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

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

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Collective Complaint no. 159/2018

RESPONSE BY THE ANIEF TO THE OBSERVATIONS FILED BY THE ITALIAN STATE

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In observations filed on 8 September 2018, the Italian Government responded to the complaint filed by the ANIEF with a lengthy note from the Ministry for Education, Universities and Research (hereafter MIUR) focusing essentially on the conclusions reached by the Plenary Session of the Council of State in judgment no. 11/2017.

It points out in that regard that, by order no. 5383 of 12 November 2018, the Sixth Division of the Council of State announced that it would, by a separate order, refer once again to the Plenary Session the issue concerning the registration in eligibility rankings to be drawn upon until exhaustion [ERE] of persons holding a vocational school-leaving qualification. It did so having concluded that it was necessary to reconsider the conclusions reached by the Plenary Session in decision no. 11 of 2017, cited above.

This written statement, which reiterates all of the submissions made in the complaint (*inter alia* in order to avoid overburdening the Committee), sets out a summary response to the observations submitted by the MIUR.

REGARDING POINT 2: VIOLATION OF ARTICLE 1 OF THE EUROPEAN SOCIAL CHARTER

The MIUR asserts that the judgment by the Plenary Session of the Council of State does not affect the right of holders of vocational school-leaving qualifications to "*earn a living in an occupation freely entered upon*" as the Italian State has limited itself to

hiring other precarious teachers in order to replace the holders of vocational school-leaving qualifications who obtained that qualification before the end of school year 2001/2002.

That assertion is not correct first of all because, having obtained the qualification during or before school year 2001/2002, the teachers in question undoubtedly fall under the category of legacy precarious workers. However, in spite of this, they have been excluded from the extraordinary stabilisation plan implemented by Law 107/2015.

It is also incorrect in another respect since, in reasonable reliance on the fact that the Council of State had already stated in more than one hundred rulings that the qualification held established their eligibility - resulting in a requirement for the MIUR to comply with those rulings - some holders of the vocational school-leaving qualifications in question have even resigned from accredited independent schools at which they were working under permanent contracts in order to be able to take up service as employees of the MIUR.

Indeed, following the judgment of the Plenary Session of the Council of State, the MIUR not only removed from the ERE those holders of vocational school-leaving qualifications who had previously been included under the terms of interim orders issued by the administrative courts, but also transformed into fixed-term contracts certain contracts of employment that had previously been concluded as permanent contracts.

REGARDING POINT 2: VIOLATION OF ARTICLE 4 OF THE EUROPEAN SOCIAL CHARTER

It is clearly apparent from the points set out in the previous paragraph that the Italian State has also violated the workers' right to sufficient remuneration such as will guarantee them and their families a dignified standard of living, and to a reasonable notice period in the event of the termination of their employment relationship. This is because, far from safeguarding the remuneration received by holders of vocational school-leaving qualifications or deferring the timescale for implementing the judgment of the Plenary Session in order to grant the holders of such qualifications an appropriate period of time in order to find alternative employment, Article 4(1) of Decree-Law no. 87 of 12 July 2018 has limited itself to providing that: " *any court orders that have the effect of annulling fixed-term or permanent contracts concluded between schools administered by the state and teachers holding a vocational school-leaving qualification received during or before school year 2001-2002... shall be implemented within one hundred and twenty days of the date on which notice of the court order was served on the MIUR*". In doing so, it does not provide for an extension, but rather fixed a maximum time limit by which judgments must be enforced.

It is equally inappropriate for the MIUR to refer to Article 4(1-bis) of Decree-Law no. 87 of 2018 as this provides that workers who have been granted tenured status under the terms of permanent contracts (who were therefore required to reject other

