



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

12 April 2017

Case Document No. 1

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

COMPLAINT

Registered at the Secretariat on 16 March 2017

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

FAO: 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, which provides 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 Corso Pietro Pisani 254, Palermo 90129, 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 comprises 32,490 individuals whose membership forms were certified by the Ministry for the Economy and Finance in February 2017 and a further 37,054 individuals who paid membership fees again in 2017, amounting to a total of 70,000 teachers and fixed-term and permanent ATA staff represented (the underestimated provisional data are currently available, which have been appended to the list of convocations by ministers and Parliament, 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 22 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 9. 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 (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 European Court of Justice.

In recent years the claims pursued by the ANIEF have resulted in the proclamation of around ten general strikes and various demonstrations and marches involving thousands of people, whilst the holding of training and refresher courses for staff in service has been constantly pursued with more than 1,652 seminars on the law applicable to schools for 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 consequently 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 addresses 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, ANIEF Associazione Professionale e Sindacale, is being **assisted by Counsel Vincenzo De Michele** of the Foggia bar (Italian tax ID DMCVCN62A16D643W), **Counsel Sergio Galleano** of the Milan bar (Italian tax ID GLLSRN52E18F205N), **Counsel Ersilia De Nisco** of the Rome bar (DNSRSL79T68A783N) **Counsel Fabio Ganci** of the Palermo bar (Italian tax ID GNCFBA71A01G273E) and **Counsel Walter Miceli** of the Palermo bar (Italian tax ID MCLWTR71C17G273N).

Reference email address: roma@studiogalleano.it

Contracting party which has violated the European Social Charter: ITALY

Statement of facts

5. As mentioned above, the ANIEF is a national professional and trade union organisation which represents and assists tens of thousands of workers from the branch of schools in Italy administered by the state whose employment relationship is governed by the National Collective Labour Agreement for the Schools Branch of 29 November 2007 (hereafter 2007 NCLA), which is currently in force (see Doc. 3). Pursuant to Article 40(1), sentence 1 of Legislative Decree no.165/2001 (see Doc. 4), collective bargaining establishes the rights and obligations that are relevant for the employment relationship.

6. By Legislative Decree No. 368 of 6 September 2001 (see Doc. 5), Italy implemented Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (see Doc. 6). As is apparent from paragraphs 7-14 of the *Marrosu-Sardino* judgment of the Court of Justice of the European Union, which was the first to provide an account of the law applicable to fixed-term contracts in Italy (see Doc. 7), these rules are also applicable to employment by all public

administrations.¹ This legislation therefore also covers the sector of schools administered by the state. Legislative Decree No. 368/2001 was repealed with effect from 25 June 2015 by Legislative Decree No. 81/2015 (see Doc. 8), 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 (see Article 29(2)(c)), whilst they continue to apply to all public administrations (including schools administered by the state) 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.

7. In particular, Article 36(2) of Legislative Decree No. 165/2001, as in force since 25 June 2008, provides 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*”. Also Article 36(5-*ter*) (introduced by Decree-Law No. 101/2013, converted into Law No. 128/2013, with effect from 1/9/2013) of Legislative Decree No. 165/2001 refers 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....*”.

8. By Law No. 247 of 24 December 2007, with effect from 1 January 2008, the legislature introduced paragraph 4-*bis* into Article 5 of Legislative Decree No. 368/2001, which provided for a maximum limit of 36 months for successive fixed-term contracts, even if not continuous, with equivalent duties for the same employer, following which the fixed-term contract would be deemed to be a permanent contract.

9. Paragraph 3 of Article 25 of the 2007 NCLA 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*

¹ Paragraph 13 states as follows: “Article 10 of Legislative Decree No 368/2001 contains a list of cases to which the new rules on fixed-term contracts do not apply. None of those cases relates to the sector of public administration.”)

accordance with statutory provisions, Community legislation and the applicable national collective agreement.” Identical provision was made in relation to auxiliary, technical and administrative staff (hereafter, ATA) by Article 44(4) of the NCLA. 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.*” Identical provision was made in relation to ATA staff by Article 60(3) of the NCLA.

