EUROPEAN COMMITTEE OF SOCIAL RIGHTS
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24 September 2021

Case Document No. 8

Professional and Trade Union Association **(ANIEF) v. Italy**
Complaint No. 159/2018

RESPONSE FROM ANIEF TO THE THIRD-PARTY'S INTERVENTION (English only)

Registered at the Secretariat on 30 July 2021

EUROPEAN SOCIAL RIGHTS COMMITTEE

COMPLAINT 159/2018 - ANIEF v/ ITALY

To the kind attention of the Executive Secretary of the European Committee of Social Rights, acting in the name and on behalf of the Secretary General of the Council of Europe

OBJECT: COLLECTIVE COMPLAINT NO 159/2018 ANIEF UNION'S REPLIES TO THE OBSERVATIONS OF TEACHERS LUISA SARNATARO *ET ALII*.

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PREMISE.

1. On 20 January 2018, the trade union association ANIEF lodged a complaint against Italy on the grounds of disproportionate interference with preschool and primary school teachers who obtained their diplomas by the 2001/2002 school year, who undoubtedly belong to the so-called "***historic precariat*", *a*** membership, the latter, which can be derived from the empirical data of the achievement of the diploma before the 2002/2002 school year and the consequent necessary reiteration of fixed-term contracts, unquestionable on the record, for at least twenty years.

2. As amply highlighted in the recent decision on the merits of 19 January 2021 (ANIEF v. Italy, Complaint No. 146/2017), the Italian State provides that the permanent recruitment of teaching staff in Public Schools is carried out through **competition** or by drawing from the **"*permanent*" graduatorie,** transformed by Law No. 296/2006 into closed graduatorie (so-called "*ad esaurimento*", in acronym GAE, or "liste ERE" in the opinion of 19 January 2021, cited above).

3. This Committee has held that the "*privileged*" access to public employment afforded to public teachers included in the "Graduatorie ad esaurimento" (exhaustive lists) does not constitute discriminatory treatment with respect to private school teachers, within the meaning of Article 1§2 of the Charter, given that such personnel, through inclusion in the Graduatorie ad esaurimento (henceforth GAE), have the opportunity to obtain permanent employment and the award of annual substitutes.

4. The Law n. 296/2006 when it transformed the permanent lists in graduatorie ad esaurimento to allow the **stabilization of** the so-called "*historic precariat*" has stated that "*are subject to the insertion in the same lists to be made for the two-year period 2007-2008 for teachers already* ***in possession of qualification***.

5. Magistral graduates were therefore entitled to inclusion in the rankings because **Article 15, paragraph 7, of Presidential Decree no. 232/98** states that the **diploma qualifies for the** teaching profession for the classes of competition **Nursery School** (AAAA) **and Primary School** (EEEE) if **achieved by the school year 2001/2002**[1], while after that date to obtain the qualification is essential to achieve a degree in science education.

6. Despite the clear wording of the law, the Ministry of Education did not allow these "*historical*" teacher's diplomas to submit applications for inclusion in the "graduatorie ad esaurimento" established by **Law n. 296 of 27 December 2006,** because **it equated the magistral diplomas obtained under the new system** (i.e. after the school year 2001/2002), with no qualifying value, **to the magistral diplomas obtained before the school year 2001/2002** (which instead retained their qualifying nature due to the new regime that, after 2002, required a degree).

7. Numerous magistral graduates therefore challenged before the Administrative Judge the general criteria established by **Ministerial Decree No. 235/2014** which, in regulating the inclusion in the GAE, did not include among the qualifications for admission the qualifying teaching diploma, because it was obtained within the school year 2001/2002.

8. In 2014, therefore, **the Council of State,** with sentence no. 1973 of 16/04/2015, **annulled the Ministerial Decree no. 235/2014**, insofar as it did not allow teachers in possession of the qualifying master's degree to be enrolled in the "graduatorie ad esaurimento".

9. This judgment was confirmed by all subsequent decisions issued by the Council of State, which confirmed that the teaching diploma obtained before the school year 2001/2002 allowed ex se the inclusion in GAE. and therefore guaranteed automatic entry into the role, by virtue of the dual channel of recruitment (see **Cons. Stato sentence no. 1973/2015, sentence no. 3628 of 21/07/2015, sentences no. 3673 and 3675 of 27 July 2015, sentence no. 3788 of 3/08/2015, sentence no. 4232 of 10 September 2015 and sentence no. 5439 of 2.12.2015)**.

10. The Italian Government, however, thwarted this consolidated orientation by appealing to the **Plenary Assembly of the Council of State, which,** in its decision, ruled that the Italian Government was not entitled to appeal.

[1] This is what the law says: "7. The qualifications obtained in the State examination at the end of the teaching courses at the Istituto Magistrale (teacher training college) which began before the 1997/1998 school year shall permanently retain their current legal value as qualification for teaching in primary schools. They allow participation in competitions based on qualifications and exams for teaching posts in nursery and primary schools".

Judgment No. 11 of 2017, ruled the cancellation of diploma magistrali from the exhaustive lists.

11. ***The*** VI Section of the Council of State, however, did not accept the judgment of the Plenary Assembly, given "*the fully effective qualification in itself of the degree magistral, such as to allow, in* ***addition to participation in competitions for the recruitment of teaching staff without the need for the prior passing of other tests, the enrollment in the GAE in accordance with art. 402, c. 1 of Dlg 297/1994, having been preserved permanently the current legal value ... the recipients of the III band, as a result of art. 1 of DL 97/2004 and according to art. 1 of DL 97/2004 and according to art. 1 of Legislative Decree 297/1994, having been preserved permanently the current legal value ... the recipients of the third band, as a result of art. 1 of DL 97/2004 and according to art. 1, c. 695 of Law 662/2006, are now also teachers ALSO ENABLED, so even those in possession of a qualification,*** *such as the appellants, in the sense seen so far* "(so: **Cons. State Sec. VI judgment no. 217 of 2018).**

12. The Government was therefore forced to intervene directly, sanctioning, with **article 4 of Decree-Law No. 87 of 2018,** the transformation on authority of all open-ended relationships stipulated by magistral graduates into fixed-term relationships until 30 June 2019.