opportunities for employment, including on a permanent basis, at other private or public sector employers, in order to take up service as employees of the MIUR) may only remain in service until 30 June 2019 (thereby "*transforming the permanent contracts of employment concluded with teachers falling under paragraph 1 into fixed-term contracts of employment expiring on 30 June 2019*"). On the other hand, teachers who had been able to obtain their inclusion within the ERE, thus being certain that they would be re-employed under annual fixed-term contracts until they were employed on a permanent basis (as a result of appointments made from the ERE or under the stabilisation plan provided for under Law no. 107/2015), may obtain "*a fixed-term contract expiring no later than 30 June 2019, instead of the annual supply appointment previously made".* Therefore, the MIUR is not accurate in asserting that the Italian State nonetheless provided a reasonable notice period to holders of vocational school-leaving qualifications given that it is unequivocally apparent from the difference between the wording used in paragraph 1-bis(a) *("fixed-term contracts of employment expiring on 30 June 2019")* and the expression used by contrast in paragraph 1-bis(b) *("fixed-term contracts of employment expiring no later than 30 June 2019")* that all holders of vocational school-leaving qualifications hired under an annual fixed-term contract (i.e. until 31 August) do not have any guarantee that they will work until 31 August, or even until 30 June 2009, as the expiry "*no later than 30 June 2019*" constitutes only a maximum time limit, and certainly not a minimum term for the supply contract.

The precarious nature and the contingent status of the term of new contracts is moreover reinforced by the fact that paragraph 1-bis specifies that the right to a fixed-term appointment is only available "*subject to the limit of vacant and available positions*". As a result, it is impossible to guarantee that current permanent contracts or annual supply contracts will be continued, even on a merely temporary basis.

REGARDING POINT 2: VIOLATION OF ARTICLES 5 AND 6 OF THE EUROPEAN SOCIAL CHARTER

The assertion made by the MIUR that the Italian State guarantees protection for trade union rights and collective bargaining is equally mistaken. Indeed, the MIUR has made provision to transform permanent contracts into fixed-term contracts and unilaterally to reduce the term of fixed-term contracts previously concluded, having acted without any prior negotiations, and indeed without even having informed trade union bodies concerning this decision. This is in spite of the fact that Article 6 § 2 of the Charter obliges States to promote machinery for voluntary negotiations with a view to the regulation of terms and conditions of employment. Such machinery was undoubtedly necessary in this case, at the very least due to the number of teachers involved and the social implications of the action taken by the MIUR (see European Council of Police Trade Unions v. Portugal, complaint no. 11/2002, decision on the merits of 21 May 2002, §§ 51 and 63).

This Committee has in fact repeatedly noted that it is essential to consult regularly and in advance with all trade unions throughout the process for determining the terms and

conditions of employment (Euro COP. v. Ireland, complaint no. 83/2012, decision of 2 December 2013), thereby allowing trade unions the opportunity to influence the result of choices made by employers (EUROMIL v. Ireland, complaint no. 111/2014, decision of 12 September 2017, § 87).

This Committee has also clarified that, in codifying customary international law, Articles 31 §§ 1 to 3 of the Vienna Convention on the Law of Treaties provide that the terms of a treaty must be considered in their context and in the light of its object and purpose (cf. European Council of Police Trade Unions (CESP) v. France, complaint no. 101/2013, decision on the merits of 27 January 2016, §82). As a result, Articles 5 and 6 of the Charter must be interpreted in the light of supplementary international instruments, including above all Articles 6 and 11 of the European Convention on Human Rights, as interpreted by the ECtHR (cf. on this issue: EUROMIL v. Ireland, complaint no. 111/2014, decision of 12 September 2017, § 45) and the International Covenant on Economic, Social and Cultural Rights, which are key sources for interpreting the provisions contained in the Charter (cf. International Movement ATD Fourth World v. France, complaint no. 33/2006, decision on the merits of 5 December 2007, §§68-71 and European Federation of National Organisations Working with the Homeless v. France, complaint no. 39/2006, decision on the merits of 5 December 2007, §§64-65).

Moreover, it must be pointed out that the serious failure to recognise the role of the trade union has been aggravated by the actions of the Constitutional Court itself, which has also recently held that supranational institutions, including also this Committee, do not have any role, basing its argument on the fact that "*the European Social Charter does not contain any provision with equivalent effect to Article 32(1), according to which 'The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto [...]'*".

REGARDING POINT 2: VIOLATION OF ARTICLE 24 OF THE EUROPEAN SOCIAL CHARTER

It is also not accurate for the MIUR to assert that the Italian State has not violated the right to protection against unfair dismissal on the grounds that it has not ordered any dismissals.

