February 2016 (see **Doc. 67**) made provision for the recruitment of teaching staff for ordinary positions within the notional workforce comprising 6,933 positions in nursery schools and 17,299 positions in primary schools, totalling 24,232, which by contrast should have been allocated for the granting of tenured status to the holders of primary school teaching certificates in the 2015-2016 academic year pursuant to Article 399(1) and (2) of Legislative Decree no. 297/1994, where their stable inclusion on the ERE had been ordered, given that any competition procedure, including in the schools sector, is moreover prohibited

until 31 December 2016 pursuant to Article 4(6) of Decree-Law no. 101/2013 in view of the continuing validity of the competition-based ranking lists for permanent positions from the competitions based on qualifications and examinations held in 1999 and 2012.

158. Evidence of this absurd and discriminatory administrative conduct may be obtained from the data of the General Accounting Office [*Ragioneria dello Stato*], which indicate more than 141,000 supply appointments for the 2015-2016 academic year, in spite of the granting of tenured status pursuant to Law no. 107/2015 and in spite of the creation of tens of thousands of positions within the notional workforce.

159. In any case, those most penalised have been the holders of primary school teaching certificates who, with the exception of those who have obtained a definitive judgment, were not granted any opportunity under Law no. 107/2015 to achieve stable tenured status, not having been included on the ERE but only on the band II institute or district eligibility rankings, and only after the adoption of Ministerial Decree no. 353 of 22 May 2014, which implemented the Decree of the President of the Republic of 25 March 2014. No exceptional recruitment plan has been provided for in respect of such workers, and on the contrary Article 1(131) of Law no. 107/2015 prohibits their future appointment in schools administered by the state upon completion of 36 months' service.

160. By judgment no. 10127/2012, the Employment Division of the Court of Cassation excluded in an incontrovertible manner the application of Legislative Decree no. 368/2001 and accordingly interpreted "retrospectively" the preclusionary rules contained in Article 4(14-bis) of Law no. 124/99 and Article 10(4-bis) of Legislative Decree 368/2001, instructing the national court not to send references for preliminary rulings to the CJEU.

161. Therefore, the ANIEF, acting through its lawyers and assistants before the Court of Justice, asserted the right of all teachers to stable employment in accordance with the statutory (Articles 1 and 5 of Legislative Decree no. 368/2001) and contractual (Article 40 of the 2007 NCLA) provisions which the Court of Cassation had unbelievably ordered the merits courts not to apply.

162. The *Mascolo* judgment of the Court of Justice of 26 November 2014 confirmed in paragraph 55 the well-founded status of the right of supply teachers to benefit from Legislative Decree no. 368/2001 also within schools administered by the state, save for the two preclusionary provisions (paragraphs 28, 84, 114 and 115 of the *Mascolo* judgment) which the *Tribunale di Napoli* consistently set aside in judgment no. 529/2015 in case

no. 5288/12 R.G., applying the *Mascolo* judgment and the internal rules on effective relief. By judgments no. 260/2015 and no. 187/2016, the Constitutional Court applied the *Mascolo* judgment of the Court of Justice, and by orders no.194 and 195 of 2016 asserted that the *Mascolo* constitutes *ius superveniens* within national law.

163. On the other hand, the Italian State has not sought to apply the *Mascolo* judgment of the Court of Justice or the seven judgments of the Council of State annulling Ministerial Decree no. 235/2014 insofar as it deprived the holders of primary school teaching certificates of the right to inclusion on the ERE with the qualification establishing accreditation to teach in primary and nursery schools.

164. By judgment-order no. 364/2016 of 29 January 2016, the 6th Division of the Council of State remitted to a plenary hearing pursuant to Article 99 of the Code of Administrative Procedure the question concerning the inclusion of the holders of primary school teaching certificates on the ERE, disregarding the consolidated case law of the 6th Division which had already definitively resolved the problem without any interpretative discrepancy and with benches comprised of the same five members of the Court that adopted order-judgment no. 364/2016, moreover excluding those who had completed SPQ and AET training and graduates of Theory of Primary Education, in addition to the holders of primary school teaching certificates, from the right to the granting of tenured status provided for under Law no. 107/2015 in the last phase C of the so-called "reinforcement workforce", which was concluded on 11 November 2015 with the granting of tenured status also to the wife of the then Prime Minister Renzi on her birthday.