13. The trade union association ANIEF. therefore denounced the arbitrary behaviour of the Italian State to this Committee.

14. By "*Act of Signification and/or Representation and/or Intervention in relation to Complaint No. 159/2018*" lawyers Roberto Scognamiglio, Angela D'Andrea and Enrico Romano, representing a number of teachers, requested the dismissal of the complaint.

15. The trade union association ANIEF as a preliminary point, objects to the **inadmissibility of** the action, considering that the Additional Protocol of 1995 allows only the social partners and non-governmental organizations to participate in collective complaint procedures.

16. For the sake of defence and without even implicitly waiving the objection formulated, we point out the groundlessness of the interveners' deductions.

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I. ON THE VIOLATION OF ARTICLE 1§2 AND ARTICLE E OF THE SOCIAL CHARTER.

17. As extensively pointed out in the complaint Italy **violated art. 1§2 of the Charter in** that art. 1, paragraph 605, letter C) of L. n. 296/2006 and art. 15 of d.PR. No 323/88 had been consistently interpreted by the Council of State as allowing the inclusion in the GAE of teachers with a teaching diploma obtained before the

2001/02 school year. Indeed, if their inclusion in the GAE were not possible, **the national legislation would not provide for any preventive or repressive measures with reference to the historical precarious workers in possession of a teacher's diploma obtained before the school year 2001/02** who, until 2006, could peacefully teach and had taught for years in state schools with that qualification.

18. In fact, magistral graduates were **excluded both from the scope of application of Legislative Decrees no. 368/2001 and no. 81/2015**, transposing Directive 1999/70, applied only to teachers in private Schools, **and from the plan for stabilization of precarious workers**, with which Law no. 107/2015 provided for the hiring of over 100,000 teachers included in the GAE, and from the **competition reserved for qualified teachers**, provided by d.lgs. 59/2017, as well as, finally, from the **compensation for damages provided by art. 36 of Legislative Decree 165/2001**, provided exclusively in favor of teachers hired with an annual contract on a vacancy in the so-called "organic of law", i.e. with a term to 31 August (see Cass. Sez. L, Judgments no. 22552 of 2016 and no. 9402 of 2017).

19. As clarified in the **decision on the merits of 19 January 2021** (ANIEF v. Italy, Complaint no. 146/2017, § 89 - 101), in fact, teaching staff not included in the GAE, being almost never able to obtain annual recruitment (i.e. with a termination date of 31 August), do **not enjoy any protection against the precarization of the employment relationship** as the Supreme Court has established that teachers not included in the GAE cannot benefit either from permanent recruitment (cf. Cass. no. 392 of 2012, no. 27481 of 2014 and no. 8671 of 2019), nor of compensation for damages for repeated fixed-term employment, obtainable only in case of employment with **annual** substitutions **(with term to 31 August)** for more than 36 months.

20. Italy has thus violated the **principles of equality, proportionality and non-discrimination between employees of State schools and employees of** private **schools with the** same private employment relationship, enshrined **in Article 1§2 and Article E of the Social Charter.**

21. Indeed, as a result of the illegitimate state interference, the magistral graduates with a qualification obtained by the school year 2001/02, even after the contractualization of the employment relationship of teachers employed by public schools, **cannot benefit from the "*preventive*" and "*repressive*" measures provided by the d.l.vi n. 368/2001 and n. 81/2015** (which stipulate that the employment relationships of teachers hired on a fixed-term basis in Private Schools are transformed into an open-ended one, if they are hired for more than 24 months).

22. Such unequal treatment is wholly unjustified since Article 2 of Legislative Decree No 165/2001 states that the employment relationships of

employees of the public schools (unlike '*staff governed by public law*', governed by Article 3) 'shall be governed by *contract*' and '*shall be governed by the provisions of Chapter I, Title II, of Book V of the* ***Civil Code*** *and by the laws on employment relationships* ***in undertakings***'.

23. For the sake of completeness, it should be pointed out that graduates from the teacher training school are **also discriminated against compared to other temporary teachers included in the permanent lists**, which were later transformed into GAE, since according to art. 2, paragraph 1, letters a), b), c), c-bis), c-ter), paragraphs 1-bis and 1-ter of Law no. 143 of 4 June 2004, **in order to be included in the permanent lists, it was sufficient to attend special qualifying courses**, lasting one year, reserved for teachers with 360 days of service. **These qualifying courses had no competitive value and, despite this, allowed entry into the permanent lists.** The permanent lists were therefore only rankings for qualifications and service reserved for teachers in possession of eligibility competition or qualification however obtained.

24. The principle of equal treatment, which is one of the **general principles of EU law** and whose fundamental character is enshrined **in Article 20 of the Nice Charter**, which "*requires that comparable situations shall not be treated differently*" (see CJEU. Chatzi judgment of 16 September 2010, paras. 63 et seq. and in a consistent sense CJEU. judgments of 5 June 2008, case C-164/07, Wood, par. 13. Sturgeon and Others, paragraph 48, CJEU. 22 December 2010, Gavieiro and Iglesias Torres, C- 444 and 456 of 2009, paragraph 41, as well as CJEU. INPS 10 June 2010, Case C-395/08 and C-396/08, which states that "***58. The prohibition of discrimination enshrined in Directive 2000/78 is nothing more than the specific expression of the general principle of equality, which is one of the fundamental principles of Union law,*** *see judgment of 12 October 2004 in Case C-313/02 Wippel [2004] ECR I-9483, paragraphs 54 and 56).").*

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II. ON VIOLATION OF ARTICLES 4§1 AND 4§4 AND ARTICLE 24 OF THE SOCIAL CHARTER.