As has been acknowledged by the MIUR itself - on pages 4 and 5 of its observations - in enacting Article 4(1-bis) of Decree-Law no. 87 of 2018, the Italian legislator itself provided that:

"1-bis. In order to safeguard continuity of teaching in the interest of pupils throughout school year 2018/2019, the Ministry of Education, Universities and Research shall, subject to the limit of vacant and available positions, implement the court orders falling under paragraph 1:

a) by transforming the permanent contracts of employment concluded with teachers falling under paragraph 1 into fixed-term contracts of employment expiring on 30

June 2019;

b) by concluding with the teachers falling under paragraph 1 a fixed-term contract expiring no later than 30 June 2019, instead of the annual supply appointment previously made.

It is in fact difficult to dispute that the transformation of permanent contracts into fixed-term contracts "by an exercise of authority", through the enactment of legislation, essentially amounts to the dismissal of employee staff. Similarly, the transformation of an annual supply contract into a contract with a shorter term is tantamount to the early termination of the employment relationship.

It also cannot be disputed that this termination by the employer violates Article 24 of the European Social Charter since, in providing for termination by the employer through the enactment of legislation and without any financial compensation, Italy has precluded the right of workers to the protections provided for in relation to dismissal.

This Committee has in fact repeatedly remarked (cf. most recently in decision 107/2014 of 31 January 2017 issued against Finland) that compensation for unfair dismissal must be "*of a high enough level to dissuade the employer and make good the damage suffered by the employee*". Thus, under the Charter, employees who have been dismissed must be granted adequate compensation or another adequate remedy including:

- reimbursement for any economic losses suffered between the date of dismissal and the decision challenging it;

- the possibility of reinstatement;

- "*compensation at a level high enough to dissuade the employer and make good the damage suffered by the employee*".

It follows that, as a matter of principle, any limit on redress that precludes "*compensation*" commensurate with the loss suffered, which compensation constitutes a sufficient deterrent, will violate the Charter unless the limit applies only to financial losses and the victim is able to obtain redress for non-pecuniary losses through other remedies, for example under anti-discrimination legislation (2012 Conclusions, Slovenia).

In the decision cited above, this Committee moreover clarified that, whilst reinstatement is not a necessary remedy, it must be deemed to be required under Article 24 in situations in which no adequate "compensation" or other "relief" is available (cf. for a similar case concerning the conversion of a fixed-term contract into a permanent contract the recent judgment of 25 October 2018 in Case C-331/17, Case C-331/17, Sciotto v. Fondazione Teatro dell'Opera di Roma).

REGARDING POINT 3: DEVELOPMENT OF THE LEGAL WORKFORCE AND OF THE *DE FACTO* WORKFORCE. VIOLATION OF ARTICLE 24 OF THE EUROPEAN SOCIAL

CHARTER

It is apparent from the above that, through the issue of judgment no. 11/2017 of the Plenary Session and the enactment of Article 4 of Decree-Law no. 87 of 2018, which implemented that judgment, the Italian State violated the rights guaranteed under the European Social Charter to the holders of vocational school-leaving qualifications who received the teaching qualification during or before the end of school year 2001/2002.

For the sake of completeness, it is pointed out that the same conclusion is also reached if one considers that, by the six judgments of 7 November 2016 (rejecting the request to transform into permanent contracts certain fixed-term contracts that had been unlawfully concluded as permanent contracts, holding that there was no right to obtain compensation in the event that tenured status had been granted), the Court of Cassation also violated Article 24 of the European Social Charter.

In fact, by the twin judgments of 7 November 2016 (annexed to the complaint as doc. 51), the Italian Constitutional Court:

- recognised as a sanction only the payment of damages (rather than the conversion of the contract into a permanent contract, which conversion is provided for under national law in the event of the abusive recourse to fixed-term contracts over a period in excess of 36 months);

- stipulated that such compensation is only payable in situations involving workers hired under fixed-term contracts within the so-called "legal workforce", whilst denying it as a matter of principle to those working within the so-called "*de facto*" workforce;

- laid down an obligation to reimburse the amount obtained as compensation in the event that the employee has been included in the ERE (entailing the possibility of future hiring as a permanent employee) or granted tenured status following the court ruling awarding damages.