165. Immediately after having failed for fully 19 months to apply the *Mascolo* judgment of the CJEU, by six identical judgments of 7 November 2016 the Court of Cassation confirmed the arguments previously made in judgments no. 709/2012 of the Milan Court of Appeal and no. 10127/2012 of the Court of Cassation, from which it did not depart, rejecting the applicability of Legislative Decree no. 368/2001 and consenting to the retroactivity on an "interpretative" level and *contra legem* of Article 4(14-bis) of Law no. 124/1999 and Article 10(4-bis) of Legislative Decree no. 368/2001.

166. Finally, judgment no. 11/2017 of the Council of State in plenary session of 20 December 2017 definitively held that the holders of primary school teaching certificates could not be included on the ERE, entirely reversing the consolidated position of the 6th Division of the Council of State, which had been favourable to workers in insecure

employment in school, who had already been recognised by the EU Commission by the communication of 31 January 2014 as being accredited to teach in primary and nursery schools.

167. Judgment no. 11/2017 of the Council of State in plenary session, which violated the final administrative ruling (**as highlighted in orders nos. 25839-25840/2016 of the Joint Divisions of the Court of Cassation**) contained in judgment no. 1973/2015 of the Council of State – which had ruled unlawful Ministerial Decree no. 235/2014 on the exclusion of the holders of primary school teaching certificates from the ERE – therefore gave rise to an incredible form of discrimination between the more than 2,600 holders of primary school teaching certificates who have benefited from a definitive judgment acknowledging the right to inclusion on the ERE, and the resulting right to the granting of tenured status, and all of the other applicant holders of primary school teaching certificates, who number more than 41,000 (6,000 of whom have been granted tenured status subject to reservation) who obtained only an interim order from the Council of State or the Regional Administrative Court accepting the request for inclusion on the ERE and who, as a consequence of judgment no. 11/2017 of the Court in plenary session, will be dismissed by the MEUR from their permanent or fixed-term employment, thereby definitively undermining their stability of employment.

168. Recently, **by the judgment of 5 October 2017 in *Mazzeo*** *v. Italy*, no. 32269/2009 (see **Doc. 68**), **the European Court of Human Rights** objected in paragraphs 35-39 to the judicial practice of the Council of State in altering or delaying the application of decisions previously adopted *in subiecta materia* and the resulting violation of Article 6 of the ECHR: "*35. The Court states first of all that the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty (Brumărescu v. Romania [GC], no. 28342/95, § 61, ECHR 1999 VII), which, inter alia, guarantees a certain stability in legal situations and contributes to public confidence in the courts (Nejdet Şahin and Perihan Şahin v. Turkey [GC], no. 13279/05, § 57, 20 October 2011, and Agrokompleks v. Ukraine, no. 23465/03, § 144, 6 October 2011). 36. This is implicit in all the Articles of the Convention and constitutes one of the basic elements of the rule of law (see, inter alia, Beian v. Romania (n. 1), no. 30658/05, § 39, ECHR 2007-XIII (extracts); Iordan Iordanov and others v. Bulgaria, no. 23530/02, § 47, 2 July 2009; and Ştefănică and others v. Romania, no. 38155/02, § 31, 2 November 2010). Uncertainty – be it legislative, administrative or*

arising from practices applied by the authorities – is an important factor to be taken into account in assessing the State's conduct (Păduraru c. Romania, no. 63252/00, § 92, ECHR 2005-XII (extracts); Beian (no. 1), cited above, § 33; and Nejdet Şahin and Perihan Şahin, cited above, § 56). 37. Consequently, legal certainty presupposes respect for the principle of res judicata (Brumărescu, cited above, § 62), namely the definitive status of judicial decisions. In effect, judicial systems characterised by the risk of final judgments being set aside repeatedly, and of definitive judgments being annulled violates Article 6(1) of the Convention (Sovtransavto Holding v. Ukraine, no. 48553/99, §§ 74, 77 and 82, ECHR 2002 VII). These continuous changes in position are inadmissible, whether they originate from the courts or from members of the executive (Tregoubenko v. Ukraine, no. 61333/00, § 36, 2 November 2004) or from non-judicial authorities (Agrokompleks, cited above, §§ 150-151). A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling nature (Riabykh v. Russia, no. 52854/99, § 52, ECHR 2003 IX). 38. The Court has also held in various cases that, even if a judgment is not annulled, the fact of calling into question the solution provided to a dispute by way of a definitive judicial decision within other judicial proceedings could violate Article 6 of the Convention in rendering illusory the right to a court and violate the principle of legal certainty (Kehaya and others v. Bulgaria, nos. 47797/99 and 68698/01, §§ 67-70, 12 January 2006, Gök and others v. Turkey, nos. 71867/01, 71869/01, 73319/01 and 74858/01, §§ 57-62, 27 July 2006, and Esertas v. Lithuania, no. 50208/06, §§ 23-32, 31 May 2012). 39. The Court has held on many occasions that the right to enforcement of a judicial decision is one of the aspects of the right to a court (Hornsby v. Greece, 19 March 1997, § 40, Reports of judgments and decisions 1997-II, and Simaldone v. Italy, no. 22644/03, § 42, 31 March 2009). If this were not the case, the guarantees provided for under Article 6(1) of the Convention would be devoid of purpose. The effective protection of a party to such proceedings presupposes an obligation on the state or one of its bodies to comply with the judgment. Where the state refuses or fails to comply, or even delays doing so, the guarantees under Article 6 enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose (Hornsby, cited above, § 41). Moreover, enforcement must be full, complete and not partial (Matheus v. France, no. 62740/00, § 58, 31 March 2005, and Sabin Popescu v. Romania, no. 48102/99, §§ 68-76, 2 March 2004)." [Unofficial translation]