25. Italy has also **infringed Articles 4 and 24 of the Charter in so** far as, by providing for the removal of magistral graduates from the GAE, it has **deprived them of the right to adequate remuneration** guaranteeing a decent standard of living and the right **not to be dismissed without valid reason** relating to their ability or conduct or based on the operational requirements of the undertaking, establishment or service and, in any event, **without adequate compensation or other appropriate redress**.

26. As already highlighted in the complaint and in the subsequent replies to Italy's observations**, Law 107/2015** had also guaranteed sufficient remuneration to magistral graduates by providing:

- a maximum duration of 36 months of service under fixed-term contracts, with a consequent right to compensation if that time limit is exceeded, and

- an extraordinary recruitment plan reserved for teachers included in the "graduatorie ad esaurimento".

27. The Italian Government, with **Decree-Law No. 87 of 12.07.2018,** in Article 4-bis, **has eliminated the maximum overall duration of 36 months,** including non-continuous, for fixed-term employment contracts entered into with teaching staff, thus precluding the possibility of obtaining compensation for damages in the event of exceeding the 36-month ceiling and **essentially liberalizing the use *sine die* of fixed-term contracts to fill vacant posts in the workforce**.

28. With **art. 4 D.L. n. 87 of 12.07.2018,** the Government has, moreover, sanctioned that magistral graduates were to be **removed from the GAE,** within the final maximum term of 120 days from the date of communication of the decision of the Council of State, with the automatic **transformation on authority of** all permanent employment contracts **into fixed-term relationships** until 30 June 2019.

29. **In so doing,** the Italian State has **precluded** magistral graduates not only from **accessing the stabilization procedures** introduced by Law no. 107/2015, but also from **challenging the acts of dismissal**, since they are merely implementing a legislative provision. Indeed, the Government, by **directly sanctioning with a regulatory act the transformation of permanent hires into fixed-term relationships until June 30, 2019**, has prevented to challenge the termination of the Ministry of Education and to obtain the provision of compensation for damages suffered as a result of dismissal.

30. In the case in question, the Government has therefore also violated Article 24 of the Charter, given that, as a result of DL. n. 87 of 2018, the magistral graduates did **not even have the opportunity to challenge the acts implementing the decisions of the Plenary Assembly of the Council of State**, since the dismissal**,** resulting from the removal from the GAE..., has a **binding content with respect to Article 4 of Decree-Law No. 87 of 12.07.2018**; in fact, being able to void the dismissal only by obtaining a declaration of the unconstitutionality of DL. No. 87/2018 by the Constitutional Court, the **right of defense of the dismissed graduate comes to connote according to the regime typical of the legislative act adopted**, transferring from the sphere of justice of the Labour Court to that of constitutional justice (see Constitutional Court, sentences no. 62 of 1993, no. 270 of 2010, no. 20 of 2012, no. 154 of 2013 and no. 275 of 2013).

31. In other words, since the form of protection follows the legal nature of the contested act, **the rights of defence against the dismissal of magistral graduates are transferred from the jurisdiction of the ordinary court to the**

constitutional justice, being able to find protection against the employer's withdrawal only through the constitutional review of the reasonableness of the Decree Law no.
87/2018, reserved for the Constitutional Court.

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III. INFRINGEMENT OF ARTICLES 5 AND 6 OF THE SOCIAL CHARTER.

32. It is clear from the foregoing paragraph that the Italian State has also violated the above provisions in that it has transformed by decree-law all open-ended contracts into fixed-term contracts and has unilaterally reduced until 30 June 2019 the duration of all fixed-term contracts already entered into with a duration until 31 August 2019.

33. Such interventions were ordered by the Government without any prior **negotiation and without even informing ANIEF and the other trade unions** of the decision, despite the fact that Article 6 § 2 of the Charter obliges the States parties to promote a mechanism for voluntary negotiations on the regulation of terms and conditions of employment, a procedure which is undoubtedly necessary in this case at least in view of the number of teachers involved and the social consequences of the Government's intervention (see. European Police Council Trade Unions v. Portugal, Complaint No. 11/2002, decision on the merits of 21 May 2002, §§51 and 63).

IV. ON THE REMOVAL OF THE GUARANTEE OF NATURAL JUSTICE AND INFRINGEMENT OF THE PRINCIPLES OF INDEPENDENCE OF THE JUDICIARY AND THE JUDICIAL ORDER.

34. The interveners against the acceptance of the proposed complaint refer to judgment no. 11 of 20/12/2017 (President Alessandro Pajno, Ext. Roberto Giovagnoli), issued by the Plenary Assembly of the Council of State in 2017, i.e. after all the **Judges of the VI Section of the Council of State, to which the Italian legal system reserves the decision of all cases of teachers working in public schools**, had consistently confirmed the right to inclusion in the GAE of magistral graduates who graduated by the school year 2001/2002.

35. Insofar as it is relevant to this Committee, it is necessary to provide some clarifications regarding this unusual decision of the highest court of Italian administrative jurisdiction. As will be highlighted in the following paragraphs, this ruling is in clear **contrast** not only with the previous consolidated teaching of the Council of State, but also **with the letter of the provisions "*interpreted*" by the Plenary Assembly in accordance with the will of the political body.**

36. In the Italian legal system, unfortunately, such an event can occur since **art. 22 of Law no. 186/1982** attributes the appointment to the President of the

Republic upon **nomination by the President of the Council of** Ministers, after consultation with the Presidency Council of Administrative Justice.