As noted above, the reasoning underlying the judgments cited is untenable and results in a serious violation of the rights of workers.

The Italian court does not deny that abuses may also occur in relation to supply appointments within the "*de facto*" workforce. However, it subjects the worker (paragraphs 97 et seq of the twin judgments cited, including in particular paragraph 102) to the burden of proving that there were no objective grounds justifying the imposition of a fixed term.

That interpretative choice by the Italian court entails a clear violation of the principle of "proximity to evidence" (which has been clearly reiterated for a number of years by the very same Italian court[1]), in stark contrast with Article 47 of the EU Charter of

[1] *Inter alia:* Court of Cassation, 3rd Civil Division, judgment no. 6209 of 31 March 2016 (rv. 639386); Court of Cassation, 3rd Civil Division, judgment no. 5961 of 25 March 2016 (rv. 639331); Court of

Fundamental Rights and Article 6 ECHR. This is because it is unlikely that the worker will have any evidence capable of demonstrating that the position held was vacant within the "legal workforce" rather than in the so-called "*de facto* workforce".

In fact, a teacher can only allege and demonstrate that fixed-term contracts have been concluded other than as a result of requirements to replace staff who are temporarily absent (due to illness, pregnancy, a leave of absence, other form of leave, secondment, exemption from service, or provisional redeployment or usage) and are entitled to retain their position.

It should by contrast be for the administration to demonstrate that the relevant position was temporarily vacant (and therefore fell within the legal workforce rather than the *de facto* workforce) due to one of the following reasons, examples of which are provided by the Court of Cassation in judgment no. 22557: *"an unanticipated increase in the pupils attending the specific individual school, the workforce of which however remains unchanged, or due to an increase in the number of classes due to contingent, for example logistical, reasons" (cf. section 19 of the judgment cited).*

Indeed, also in a recent ruling on fixed-term contracts (obviously[2]) governed by private law, the Court of Cassation ruled to this effect in judgment no. 25677 of 2015 (presiding judge Stile, author of the Esposito judgment: Enclosure 85 according to the numbering of the documents annexed to the complaint):

"4. The first ground of appeal is well-founded and should be accepted. It must indeed be concluded that, in seeking to assert within the proceedings that a permanent employment relationship existed with Poste Italiane S.p.A. under the terms of a contract concluded between the parties, the claimant fulfilled the burden of referring to the facts constitutive of the right invoked in the proceedings by asserting the existence of an employment contract, along exclusively with an assertion that the fixed term stipulated therein was unlawful pursuant to Article 2(1-bis) of Legislative Decree no. 368 of 2001. Once the factual allegation concerning the facts constitutive of the right has been made as mentioned above, it is then for the defendant both to contest the facts themselves, in contrast with the assertions made by the claimant, by alleging facts that alter, cancel or preclude those facts (specifically, the lawfulness of the term included, on the grounds that it complies with the percentage limits laid down by that provision) and also, in accordance with Article 2697 of the Civil Code, to furnish proof concerning facts capable of fulfilling the legal prerequisites with reference to which it seeks to establish the lawfulness of the fixed term. 5. The conclusions set out above are consistent with the interpretation of Article 2697 of the Civil Code in the light of the principle of proximity to or the availability of evidence. This principle has been

Cassation, 5th Civil Division, judgment no. 4623 of 9 March 2016; Court of Cassation, Civil Employment Division, judgment no. 486 of 14 January 2016 (rv. 638521); Court of Cassation, 5th Civil Division, judgment no. 24492 of 2 December 2015.

[2] This case did not concern a public sector worker but rather a private sector worker, and it is thus evident that there is discrimination between those working in one sector or the other.

recognised within the case-law of the Court of Cassation, according to which 'the burden of proof must be allocated not only in accordance with the legislative description of the substantive facts in dispute 7 , but also along with an indication of the facts constitutive of the right, and those that cancel or preclude the right, also in accordance with the principle of the traceability, proximity or availability of evidence. This principle may be inferred from Article 24 of the Constitution, which associates the right to pursue court action with a prohibition on interpreting the law in such a manner as to render the exercise of that right impossible or excessively onerous' (Court of Cassation, Joint Divisions, judgment no. 13533 of 30 October 2001, judgment no. 141 of 10 January 2006, Court of Cassation, 1st Division, judgment no. 20484 of 25 July 2008, Rv. 604543)".