10. By the circular of 25 September 2008 (see Doc. 9), the 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. 10).

11. 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, Doc. 11), as replaced by Article 1 of Law No. 124/1999 (Urgent provisions on School Staff), which provides that “50% of teaching positions in nursery, primary and secondary schools, including art high schools and institutes of art shall be filled out of the positions eligible for allocation each year for that purpose by competitions based on qualifications and examinations, whilst the remaining 50% shall be drawn from the permanent eligibility ranking lists established pursuant to Article 401”.

12. Article 401 of the Consolidated Act, as replaced by Article 1 of Law No. 124/1999, provides as follows: “1. *The eligibility ranking lists for competitions based only on qualifications to recruit teaching staff in nursery, primary and secondary schools, including art high schools and institutes of art, 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 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. ...”.

13. Supply staff or any school staff working under fixed-term contracts (teachers and ATA) were (and are) governed by Article 4 of Law No. 124/1999 (see Doc. 12) 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 and Article 44(5) for ATA staff 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, which are based on the financial allocations decided from year to year by the Italian State.

14. Teaching staff are appointed to supply positions by working through two types of eligibility ranking lists, primarily the permanent provincial ranking lists pursuant to Article 401 of Legislative Decree No. 297/1994, which were transformed into eligibility ranking lists to be drawn upon until exhaustion (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; 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 eligibility ranking lists to be drawn upon until exhaustion may be included. In particular, all teachers who qualified through SPQ² or AET³ university training courses and “technical-practical teachers” (TPT) cannot be included in the provincial eligibility ranking lists to be drawn upon until exhaustion (ERE) as the

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 (SSST).

qualification establishing entitlement to teach was issued after the closure to new members of the provincial permanent eligibility ranking lists, i.e. after 1/1/2007.

15. ATA staff from the third and fourth functional category (for example, school support staff) may be granted tenured status under a permanent contract on the basis of provincial competitions based only on qualifications for the vacant available positions identified each year by the MEUR through so-called band 1 permanent eligibility ranking lists on which ATA staff who have been in post for 24 months are included pursuant to Article 554 of Legislative Decree No. 297/1994.

16. In parallel with the transformation of the permanent provincial eligibility ranking lists for teachers into ERE, Article 1(605) of Law No. 296/2006 had laid down a three-year plan for the granting of tenured status to 150,000 teachers and 30,000 ATA staff (predominantly with the professional status of school support staff), which however was never implemented after the new government in 2008 blocked any solution to insecure employment in schools and the programmed granting of tenured status.

17. In order to block the right to permanent employment in a school administered by the state pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001 after 36 months' service, the Italian Government moreover introduced (by Article 1(1) of Decree-Law No. 134 of 25 September 2009, converted with amendments into Law No. 167/2009) Article 4(14-bis) of Law No. 124/1999, with effect from 25 September 2009, which provides that the supply appointments falling under Article 4 of Law no.124/1999 may be transformed into permanent contracts only by the granting of tenured status to teaching or ATA staff according to law and on the basis of recruitment by ERE, which had been frozen: *“Fixed-term contracts concluded for the purpose of awarding the supply 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.”*.

18. By the *Affatato* order in Case C-3/10 (see Doc. 13), the *Tribunale di Rossano Calabro* referred questions for a preliminary ruling concerning the failure to apply

Directive 1999/70/EC throughout all public sector employment, including schools administered by the state.

19. In its written observations in *Affatato* Case C-3/10 (see Doc. 14), the Italian Government asserted that none of Legislative Decree No. 368/2001, including in particular Article 5(4-bis), was applicable to the public administrations.

20. This assertion was received by the European Commission on 10 May 2010 (see Doc. 15) in response to a question by MEP Rita Borsellino. The Commission stated that the Italian Government was applying 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.

21. Consequently, by an order issued in the *Affatato* case on 1 October 2010 (see Doc. 16), 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.

22. 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. *"In view of the provisions laid down in Article 40(1) of Law No. 449 of 27 December 1997, as amended, Article 4(14-bis) of Law No. 124 of 3 May 1999 and Article 6(5) of Legislative Decree No. 165 of 30 March 2001, fixed-term contracts concluded in order to make supply appointments to teaching and ATA staff shall also be excluded from the scope of this Decree, having regard to the need to guarantee the constant provision of the schooling and educational service even in the event of the temporary absence of teaching and ATA staff working under a permanent or also a fixed-term contract. Article 5(4-bis) of this Decree shall not in any case apply. In order to ensure the right to education in nursery schools and in primary schools operated by local authorities, the*

exceptions provided for under this paragraph shall apply, in accordance with the stability pact and the financial restraints that limit local authority spending for personnel and the recruitment regime, also to the relative educational and school staff’.