37. As a matter of established practice, from 1929 **until 2017, in order to** ensure in any case the independence of the highest organ of Administrative Justice, the actual **choice of the President of the Council of State was** actually **made by the Presidential Council** (the single self-governing body of the Council of State), which expressed a name (as a rule, the Councilor with the most seniority), which was then ratified by the President of the Council.

38. **In 2017, however, the President of the Council of** State was instead **directly appointed by the President of the Council of Ministers, who** designated Councillor Alessandro Pajno in place of Councillor Stefano Baccarini, who was entitled to the Presidency as the most senior Councillor.

39. The appearance of the independence of the Council of State in its highest expression was questioned by the same Councillor Baccarini, who did not fail to point out how "*Article 22, paragraph 1, of the law provides that the President of the Council of State is appointed from among the magistrates who have actually exercised directive functions for at least five years, by decree of the President of the Republic, on the* ***proposal of the President of the Council of Ministers*** *after deliberation of the Council of Ministers, after hearing the opinion of the Presidency Council. Here, the procedural form of the opinion to ensure the participation of the Presidency Council appears even more inadequate. Because, once* ***the autonomy of the Presidency Council*** *in matters of the legal status of magistrates has been* ***recognised*** *by a constitutionally necessary provision,* ***it is not reasonable to create an exception for the top position of President of the Council of State, who is responsible for presiding over the Presidency Council****. Because, as pointed out by the Constitutional Court in its judgment no. 72 of '91, the constitutional guarantees provided for the protection of the status of* ***independence of magistrates and the judicial order*** *include in their scope also the appointment of magistrates in management offices: which, moreover, in the administrative judiciary translate into positions of legal status*" (thus **Stefano Baccarini**, "*Status and careers of administrative judges*" - published in Giustamm, July 2017, **all. A**).

40. The direct appointment by the President of the Council of Ministers of the President of the Council of State, who presided over the Plenary Assembly referred to by the interveners, therefore infringes the **principles of the independence of the judiciary and of the judicial order and of the natural judge established by law**, enshrined in Article 6 *ECHR* and Article 47 of the *Charter of Fundamental Rights of the European Union*, which reflects the fundamental requirement of predetermination of the judge.

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V. ON THE QUALIFYING NATURE OF THE 'DIPLOMA MAGISTRALE EX ARTICLE 15, PARAGRAPH 7, OF PRESIDENTIAL DECREE NO. 323 OF 1998 AND ARTICLE 4 OF DECREE-LAW NO. 87 OF 2018.

41. The interveners argue that the government interference would be legitimate because the Plenary Assembly of the Council of State, with sentence no. 11/2017, denied the qualifying nature of the teacher's diploma obtained within the school year. 2001/2002, contradicting what was sustained by the VI Section of the Council of State with the judgments of 16 April 2015, no. 1973, 21 July 2015, no. 3628, 27 July 2015, nos. 3673 and 3675, 3 August 2015, no. 3788, 10 September 2015, no. 4232, 2 December 2015, no. 5439 and no. 217 of 16 January 2018, as well as with over two hundred orders.

42. That statement, however, is in stark contrast with **Article 15(7) of Presidential Decree No 323 of 23 July 1998,** which states, verbatim: "*The qualifications obtained in the State examination at the end of the courses of study at the Istituto Magistrale (teacher training college) which began before the 1997/1998 academic year* ***retain,*** *on a* ***permanent basis,*** *their current legal and* ***qualifying*** *value for teaching in primary schools*".

43. It should be recalled that the statement of the Plenary Assembly was later **denied, by authentication, by the legislature,** which, with **art. 4 of Law Decree no. 87/2018,** in defining the access requirements to the extraordinary competition for primary schools and kindergartens, reaffirmed the **qualifying value of the teacher's diploma obtained before 2002**, placing on a ground of **full equivalence** - as regards the qualifying value **- of the qualification the degree in science of primary education and the teacher's diploma obtained before 2002**.

44. **Article 4, paragraphs 1-quinquies et seq. of Decree-Law No. 87/2018 has**, in fact, **reserved access to the competition to teachers in possession**, indifferently, of one of the following requirements*: "- a) teaching qualification obtained at the degree courses in primary education sciences ... b)* ***magistral diploma with the value of qualification*** *or similar qualification obtained abroad and recognized in Italy under the current legislation,* ***achieved, however, within the school year 2001/2002***".

45. **The MIUR has** therefore **reaffirmed the full qualification value of the diploma obtained within the A.S.: 2001/2002 with three different regulatory acts**:

I. with the **decree of the Minister for Education, Universities and Research no. 308 of 15 May 2014**, containing '*Provisions relating to the tables for the evaluation of qualifications in the second and third bands of the school rankings,*

in application of the decree of the Minister for Education, Universities and Research no. 249 of 10 September 2010, as subsequently amended 249 and subsequent amendments", both in the introduction and in the table, where among the qualifying qualifications for access to the second band (point A. A1) it is specified "*including the teacher's secondary school diploma, the three-year master's degree and equivalent experimental qualifications*";

II. with the **Decree of the Minister of Education, Universities and Research No 353 of 22 May 2014,** concerning the notice for the constitution of the school rankings, in Article 2 - Titles of access to the bands of the school rankings, paragraph 1, letter b - Second band - point 7);

III. with the **decree of the Minister of Education, University and Research No 967 of 24 December 2014,** concerning the authorisation of the activation of the training courses for the achievement of the specialisation for support activities, where in the preamble it is specified that the qualifications, valid for access to the selective procedures, include the magistral diplomas in question.