The Sixth Division reached a similar conclusion in order no. 122 of 2016 (presiding judge Arienzo, author of the Paggetta judgment). In this case the appellant worker objected that the merits court had not ruled on the fact asserted that, during the course of the relationship, he had been allocated to financial tasks, which as mentioned above were entirely separate from the service of the concession service, consisting in the collection, processing and delivery of post. Here too, departing from the judge rapporteur's position that the appeal should be dismissed having regard to previous judgments issued by the division, the Court reversed the judgment and remitted the proceedings, holding that this fact may be decisive for the purposes of establishing the validity of the (unjustified) time limit incorporated into the contract, and hence whether the special provisions laid down by Article 2(1-bis) of Legislative Decree no. 368 of 2001 were applicable.

Thus, the principles laid down by the Court of Cassation itself as developed over years of case-law have been blatantly disregarded, in clear breach of European law, in legal proceedings in which the Italian State or a public administration is involved as the employer.

Therefore, the argument endorsed by the Court of Cassation in November 2016 that the decision as to whether the position to be occupied is to be classified under the *de facto* workforce or the legal workforce must be made on the basis of choices made unilaterally by the employer administration, which are elevated to procedural truths that are assumed within the proceedings to be valid and that it is for the worker to demonstrate are mistaken, is entirely untenable.

Moreover, it is widely known and is even admitted by the Italian State in its observations (cf. pages 7 et seq) that the legal workforce in Italian schools (Article 4(1) and (11) for administrative, technical and auxiliary [ATA] staff) is established in theoretical terms before the start of each school year, on a school-by-school basis, by the Ministry of Education with reference to exclusively financial prior considerations. This workforce includes workers who have been employed on a permanent basis and, for vacant positions (resulting from the failure to call recruitment competitions for more than 11 years: see section 42 of the Mascolo judgment of the European Court: doc. 28 annexed to the complaint), entails the allocation of teaching positions for the

entire school year (from September to August of the following year).

By its very nature, that workforce does not have any relationship with the effective needs of the school and is subsequently followed, around the middle of the year in June-July (after having verified pupil registration), by a correction resulting in the "*de facto*" workforce (Article 4(2)) in relation to which appointments are by contrast made until the end of teaching activity, i.e. from September until June.

It is entirely evident that also the repetition of successive fixed-term contracts for vacant positions in the so-called "de facto workforce" must be regarded as an abuse pursuant to Clause 5 of the Framework Agreement on fixed-term work annexed to Council Directive 1999/70/EC of 28 June 1999.

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VI - REGARDING POINT 4: VOCATIONAL SCHOOL-LEAVING QUALIFICATIONS, VIOLATION OF ARTICLE 24 OF THE EUROPEAN SOCIAL CHARTER.

Turning now to the specific object of the complaint, it is noted that judgment no. 11 of 2017 of the Plenary Session clearly encroached also upon the sphere of competence reserved to the legislator, which had unequivocally recognised that qualification as establishing eligibility. In doing so, the judgment *de facto* created a non-existent legal provision.

In fact, despite the (partial) account provided by the MIUR, there cannot be any question that a vocational school-leaving qualification obtained during or before school year 2001-2002 permanently retains its status of establishing eligibility to teach within nursery and primary schools.

It is recalled in this regard that **Article 3 of Law no. 341 of 19 November 1990**, on the reform of university teaching systems, had provided for the establishment of "*a specific degree course, sub-divided into two streams ... aimed at providing cultural and professional training for teachers in respectively nursery and primary schools",* and left it to *"a Decree of the Minister of Public Education, issued in concert with the Ministers for Public Administration and the Treasury Minister, [to stipulate] within one year of the entry into force of this Law the timescales and arrangements for the gradual transfer to the new system, with reference also to the rights of teachers working in nursery and primary schools*".