23. 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 (see Doc. 17), on the grounds that it lacked appropriate measures to sanction abuse of fixed-term contracts.

24. 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. 18), 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 precarious public sector workers, 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 asserted the exact opposite. The Rapporteur of the judgment refused to write and sign the decision.

25. Judgment no.392/2012 of the Court of Cassation was “protected” as regards its incontrovertible assertion that national law was compatible with EU law by the 2011 report on the administration of justice of 26 January 2012, which refers on page 18 (see Doc. 19) to the judgment of 20 September 2011 of the European Court of Human Rights in the case *Ullens de Schooten and Rezabek v. Belgium*, which held that the failure to comply with the obligation to make a reference for a preliminary ruling to the Court of Justice which is incumbent upon courts against whose decisions there is no judicial remedy pursuant to Article 267 of the Treaty on the Functioning of the European Union does not constitute a breach of Article 6(1) ECHR where sufficient reasons are provided by the Court of Cassation for the failure to make a reference. This is implicitly tantamount to asserting that it is sufficient for a court against whose decisions there is no judicial remedy to provide reasons for the refusal to comply with the obligation to make a reference for a preliminary ruling.

26. By the decree of 1 March 2012 (see Doc. 20), the President of the Milan Court of Appeal reorganised the hearing schedules for the Employment Division of the Court of Appeal for 1,080 cases which were defined as “serial” (including hundreds relating to the stabilisation of workers in insecure employment in schools pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001). All of the cases were assigned to rapporteur judges who were not formally allocated to the Employment Division of the Milan Court of Appeal and were concluded by decisions against the school supply staff, refusing any protection in terms of both employment stability and compensation, as stated in judgment No. 709/12 of 15/5/2012 (see Doc. 21), which was written by the President himself of the Milan Court of Appeal and copied in full by the other judges (see Doc. 22).

27. Immediately afterwards, by judgment No. 10127 of 20 June 2012 (see Doc. 23), the Court of Cassation upheld the judgment of the Milan Court of Appeal on supply staff in schools administered by the state, asserting 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. By judgment No. 10127/2012, the Court of Cassation upheld the non-applicability of Legislative Decree No. 368/2001 with a legal sleight of hand, 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. An unfortunate teacher in a technical and commercial institute with more than 36 months’ service in a school administered by the state is denied any rights.⁴

⁴ Article 70, paragraph 8 of Legislative Decree 165/2001 is worded as follows: “8. The provisions of this decree shall apply to staff working in schools. The provisions of Article 21 of Law No. 59 of 15 March 1997 and Legislative Decree No. 35 of 12 February 1993 shall continue to apply. The foregoing shall be without prejudice to the procedures governing the recruitment of staff in schools, as provided for in Legislative Decree No. 297 of 16 April 1994 and subsequent amendments and additions”. Article 36, paragraph 2, provides: “2. In order to meet exclusively temporary or exceptional needs, the public authorities may take advantage of the flexible contractual arrangements for the appointment and employment of staff provided for in the Civil Code and laws on labour relations in companies, in compliance with the recruitment procedures in force. Without prejudice to the competences of the authorities with regard to the determination of organisational needs pursuant to the legislative provisions in force, national collective agreements shall make provision to regulate the issue of fixed-term employment contracts, training and work contracts, other educational relationships, staff leasing and

28. The Court of Cassation 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 this Court in *Ullens de Schooten and Rezabek v. Belgium* 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.