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VI. ON THE ERGA OMNES EFFECT OF THE JUDGMENT ANNULLING THE MINISTERIAL DECREE PRECLUDING THE INCLUSION OF 'DIPLOMATI MAGISTRALI' IN THE 'GRADUATORIE AD ESAURIMENTO'.

46. Nor is the opposing party's assertion that the judgments of the Sixth Chamber of the Council of State annulling the judgment could not be applied generally persuasive.

47. The Council of State has in fact constantly stressed, even **after judgment no. 11 of 20 December 2017**, that "*on the basis of a* ***CONSOLIDATED JURISPRUDENTIAL GUIDELINE of*** *the section, on this matter, from which there* ***are no reasons to deviate*** *(see Cons. Stato, sez. VI, judgments no. 5281, 3323 and 3324 of 2017, whose arguments, although referred primarily to the appeal of Ministerial Decree no. 235 of 2014, are also applicable to the resolution of the present dispute - the Council of State, sez. 5281, 3323 and 3324 of 2017, the arguments of which, although referring* ***mainly to the challenge to Ministerial Decree no. 235 of 2014****, are also applicable to the resolution of the present dispute - on the specific challenge to Ministerial Decree no. 495 of 2016, "in part qua", see, recently, Cons. Stato, sez. VI, sentence no. 3198 of 2018) ...* ***there was no burden on the appellants to challenge the above-mentioned decrees of 2014 and 2016****, since, as pointed out in the notice of appeal, Ministerial Decree no. 235 of 2014 had* ***already been annulled*** *-* ***with EFFECTIVENESS "ERGA OMNES", since it is a general act having inseparable effects***" (**Cons. Stato Sez. VI, 23 July 2018, no. 4500**, and in a conforming sense: Cons. Stato Sez. VI, 27 March 2017, no. 1281, Cons. Stato Sez. VI, 19 May 2017, no. 2065, Cons. Stato Sez. VI, 19 June 2017, no. 2976, Cons. Stato Sez. VI, 5 July 2017, no. 3323, and Cons.

Stato Sez. VI, 15 November 2017, no. 5281, and Cons. Stato Sez. VI, 29 May 2018, no. 3198).

48. Nor can it be overlooked that also the United Sections have in fact clarified that the "***Ministerial Decree no. 235 of 1 April 2014*** *(and the attached Ministerial Decree. May 22, 2014, 353) - an act of a general nature and constituting the exercise of authoritative power in the identification of criteria for inclusion in the rankings, which, however, has* ***already been declared illegitimate by the administrative court with reference to the failure to provide for the inclusion of holders of teacher's diploma achieved within the school year 2001-2002*** *(Cons. State judgment no. 1973 of 2015)*" (**CASS. SU. 13/09/2017, no. 21197,** and in a conforming sense: Cass. SU. 16 December 2016, no. 25972 and no. 25973, Cass. SU 15 December 2016, no. 25840 - 25846, Cassazione civile sez. un., 01/02/2017, no. 2614, Cassazione civile sez. un., 31/01/2017, no.2481, and Cassazione civile sez. un., 18/09/2017, no. 21542).

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VII. ON THE RIGHT TO INCLUSION IN THE RANKING LIST ON THE BASIS OF THE TABLE ANNEXED TO LEGISLATIVE DECREE NO. 97/2004 AND ARTICLE 1, PARAGRAPH 605, LETT. C OF LAW NO. 296/2006.

49. In support of the Italian Government's interference, it is not even possible to mention the fact that the Plenary Assembly, in the judgment referred to by the interveners, also wrongly held that a teaching diploma obtained before the 2001/2002 school year was not sufficient to obtain inclusion in the GAE.

50. The judgment in fact blatantly confuses the requirements for access to the GAE (governed by Law 296/2006, which requires only the possession of a qualification at the date of establishment of the GAE) with the requirements for access to the abolished permanent lists.

51. Furthermore, the Plenary Assembly seems to ignore that the **table attached to the decree-law.**

No. 97/2004, also in relation to the abolished permanent lists, already provided in point "*A) Qualifications for access to the* permanent *list*", the "*qualification/qualifying qualification for teaching****, however*** *possessed*".

52. In this sense, the VI section of the Council of State - both before and after the Plenary Assembly's ruling - has consistently stated that "***sufficient requirement for inclusion in the GAE is the possession of a teaching qualification.*** *Moreover, the table of evaluation of qualifications of the aforementioned third band of the "graduatorie ad esaurimento" of the teaching staff of schools and institutes of all levels - see* ***table in ARTICLE 1 OF LAW DECREE NO. 97/2004,*** *converted by Law no. 143/2004, supplemented by Law no. 186/2004 and modified by law no. 296/2006 - provides, among other things, at point A), called "qualifying titles for access to the*

ranking list", the qualifying title ALWAYS possessed, which is therefore a valid title, like the above mentioned diploma magistrale, for the above mentioned insertion" (thus, *ex multis,* **Cons. Stato. Sez. VI Sentence no. 3628 of 21.7.2015**, as well as in a conforming sense: Cons. Stato Sez. VI Sentence no. **3628 of 21.7.2015**, Cons. Stato Sez. VI Sentence no. **3673 of 27.7.2015**, Cons. **Stato Sez. VI Sentence no. 3675 of 27.7.2015, Cons. Stato Sez. VI Sentence no. 3788 of 3.8.2015, Cons. Stato Sez. VI Sentence no. 4232 of 3.8.2015, Cons. Stato Sez. VI Sentence no. 4232 of 3.8.2015. 10.9.2015 and Cons. Stato Sez. VI judgment no. 217/18)**.