"Considering that, following the introduction of the above-mentioned decree courses, the academic qualifications currently issued by vocational schools and colleges [could no longer] be deemed to be valid for the purposes of establishing eligibility to teach in the above-mentioned [nursery and primary - author's note] schools", **Article 2 of the Decree-Law of 10 March 1997** had provided that school-leaving qualifications from vocational colleges obtained during or before school year 2001-2002 would retain "*the current legal status on a permanent basis*", thus allowing participation "*in procedures for accreditation to teach in primary schools provided for under Article 9(2) of ... Law*

no. 444 of 1968".

Subsequently, Article 1(2) of Law no. 425 of 10 December 1997, laying down provisions on the reform of state examinations upon the conclusion of upper secondary teacher training courses, had authorised the Government "*to make provision to regulate state examinations upon the conclusion of upper secondary teacher training courses and related subjects*" and to stipulate "*transitory provisions... concerning the gradual application of the new provisions governing state examinations during the first two school years also as regards the eligibility established by the academic qualifications*".

In particular, **Article 8(2) of the Law** had provided for the repeal, with effect from the entry into force of the above-mentioned regulation, *inter alia* of Article 197 of Legislative Decree no. 297 of 16 April 1994. That article provided that, "*upon conclusion of studies carried out ... in a vocational college, a school-leaving examination [shall be held], which shall be a state examination*" and that "*the qualification obtained from the school-leaving examination upon completion of the course of study ... at the vocational training college shall establish eligibility... to teach in a primary school*".

However, **Article 15(7) of the regulations approved by Decree of the President of the Republic no. 323 of 23 July 1998**, acting in accordance with the authority granted under Article 1(2) of Law no. 425 of 1997, had provided that "***the qualifications obtained in the state examination upon completion of courses at vocational colleges that started during or before school year 1997/98 shall retain on a permanent basis the current legal status and shall continue to establish eligibility to teach 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."***

That provision therefore expressly recognised the status of "***establishing eligibility to teach in primary schools***" for the school-leaving qualification in question.

However, the Plenary Session of the Council of State held that "*the interpretation that must be given to the phrase (contained in Article 15(7) of Decree of the President of the Republic no. 323 of 1998) 'the qualifications received in the state examination upon completion of courses at vocational institutes that started 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'*" must be established, also in this case, taking account of the provision contained in the sentence immediately following it (also contained in Article 15(7)), as meaning that vocational school-leaving qualifications received during or before school year 2001/2002 retain their legal status as an academic qualification and enable the holder (without any need to also obtain a university degree) to participate in procedures establishing accreditation to teach pursuant to Article 9(2) of Law no. 444/1968 and in ordinary competitions based on qualifications and examinations for teaching positions in

nursery and primary schools.

It must be stressed in this regard that **Article 15(7) of the regulations approved by Decree of the President of the Republic no. 323 of 1998 in actual fact does not contain any reference to the accreditation procedures provided for under Article 9(2) of Law no. 444 of 1968; by contrast, the regulations unconditionally recognise a school-leaving vocational qualification as establishing accreditation to teach.**

Therefore, far from "duplicating" in regulations a provision laid down by Article 2 of the Decree-Law of 10 March 1997, that provision in actual fact introduced new rules incompatible with the Decree-Law, expressly providing that a vocational school-leaving qualification established accreditation to teach and thereby restoring the legal rule from the repealed Article 197 of Consolidated Text no. 294 of 1997.

The interpretation endorsed by the Plenary Session (according to which that provision should be interpreted as requiring "*that vocational school-leaving qualifications received during or before school year 2001/2002*" should retain their legal status as an academic qualification and enable the holder "*to participate in procedures establishing accreditation to teach pursuant to Article 9(2) of Law no. 444/1968*") is thus at odds with the literal wording of the regulatory provision, which by contrast - it is repeated - acknowledges *expressis verbis* vocational school-leaving qualifications received during or before school year 2001-2002 as establishing accreditation.