169. Accordingly, judgment no. 11/2017 of the Council of State in plenary session, along with the six "pilot" judgments of the Court of Cassation of 7 November 2016, which have been

followed by dozens of judgments of the Supreme Court and hundreds of judgments of the merits courts at first and second instance, all identical and copied from the "standard form" judgments, and all rules – Article 4(14-bis) of Law no. 124/1999, with effect from 25 September 2009 until the present time; Article 10(5-bis) of Legislative Decree no. 368/2001 from 6 July 2011 until 24 June 2015; Article 36(5) and (5-ter) of Legislative Decree no. 165/2001 with effect from 1 September 2013 until the present time; Article 29(2)(c) of Legislative Decree no. 81/2015 from 25 June 2015 until the present time – that preclude recognition of the right to employment stability to the holders of primary school teaching certificates pursuant to Articles 1 and 5 of Legislative Decree no. 368/2001 therefore constitute a highly serious **violation** of the following provisions **of the European Social Charter**:

• **Article 1**, commitments 1 and 2 as the Italian State has failed to honour both the commitment towards tens of thousands of teachers holding a primary school teaching certificate awarded under the old system before the end of the 2001-2002 academic year, who are accredited to teach in primary and nursery schools, to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment, along with the commitment to protect effectively the right of the worker to earn his or her living in an occupation freely entered upon by rendering employment insecure in its triple capacity as legislator, judge and employer;

• **Article 4**, commitments 1 and 4 as the Italian state has failed to honour, as an employer, the commitment towards tens of thousands of teachers holding a primary school teaching certificate awarded under the old system before the end of the 2001-2002 academic year, who are accredited to teach in primary and nursery schools, to receive remuneration such as will guarantee them and their families a dignified standard of living, imposing by judgment no. 11/2017 of the Council of State in plenary session – in order to safeguard the career advancement of the judges comprising the supreme court in administrative matters – the discriminatory modification, not justified by any objective reasons, of the principles of law set forth in seven previous judgments of the Council of State, thereby allowing the MEUR to terminate immediately the permanent contracts or fixed-term contracts until 31 August 2018 or until 30 June 2018 or the temporary supply appointments of **50,203** teachers holding primary school teaching certificates, which had been concluded under the terms of the interim or non-definitive rulings of the Regional Administrative Court or the Council of State, which

were set aside by the ruling of the Council of State sitting in plenary session;

• **Article 5,** because the Italian State has not guaranteed the freedom of workers in schools to form national trade union organisations such as the ANIEF for the protection of their economic and social interests and to join those organisations, as the national legislation has undermined this freedom and has instead operated through the Council of State and the Court of Cassation in such a manner as to impair it, even frustrating the judgments of the Council of State and the statutory rules and the provisions of collective labour agreements which recognise the rights of workers;

• **Article 6**, commitment no. 4, because the Italian State has failed, through both legislation and the judiciary, to recognise as a matter of fact the right of the holders of primary school teaching certificates to collective action through the complainant the ANIEF in cases involving conflicts of interest because the collective action brought through its lawyers, in the proceedings indicated, before the national ordinary and administrative courts, the Court of Justice of the European Union and the Italian Constitutional Court was deprived of its effects of protecting rights, having been rejected by the Council of State and the Court of Cassation;

• **Article 24,** because the Italian State, as an employer and through legislation and the judiciary, has not recognised for tens of thousands of teachers holding primary school teaching certificates who were hired under permanent or fixed-term contracts to vacant positions within the workforce the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the public offices or service or the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief, in addition preventing also the right to appeal to an impartial body.