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XI. THE ALLEGED LATENESS OF THE APPEALS.

53. In support of the interference on the part of the Plenary Assembly of the Council of State, it does not appear to be possible even seriously to assert that all the judges of the Sixth Chamber of the Council of State (to which the Italian legal system reserves the decision of cases concerning the recruitment of teachers in the public schools) were mistaken as regards the determination of the *dies a quo* for challenging the damaging act, since the **publication of the new decrees for the inclusion or updating of the GAE brought the appellants within the time-limit for lodging an appeal,** given that only purely confirmatory measures cannot be challenged independently.

54. In fact, it is a **basic principle of Italian administrative law** that **the act "*merely confirming*" a previous measure is not subject to autonomous appeal.** Indeed, "*According to* ***constant jurisprudence****, in order to establish whether an administrative act is* ***merely confirmatory (and therefore not subject to appeal****) or confirmatory in the proper sense (and therefore independently injurious and to be challenged within the time limits), it is necessary to verify whether or not the subsequent act was adopted without a new investigation and a new weighing of interests;* " (so, most recently, **Consiglio di Stato, V, 13/11/2019, no. 7804,** and in terms Cons. **Stato, 25 June 2013, no. 3457, Cons. Stato, 14 April 2014, no. 1805, Cons. Stato, 9 July 2014, no. 3491, Cons. Stato, 12 February 2015, no. 758, Cons. Stato,**
29 February 2016, no. 812, Cons. Stato, 12 October 2016, no. 4214, Consiglio di Stato 27/01/2017, no. 357, and Cons. Stato, 29 August 2019, no. 5977).

55. The VI Section of the Council of State had therefore rightly considered timely the appeals of the diplomati magistrali as it must be challenged only "***act that has caused a current injury to their legal sphere*** *and this act is identified in Ministerial Decree no. 235/2015 on the formation of the rankings for the three-year period. Conversely,* ***it was not considered necessary to challenge the previous ministerial decrees****., even if they have similar content,* ***given the autonomy that characterizes each three-year period relating to the updating of the exhaustive lists for the teaching staff*** "(so *ex multis*: **Cons. State, Sec. VI, June 19, 2017, No. 2976,** Pres. Santoro, est. Buricelli).

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X. ON THE IRRELEVANCE OF THE ORDER OF THE CASSATION NO. 19679/2919.

56. The attempt by the interveners to endorse the work of the Plenary Assembly by referring to the order of the United Sections of the Supreme Court no. 19679/2919 is completely lacking in legal merit.

57. This order, in fact, limited itself to **declaring inadmissible the appeal pursuant to article 111 of the Constitution**, This order merely declared inadmissible the appeal under art. 111 of the Constitution, brought against the decision of the Plenary Assembly, since "*the review of the United Sections of the Supreme Court on the decisions of the administrative judge is limited to the grounds inherent in jurisdiction, i.e. to the defects concerning the scope of jurisdiction in general or the failure to respect the external limits of jurisdiction, with the* ***exclusion of any review*** *of the way in which the jurisdictional function is exercised, which instead concerns* ***errors in iudicando, or even in procedendo****, which go beyond the confines of the abstract evaluation of the existence of the defining indexes of the matter and concern the ascertainment of the validity or otherwise of the request (among many others, Cass., S.U., 29 December 2017, no. 31226; Cass., S.U., 27 April 2018, no. 10264). And this is the case* ***regardless of the seriousness of the violation, even if it touches the threshold of the so-called distortion of the reference rules, whether substantive or procedural, applied*** *(Constitutional Court, sentence no. 6 of 2018).*".

58. In other words, the United Sections, far from endorsing the work of the Plenary Assembly, simply said that **art. 111 of the Constitution does not allow the Supreme Court to review the errors *in iudicando* of the Plenary Assembly**.

59. It should also be noted that the Joint Sections of the Court of Cassation, in their Order no. 19598 of 18 September 2020, decided to refer a question to the Court of Justice for a preliminary ruling on the possibility of assessing the correctness of a ruling by the Italian Council of State on the grounds of violation of the limits of jurisdiction where, as in this case, there has been a violation of EU rights (attachment B).

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XI. ON TORTIOUS INTERFERENCE.

60. From what has been set out in the previous paragraphs, it is clear that the Italian Government, thanks to the intervention of the Plenary Assembly of the Council of State and the enactment of Article 4 of Decree-Law no. 87 of 2018, has illegitimately **precluded pre-2001/2002 diplomaati magistrali, historical precari, from benefiting from the only measure implementing clause 5 of the Framework Agreement**, despite the fact that "*clause 5(1) of the Framework Agreement* ***requires*** *Member States, in order to prevent the abusive use of a succession*

of fixed-term employment contracts or relationships, to ***adopt effectively and bindingly at least one of the measures it lists***" (thus: CJEU María Elena Pérez López C-16/15, 14 September 2016);

61. The **Constitutional Court**, with **sentence no. 41/2011** has in fact clarified that the transformation of the permanent to exhaustive lists aims to **stabilize the historical precarious workers in possession of the qualification at the time of such transformation**. The **Constitutional Court** in the subsequent judgment **no. 187 of 2016** noted that the **inclusion in the lists for which the case is the only way to ensure the historical precarious** ***"serious and unquestionable chances of entry into the role to all personnel concerned, according to one of the alternatives expressly taken into account by the Court of Justice".***

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XII. INFRINGEMENT OF ARTICLES. 6 AND 13 ECHR OF ART. 1 PROT. 1 AND ARTICLES. 47 AND 52 OF THE CFCU.