29. In parallel with this judicial policy of denying protection to the fundamental rights of public sector workers in insecure employment, by circular No. 65934 of 14 May 2012 the Ministry of Justice intervened to interpret the provisions contained in Article 37 of Decree-Law No. 98/2011 on the costs of justice, stressing the distortion of the fair trial which was already apparent from the exemption from liability for costs granted to all public administrations by Article 158 of Presidential Decree No. 115/2002 (see Doc. 24). In particular, from that moment on a *contra legem* administrative practice emerged whereby, in all trials involving individual disputes concerning employment or public sector work and disputes concerning welfare and mandatory assistance before the Court of Cassation, it is still mandatory to pay the single court fee of €1,036.00 (the amount was initially €900.00), whilst that payment is not due if the appellant worker's annual "personal" income (i.e. not family income) is less than €34,585.23, as resulting from the last tax return; on the other hand, in the event that the individual income threshold is exceeded, (only) the €18 fee need be paid, assuming that the amount in dispute in the proceedings is indeterminable (Article 13(1) and Article 9(1-*bis*) of Presidential Decree no.115/2002).

30. Judgment No. 10127/2012 of the Court of Cassation has been strongly criticised in the literature for having violated the ECHR, EU law and national law (see Doc. 25). The criticisms levelled against judgment No. 10127/2012 of the Court of Cassation include the objection that, by ordering that each party was to bear its own costs, the Court had made a delightful gift to the government counsel who, in unjustifiably winning cases that should have been lost, received significant fees from the MEUR.⁵

ancillary work pursuant to Article 70 of legislative decree No. 276/2003, and subsequent modifications and additions, in application of the provisions of Legislative Decree No. 368 of 6 September 2001...".

31. Following the criticisms made against the two judgments No. 392/2012 and No. 10127/2012 of the Court of Cassation and the “temporary placing into administration” of the Employment Division of the Milan Court of Appeal, report No. 190 of 24 October 2012 of the Case Law Analysis Office of the Court of Cassation (see Doc. 26) 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” 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 “consistency” of the judgments made against those in insecure employment in schools administered by the state: *“The Employment Division of this Court has asked this Office to examine, within the context of the rules governing fixed-term contracts within 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).”*

32. 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, inter alia: the definition within the law of the different types of supply

⁵ (cite the legislative sources on the costs of the State counsel, otherwise the reader won't believe it. It shouldn't be too complicated)

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, on a formal level, is 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 launched 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 relationship which 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 it is at odds with that principle.”

33. Essentially, report No. 190 of 24 October 2012 by the Case Law Analysis Office of the Court of Cassation asserted that Legislative Decree No. 368/2001 was applicable also to public sector workers along with 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.

34. At the same time, having received national information indicating that Community law obligations towards supply staff in school were not being respected and concerning the inadequate application of Article 5(4-bis) of Legislative Decree No. 368/2001, after

sending a letter of formal notice on 14 March 2011, the European Commission launched 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 also 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.

35. Consequently, following the report by the Case Law Analysis Office of the Court of Cassation, by the order of 3 January 2013 in Case C-50/13 *Papalia*, the *Tribunale di Aosta* (see Doc. 27), which awarded compensation equal to 20 months' salary for the abuse of fixed-term contracts within public sector employment, sent a new reference for a preliminary ruling concerning Italian public sector employment against the Court of Cassation judgment No. 392/2012, which had required public sector workers in insecure employment to furnish proof of the loss suffered, which is impossible to provide if associated with a prohibition on conversion. The case involved Mr Rocco Papalia, leader of the Municipality of Aosta brass band, who had worked as an employee in an insecure situation without interruption for almost 30 years!

36. By four orders made in January 2013 in Joined Cases C-22/13 *Mascolo* (see Doc. 28), 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.

37. In Case C-22/13 the applicant Raffaella Mascolo, assisted by lawyers from the ANIEF, submitted written observations on 6 May 2013 (see Doc. 29). The Italian Government submitted written observations in Joined Cases *Mascolo and others* (see Doc. 30) C-22/13, C-61/13, C-62/13, C-63/13 and C-418/13, threatening (page 30, paragraphs 52-54) disciplinary action against the *Tribunale di Napoli* as the court making the reference.

38. At the same time, in the written observations filed on 25 April 2013 regarding the reference for a preliminary ruling in *Papalia* C-50/13 sent by the *Tribunale di Aosta* (see Doc. 31), the EU Commission concluded that Article 36(5) of Legislative Decree

No. 165/2001 was incompatible with Directive 1999/70/EC, thereby modifying the “agnostic” position stated in *Marrosu-Sardino* Case C-54/04 and *Affatato* Case C-3/10.