170. Each of the violations of the European Social Charter mentioned above has been committed in parallel with the violation of **Article E of the European Social Charter** and the commitment of the Italian State **not to discriminate** against teachers holding primary school teaching certificates accredited to teach in primary and nursery schools and their entitlement to be granted tenured / permanent status within the public administration for the schools sector, compared to teachers with primary school teaching certificates who held supply appointments and had been included in the ERE and hired under permanent contracts with legal effect from 1 September 2015 under the exceptional plan for the granting of tenured status pursuant to Article 1(98) et seq of Law no. 107/2015 who have obtained a

definitive ruling from the Council of State or the Regional Administrative Court recognising their stable inclusion in the ERE.

171. **By this collective complaint, the European Committee of Social Rights is therefore requested to intervene in order that, acting within the limit of its competence, it shall make a finding concerning the violations of the European Social Charter alleged against the Italian State and recommend that they be rectified.**

172. Finally, considering the seriousness of the violation of the European Social Charter and the resulting violation of the fundamental rights protected by the Charter of tens of thousands of teachers holding primary school teaching certificates, also in view of the fact that collective complaint no. 146/2017 brought by the ANIEF concerning an analogous question regarding staff in insecure employment in schools administered by the state is pending, the Committee is asked to adopt as an **immediate measure** the urgent procedure for establishing the admissibility of this complaint pursuant to Article 36 of the Rules of the European Committee of Social Rights, where possible omitting the admissibility stage for this complaint in consideration of the fact that collective complaint no. 146/2017 filed by the ANIEF has already been ruled admissible.

****

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

1- Statute of the ANIEF and minutes of the 2nd ANIEF Congress (17-18 December 2016);
2- Documentation concerning the representativeness of the ANIEF;
3- Judgment no. 11/2017 of 20 December 2017 of the Council of State in plenary session;
4- Decree of the President of the Republic of 25 March 2014;
5- Communication of the EU Commission of 31 January 2014;
6- *Marrosu-Sardino* judgment of the Court of Justice of the European Union;
7- MEUR circular of 25 October 2008;
8- Circular of 19 September 2012 of the Department of Public Administration;
9- Order of the *Tribunale di Rossano* in Case C-3/10 *Affatato*;
10- Written observations of the Italian Government in Case C-3/10 *Affatato*;
11- Answer of the EU Commission of 10 May 2010 to a question put by MEP Rita Borsellino;
12- Order of 1 October 2010 of the Court of Justice in Case C-3/10 *Affatato*;
13- Judgment no. 392/2012 of 13 January 2012 of the Court of Cassation;

14- Judgment no. 10127 of 20 June 2012 of the Court of Cassation;

15- Report no. 190 of 24 October 2012 of the Case Law Analysis Office of the Court of Cassation;

16- Judgment of the Court of Justice of 18 October 2012 in *Valenza* and others;

17- Order of January 2013 of the *Tribunale di Napoli* in Case C-22/13 *Mascolo*;

18- Written observations by the lawyers of the ANIEF on behalf of the appellant Raffaella Mascolo in Case C-22/13;

19- Written observations of the Italian Government in Case C-22/13 *Mascolo*;

20- Reference for a preliminary ruling no. 207/2013 of the Constitutional Court in Case C-418/13 *Napolitano and others*;

21- Order no. 206/2013 of the Constitutional Court;

22- Order of 12 December 2013 of the Court of Justice in Case C-50/13, *Papalia*;

23- Presidential Decree of 25 March 2014 with opinion no. 3813 of 11 September 2013 of the Council of State;

24- Ministerial Decree no. 353 of 22 May 2014**;**

25- Ministerial Decree no. 235 of 1 April 2014;

26- Opinion of 17 July 2014 delivered by Advocate General Szpunar in Joined Cases C-22/13, *Mascolo and others*;

27- Document of the MEUR from the end of August 2014 containing the "Guidelines for Good Schooling";

28- *Mascolo* judgment of the CJEU of 26 November 2014 in Joined Cases C-22/13, C-61/13, C-62/13, C-63/13 and C-418/13;

29- Judgment no. 1973/2015 of the Council of State;

30- Judgment no. 3628/2015 of the Council of State;

31- Judgment no. 3673/2015 of the Council of State;

32- Judgment no. 3675/2015 of the Council of State;

33- Judgment no. 3788/2015 of the Council of State;

34- Judgment no. 4232/2015 of the Council of State;

35- Judgment no. 5439/2015 of the Council of State;

36- Ministerial Decree no. 325 of 3 June 2015;

37- Circular email of 11 November 2015 from Prime Minister Renzi;

38- Order-judgment no. 364/2016 of 29 January 2016 of the Council of State;