62. Finally, **Italy has also infringed** the **principles of legal certainty and protection of legitimate expectations under** Articles 6 and 13 of the ECHR. and Article 1 of Prot. 1 as the Consiglio di Stato, prior to the decisions of the Adunanza Plenaria, had consistently remarked:

the qualifying nature of the **teacher's diploma obtained before the 2001/2002 school year,**

the ***erga omnes*** **effect** of judgments annulling Ministerial Decisions updating the GAE; and

- the **revival of the interest in bringing proceedings of persons unlawfully excluded**, who are thus **brought within the** time-limit laid down by **the publication of a new decree for the inclusion or updating of the GAE,** given that only acts which are merely confirmatory cannot be challenged independently.

63. *The* Council of State prior to the intervention of the A.P. had in fact consistently stressed that "***Ministerial Decree 235/2014, an act of a regulatory nature, was annulled with effect erga omnes by the judgment of the section of 16 April 2015, no. 1973****, in the part in which it does not allow the entry into the GAE of magistral graduates,* ***so it is therefore not possible to recognize a late challenge to an act already annulled, which no longer exists****;* " (so *ex multis*, **Cons. State Sez. VI, order of 27/03/2017, no. 1281** President Maruotti, Councillor, Extender Spisani, reiterated subsequently, among many others, by: Cons. **Stato Sez. VI, order of 14/4/2017, no. 1595,** President Santoro, Councillor, Extender Buricelli, Cons. **Stato Sez. VI 26 April 2017, no. 1745, precautionary decree of Dr.** Santoro, Cons. **Stato Sez. VI 8 May 2017, no. 1928,** precautionary decree of Dr. Santoro, Cons. Stato Sez**. VI, order of 29/5/2017, no. 2267,** President Caracciolo, Counselor, Extender Spisani, Cons. Stato Sez**. VI, order of 29/5/2017, no. 2296,** Caracciolo,

President, Counselor, Extender Spisani, Cons. **Stato Sez. VI, order of 9/6/2017, no. 2417,** President Santoro, Counselor, Extender
Buricelli).

64. In other words, before the intervention of the A.P., **the orientation in favour of the inclusion in the GAE of magistral graduates with qualifications obtained before 2002 constituted living law**, because it developed over a period of **3 years** (from 2015 to 2018), with **over 300 pronouncements** (including **8 JUDGMENTS** of the Council of State and over 300 precautionary orders of the Lazio TAR and the Council of State, cf. among the most significant: **Cons. St. Sez. VI, no. 4834 of 22.10.2014; no. 428 of 28.1.2015; no. 1089 of 11.03.2015; no. 1808 of 29.04.2015; no. 4334 of 22.9.2015; no. 3900 of 31.8.2015; no. 3901 of 31.8.2015; no. 3951 of 31.8.2015; no. 3952 of 31.8.2015; no. 5445 of 4.12.2015; no. 5540 of 16.12.2015; no. 5541 of 16.12.2015; no. 5542 of 16.12.2015; no. 5555 of 16.12.2015; no. 5647 of 17.12.2015; no. 247 of 22.01.2016; no. 428 of 5.2.2016**) and based on **procedural premises and substantive conclusions in line with established case law,** according to which the **annulment of the provisions contained in Ministerial Decree no. 235 of 2014 has effect** ***erga omnes*** (see, by way of example only, Cons. Stato Sez. VI, 27 March 2017, no. 1281, Cons. Stato Sez. VI, 19 May 2017, no. 2065, Cons. Stato Sez. VI, 19 June 2017, no. 2976, Cons. Stato Sez. VI, 5 July 2017, no. 3323, Cons. Stato Sez. VI, 5 July 2017, no. 3324, Cons. Stato Sez. VI, 15 November 2017, no. 5281).

65. It follows that magistral graduates had **a real "*asset" within the* meaning of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms**, having appealed to the TAR. Lazio prior to the intervention of the Plenary Assembly, when the orientation was in favour of the inclusion in the GAE of magistral graduates, with qualifications obtained before 2002.

66. **Italy has therefore also infringed the effectiveness of judicial protection and the principles of fair trial, legal certainty and predictability and the protection of property,** enshrined in Article 6 of the European Convention on Human Rights and in Article 1 Protocol No. 1 annexed to the ECHR and **incorporated in Articles 52 and 47 of the Charter of Fundamental Rights of the European Union.**

67. The **European Court of Human Rights,** moving from the "*inclusion*" in the notion of law of "*jurisprudential law*", requires the "***certainty of legal relations"*** *(*see EDU Court. Brumărescu v. Romania [GC], no. 28342/95, § 61, and Mazzeo v. Italy no.32269/2009, 5 October 2017, § 35), as well as the "***knowability of the rule of law*** *and the (reasonable)* ***foreseeability of its application"*** (see EDU Court. Sunday Times v. the United Kingdom, judgment of 29 April 1979, §§ 48-49,

Nejdet Şahin and Perihan Şahin v. Turkey [GC], no. 13279/05, 20 October 2011, § 57, and Agrokompleks v. Ukraine, no. 23465/03, 6 October 2011, § 144).