Moreover, it does not appear possible to supplement the regulatory provision laid down by Article 15(7) of Decree of the President of the Republic 323 of 1998 in any other manner, with reference to the principles of *lex superior derogat legi inferiori* and *lex posterior derogat legi priori*, such that the recognition of accrediting status to vocational school-leaving qualifications obtained upon completion of a course of study that started during school year 1997/98, which is expressly provided for under that Article, would nonetheless be subject to the "specific accreditation" provided for under Article 9(2) of Law no. 444 of 1968.

It is in fact evident that such an interpretation of Article 15(7) of Decree of the President of the Republic no. 323 of 1998 would not only be at odds with the literal wording of the provision and with the principles governing interpretation and the relationship between different sources of law, but would also essentially negate the innovative effect of the above-mentioned regulatory provision, reducing it to a mere pleonasm or a provision devoid of any meaning and without any practical and normative effect; it is evident that - since legal provisions must be interpreted in such a manner as to have a meaning and not in such a manner that they do not - this cannot be the case.

Moreover, the systematic interpretation provided by the MIUR has been refuted on various occasions by the Council of State which, in an impressive number of judgments (cf. paragraphs 90 to 93) and interim orders (paragraph 94), has repeatedly and constantly recognised the accrediting effect for all purposes of vocational school-leaving qualifications. It has also done so for the purpose of including in eligibility rankings to be drawn upon until exhaustion [ERE], the only instrument for granting tenured status to precarious teachers in Italy alongside public competitions, which were not however held between 1999 and 2012.

Moreover, those judgments were adopted following an opinion given by the Council of State itself (cf. paragraphs 76 et seq of the complaint), which had led to the adoption of a Decree of the President of the Republic recognising vocational school-leaving qualifications as having accrediting status.

Moreover, those judgments reiterated that the first of them (no. 1973 of 16 April 2015, paragraph 90 of the complaint) had annulled MUIR Ministerial Decree 235/2014 with *erga omnes* effect insofar as it did not allow teachers holding a vocational school-leaving qualification with accrediting status (having been obtained during or before school year 2001/2002) to register also in the ranking lists to be drawn upon until exhaustion, given that **Law no. 296/2006 obliges the MIUR to include in the ERE** "*teachers already holding accreditation*" **at the time of the transformation of permanent ranking lists into ERE**, thereby resolving the question of law.

In spite of that framework, as is clarified in the complaint (paragraphs 103 to 111 of the complaint), the Plenary Session of the Council of State reached a decision that was completely at odds with its previous rulings, amongst other things "reviving" Ministerial Decree 235/2014 which, as mentioned above, had been annulled by the Council of State itself. In doing so it violated an established position under law and clearly discriminated against the thousands of workers previously included in the ERE by the definitive judgments or interim orders mentioned above.

It was also held by the recent Sciotto judgment of the EU Court of Justice of 25 October 2018 (in Case C-331/17, paragraph 71, Enclosure 87) that this also constituted discrimination against certain fixed-term workers.

REGARDING POINT 5 - THE MEASURES LAID DOWN BY DECREE LAW NO. 87 OF 2018 (SO-CALLED "DIGNITY" DECREE)

In the light of this framework, which has been summarised here and which is set out in detail in the complaint (to which reference is made), the MIUR responds by asserting that the circumstances of vocational school-leaving qualifications should be "resolved" (page 27 of the Observations of the Italian State) through the approval of the "dignity" decree.

Nothing could be further from the truth.

The "dignity" decree provides on the contrary for the transformation of the orders

requiring inclusion within ERE stipulated in the judgments of the Council of State issued prior to the ruling by the Plenary Session - which were supposed to remain unaffected until the legal proceedings had been resolved - into the grant of fixed-term appointments until the end of school year 2018/2019 (thus until 30 June 2019).

As a result, they will cease working next year (perhaps in spite of the fact that their cases have not yet been concluded), and as a result will be forced to apply once again to the courts, launching new litigation, if for no other reason than due to the fact that the Decree-Law constitutes an evident interference by the State in decisions taken by the judiciary.