39- Interim orders no. 5540, 5541, 5542 and 5555 of 16 December 2015 of the Council of State;

40- Judgment no. 18890/2017 of 31 July 2017 of the Joint Divisions of the Court of Cassation;

41- Order no. 25839/2016 of 15 December 2016 of the Joint Divisions of the Court of Cassation;

42- Order no. 25840/2016 of 15 December 2016 of the Joint Divisions of the Court of Cassation;

43- Judgments no. 4911, 4912, 4913 and 4914 of 14 March 2016 of the Joint Divisions of the Court of Cassation;

44- Judgment of the Court of Justice of 12 December 2013 in Case C-361/12 *Carratù*;

45- Judgment no. 5072/2016 of the Joint Divisions of the Court of Cassation;

46- Judgment no. 260/2015 of the Constitutional Court;

47- Judgment no. 187 of the Constitutional Court of 20 July 2016;

48- Orders no. 194 and 195 of the Constitutional Court of 20 July 2016;

49- Order of the *Tribunale di Trapani* of 5 September 2016 in Case C-494/16 *Santoro*;

50- Judgment of the Court of Justice of 14 September 2016 in *Martínez Andrés and Castrejana López*;

51- Judgments no. 22552, 22553, 22554, 22555, 22556 and 22557/2016 of 7 November 2016 of the Employment Division of the Court of Cassation;

52- Communication of 7 November 2016 ref. no. 0022549 of the First President of the Court of Cassation;

53- Order of the Employment Division of the Trento Court of Appeal of 17 July 2017 in Case C-494/17 *Rossato*;

54- Individual application to the European Court of Human Rights no. 22417/*Billeci and others*, with a declaration of admissibility from the Court Registry;

55- Individual application to the European Court of Human Rights no. 69611/2017 *Tenore and ANIEF*, with a declaration of admissibility from the Court Registry;

56- Written observations of the EU Commission in Case C-331/17 *Sciotto*;

57- Judgment of the Court of Justice in Case C-596/14, *Diego Porras*;

58- Judgment of the CJEU in Case C-286/06 *Impact*;

59- Memorandum of 15 May 2017 signed by the Presidents of the Court of Cassation, the Council of State and the Court of Auditors;

60- Order of 17 November 2015 of the Joint Divisions of the Court of Cassation (no. 107/2016 register of orders);

61- Judgment of the Court of Justice of 5 April 2016, *Puligienica*;

62- Judgment of the European Court of Human Rights of 4 February 2014, *Mottola*;

63- Data provided by the MEUR concerning the holders of primary school teaching certificates after judgment no. 11/2017 of the Council of State in plenary session;

64- Judgment no. 217 of the 6th Division of the Council of State of 16 January 2018;

65- Judgment no. 30301 of 18 December 2017 of the Joint Divisions of the Court of Cassation;

66- Judgment no. 12/2017 of 20 December 2017 of the Council of State in plenary session;

67- Notice concerning a competition no. 105 of 23 February 2016, Decree of the Director General of the MEUR;

68- Judgment no. 32269/2009 of 5 October 2017 of the European Court of Human Rights in the case *Mazzeo v. Italy*;

69- National Collective Labour Agreement for the Schools Branch of 29 November 2007, articles transcribed in the substantive submission;

70- Legislative Decree no. 165/2001 (Consolidated Act on Public Sector Employment), articles transcribed in the substantive submission;

71- Legislative Decree no. 368/2001, national legislation implementing Directive 1999/70/EC on fixed-term work, repealed with effect from 25 June 2015;

72- Directive 1999/70/EC implementing the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP;

73- Articles 19-29 and 55 of Legislative Decree no. 81/2015, repealing Legislative Decree no. 368/2001;

74- Articles 399, 400, 401 and 554 of Legislative Decree no. 297/1994 (Consolidated Act on Schools);

75- Article 4 of Law no. 124/1999;

76- Article 4 of Decree-Law no. 101/2013;

77- Article 15 of Decree-Law no. 104/2013;

78- Article 1(605) of Law no. 296/2006;

79- Articles 1 and 2 of Decree-Law no. 97/2004, with appended table for assessment.

Rome, 20 January 2018

Marcello Pacifico as legal representative of the ANIEF ________________________________

Sergio Galleano as counsel for the ANIEF ________________________________

Vincenzo De Michele as counsel for the ANIEF ________________________________

Ersilia De Nisco as counsel for the ANIEF ________________________________

Fabio Ganci as counsel for the ANIEF ________________________________

Gabriella Guida as counsel for the ANIEF ________________________________

Walter Miceli as counsel for the ANIEF ________________________________