68. *The* **Court of Justice** has also consistently held that "*the* ***principles of the protection of legitimate expectations*** *and legal certainty* ***are part of the Community legal order and*** *must therefore be respected by the Community institutions, but* ***also by the Member States*** *when exercising the powers conferred on them by Community directives*" (**CJEU. 10 September 2009**, *Plantanol GmbH & Co. KG,* C-201/08, paragraph 43, and concurringly: **CJEU 26 February 1987,** *Consorzio Cooperative d'Abruzzo* C-15/85, paras 12 and 17, CJEU **4 July 1973**, *Westzucker* C1/73, CJEU **3 May 1978**, *Tòpfer*, Case 112/77, **CJEU 3 March 1982**, , C- 14/81, *Alpha Steel* **CJEU 19 May 1983**, *Vassilis Mavridis v. European Parliament*, Case 289/81, **CJEU 21 September 1983**, *Deutsche Milchkontor GmbH*, **CJEU 20 June 1991**, *Cargill B.V.*, C248/89, **Court of Justice 22 January 1997**, Opel *Austria GmbH v. Council,* T115/94, **Court of Justice 18 December 1997**, joined cases C-286/94, C-340/95, C-401/95 and C-47/96, *Molenheide and others,* paragraphs 45-48, **Court of Justice 3 December**
1998, C-381/97, *Belgocodex*, paragraph 26, ECJ **13 December 1989,** Case C-342/87, *Genius Holding*, **ECJ. 19 September 2000,** Case C-454/98, *Schmeink & Cofreth and Strobel*, **CJEU. 26 April 2005,** Case C-376/02, *Goed Wonen,* paragraph 32, CJEU**. 7 June 2005**, *VEMW and Others,* C-17/03, **CJEU. 11 May 2006,** Case C-384/04, *Federation of Technological Industries,* paragraph 29, **CJEU. 6 July 2006, Joined Cases** C-439/04 and C-440/04, *Kittel*, ECJ **14 September 2006**, Joined Cases C-181/04 to C-183/04, *Elmeka,* paragraph 31, **ECJ**. **21 February 2008**, *Netto Supermarkt,* C-271/06, paragraph 18).

69. As is well known, the principle of legal certainty is one of the fundamental principles of the European Union and consists of three sub-principles: the non-retroactivity of regulatory acts, the protection of legitimate expectations and the protection of acquired rights. According to the unequivocal teaching of the **CJEU**. in fact "*the principle of* ***legal certainty****, which has as a corollary that of the* ***protection of legitimate expectations,*** *requires, in particular, that the* ***legal rules are clear, precise and foreseeable in their effects****, in particular when they may have adverse consequences on individuals and businesses (see, to that effect, judgment of 11 June 2015, Berlington Hungary and Others, C-98/14, EU:C:2015:386, paragraph 77, and the case-law cited therein)*" (thus: CJEU. 20 December 2017, Case C-322/16, Global Starnet Ltd. and concurring: CJEU 15 February 1996, Duff and Others; CJEU. 7 June 2005, VEMW and Others, C-17/03, CJEU. Net Supermarkt, C-271/06, and CJEU. 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation*, Case C-362/12, paragraph 44, stating that "*according to settled case-law, the principle of* ***legal certainty****, which has as its corollary that of the* ***protection of legitimate expectations,*** *requires that legislation which entails*

disadvantageous consequences for private individuals must be clear and precise and that its application must be foreseeable for the persons administered.").

70. **The Italian Government should therefore have limited the effectiveness of the change in case-law, which was** unforeseeable and had effects in *malam partem*, **to judgments brought after the filing of the decision of the Plenary Assembly** (see, Corte EDU. Cocchiarella v. Italy, judgment of 29 March 2006, § 44, Di Sante v. Italy, judgment of 24 June 2004, Paulino Tomas v. Portugal, judgment of 27 March 2003, Midsuf v. France, decision of the Grande Chambre of 11 September 2002, Giumarra v. France, judgment of 12 June 2001, § 44), given that the "***principle of legal certainty requires, in particular, that legal rules be clear, precise and foreseeable in their effects, in*** *particular where they may have adverse consequences for individuals and businesses*" (so: ECJ, judgment of 7 June 2005, C-17/03 and, in the same terms, among others, ECJ, judgments 13.3.2008, C-383/06, 384/06 and 385/06; 9.10.2001, C- 80/99, 81/99 and 82/99; 21.9.1983, C-205/82 and 215/82; 27.9.1979, C-230/78).

71. The same conclusion is also reached insofar as the retroactivity of the new jurisprudential orientation violates the principles of **certainty and predictability of** the law, **similarly to retroactive interpretative laws,** which the ECtHR has constantly reiterated as being contrary to the ECHR. (see European Court, judgment section two, 7 June 2011, **Agrati** and others v. Italy; section two, 31 May 2011, **Maggio** v. Italy; section five, 11 February 2010, **Javaugue** v. France; section two, 10 June 2008, **Bortesi** and others v. Italy).

72. Furthermore, the right to a fair trial contained in Article 6 of the ECHR is now the subject of European Union rules, both directly and '*immediately*', through its official recognition (at least) as a '*general principle of European Union law*', and indirectly and '*mediately*', as a **right equivalent to that protected under Article 47 of the Charter of Fundamental Rights of the European Union, which is relevant under Article 52 ('Scope and interpretation of rights and principles') of the Charter of Fundamental Rights of the European Union (see Article 52 of the Charter of Fundamental Rights of the European Union). 52 ("*Scope and interpretation of rights and principles*") of the Charter of Fundamental Rights of the European Union** (cf. ECJ, 8 February 2007, C-3/06 P, Groupe Danone/Commission, ECJ, 28 June 2005, C-189/02, ECJ, C- 262/88, ECJ, C - 189/02, ECJ, C- 205/02, ECJ, C- 475/03 and ECJ, C- 213/02), the judgments of the Plenary Assembly are contrary to the European Union's legal order.

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In view of the foregoing, we insist that the complaint be upheld.

Attached:

A) Article G. Virga 20.12.15

B) Cass. S.U. 19598/2020

Marcello Pacifico as legal representative of ANIEF _____

Sergio Galleano as assistant ANIEF _____
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Fabio Ganci as ANIEF assistant _____