In fact, ANIEF lawyers have not only challenged decision no. 12/2017 of the Plenary Session before the Joint Divisions of the Italian Court of Cassation (Enclosure 88), but have also requested the Council of State to refer the matter once again for examination by the lower court for the reasons set out in the enclosed intervention (Enclosure 89, which is referred to in its entirety). By order no. 5383 of 12 November 2018, the Sixth Division of the Council of State accepted that request and announced that it would, by a separate order, refer once again to the Plenary Session the issue concerning the registration in ERE of persons holding a vocational school-leaving qualification. It did so having concluded that it was necessary to reconsider the conclusions reached by the Plenary Session in decision no. 11 of 2017, cited above.

Moreover, the so-called Dignity Decree has also been adopted in consideration of the need "*to ensure continuity for the school system*" (see the full text of the Dignity Decree, filed here as doc. 88), thereby highlighting the shortcomings that still persist within nursery school teaching.

Moreover, the provision for reserved competitions also do not remedy the violations of the provisions of the Charter and of EU law. This is first of all because it subjects the holders of vocational school-leaving qualifications, who have previously been recognised as having the right to inclusion in the ERE, to a further burden associated with the competition procedure, the outcome of which is controlled by their employer, the MIUR.

Secondly, a reserved competition unlawfully excludes all teachers who do not fulfil the prerequisites of two years' service as well as all teachers who have worked for accredited independent schools and municipal schools.

Moreover, it is important to note that Article 4-bis of the so-called Dignity Decree removed the maximum overall limit of thirty-six months stipulated for the fixed-term contracts of workers in schools previously provided for under paragraph 131 of Law 107/2015, thereby legitimising the potentially endless repetition of fixed-term appointments of teachers.

It must be recalled in this regard that, within judgment no. 187/2016, the Constitutional Court considered the progressive stabilisation of legacy precarious workers by running through ranking lists to be drawn upon until exhaustion as a suitable measure for

preventing and punishing the abuse of successive fixed/term contracts in the following terms: "*For teachers, the chosen option is the path leading to the grant of tenure under the extraordinary plan intended to fill "all the teaching and support positions within the legal workforce. This measure is designed to guarantee to all precarious teachers the opportunity to enjoy privileged access to public sector employment until the permanent ranking lists to be drawn upon until exhaustion have been entirely depleted, in accordance with Article 1(109) of Law no. 107 of 2015, enabling them to obtain a tenured position either automatically (as they move up the ranking list), or through moderated selections (reserved competitions)*".

Therefore, the interpretation cited above upheld as legitimate the use of fixed-term contracts in the schools sector in order to cover vacant positions within the workforce, provided that it is offset by compliance with procedures for recruitment and hiring under former permanent ranking lists.

In other words, teachers may only be legitimately hired under fixed-term contracts to vacant and available positions if - as consideration for that situation of precariousness - the provisional appointment enables them to accumulate a length of service score that can enable them to move up the ranking lists that are drawn on when making permanent appointments.

Any supply appointment or appointments to vacant and available positions (which thus occur not in order to address temporary and exceptional requirements but in order to satisfy the permanent and ongoing needs of the employer) are only deemed to be compliant with the principles derived from EU law mentioned above where the fixed-term worker is able to take advantage of that employment experience for the purposes of stabilisation by drawing on permanent ranking lists.

Conversely, any supply appointment to vacant and available positions that is not made with a view to making a permanent appointment by drawing on ranking lists would be irredeemably at odds with clause 5(1) of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP annexed to Council Directive 1999/70/EC 28 of 28 June 1999.

To summarise, there is only one instrument under Italian law to prevent the abusive recourse to fixed-term contracts in the schools sector: the mechanism of drawing on ranking lists, which may be used in order to make permanent appointments. However, the holders of vocational school-leaving qualifications are excluded from this mechanism.

This response has been drafted in Italian and the undersigned reserves the right, if necessary, to send a translation in French by 30 November 2018

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

85 - judgment 25677/2015 of the Italian Court of Cassation

86 - Sciotto judgment of the CJEU of 25 October 2018

87 - Decree-Law no. 87 of 2018, so-called “Dignity” Decree

88 - appeal to the Joint Divisions against judgment 12/2017 of the Plenary Session

89 - intervention of 19 September 2018 by Volpini before the Council of State

90 - order no. 5383/2018 of the Council of State.

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