39. By preliminary reference No. 207/2013 in Case C-418/13 *Napolitano and others* (see Doc. 32), 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. 33) 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.

40. Co-ordinating its actions with the two orders of the Constitutional Court, Nos. 206 and 207 of 2013, the Italian Government issued Article 4(6) of Decree-Law No. 101 of 31 August 2013 (converted with amendments into Law No. 125/2013, Doc. 34) setting out the stabilisation plan for public sector workers in insecure employment, which was to be implemented before 31 December 2016 on the basis of the accrual of at least 36 months’ service, even if not continuous, by so-called “historic” workers in insecure employment.

41. The stabilisation plan was to be implemented through procedures reserved exclusively for those who fulfilled the prerequisites laid down by Article 1(519) of Law No. 296/2006 and Article 3(90) of Law No. 244/2007 in addition to those who, as at the date of publication of the conversion Law No. 125/2013, had over the past five years accrued at least three years’ service under a fixed-term contract of employment as an employee of the administration holding the competition, which could be launched until 31 December 2016 only on the basis of an amount not exceeding 50% of the recruitment resources for the years 2013, 2014, 2015 and 2016, considered also collectively, as an alternative to those provided for under Article 35(3-bis) of

Legislative Decree No. 165/2001 and, for the schools branch, by applying the specific sectoral legislation, namely Article 399 of Legislative Decree No. 297/1994, with the relative eligibility ranking lists based on competitions remaining valid until 31 December 2016.

42. On the other hand, for the schools branch these competitions reserved solely for those with qualifications establishing accreditation to teach and length of service reiterated the previous legislative framework laid down by Article 399 of the Consolidated Act on Schools, which had introduced the dual channel based 50% on the eligibility ranking lists resulting from competitions based on qualifications and examinations and 50% on eligibility ranking lists resulting from competitions based only on qualifications, the latter having been limited by the amendments introduced by Law No. 124/1999 only to provincial permanent eligibility ranking lists, which subsequently became eligibility ranking lists to be drawn upon until exhaustion (ERE) in 2007.

43. In addition, Article 4(3) and (4) of Decree-Law No. 101/2013 provided until 31 December 2016 that the public administrations, including the schools' administration, could (and can) be authorised to launch new competition procedures solely upon condition that the necessary expertise required for the permanent appointment, including in accordance with a criterion of equivalence, is not available by moving through the currently valid eligibility ranking lists approved after 1 January 2007. Essentially, teachers holding the SPQ or AET qualification and included in the band II institute or district eligibility ranking lists who had accumulated 36 months' service, even if not continuous, during the five years prior to the entry into force of Law No. 125/2013 should have been granted tenured status by 31 December 2016 before the MEUR could launch new public competitions in relation to the same expertise, in any case during the validity period of the ERE with the inclusion of those who satisfy the aptitude requirements in the eligibility ranking lists resulting from competitions.

44. In order to hold the competitions that are reserved for qualified teachers not included in the ERE with 36 months' service in a school administered by the state it was necessary to use the same recruitment mechanism for schools provided for "ordinarily" under Article 399(1)-(2) of Legislative Decree No. 297/1994, which is based on the so-called "dual channel" system held by the Constitutional Court in judgment No. 41/2011

to be compatible with Article 97(3) of the Constitution, which provides that permanent staff within public sector employment are to be hired by public competition, unless provided otherwise under special legislation.

45. Immediately afterwards, co-ordinating its activity with Article 4(6) of Decree-Law No. 101/2013 and with Article 15(1) of Decree-Law No. 104 of 12 September 2013 (converted with amendments into Law No. 128/2013, Doc. 35), the Italian Government decided to take advantage of the results of the competition called by MEUR director's decree No. 82 of 24 September 2012 concerning the recruitment of teaching staff (in order No. 207/2013 the Constitutional Court had criticised the fact that no public competitions had been held for schools over a thirteen year period between 1999 and 2012) and prepared a three-year plan to hire permanent teaching, educational and ATA staff over the period 2014-2016, taking account both of vacant and available positions during each year and of the need to cover turnover, without specifically referring to the provisions of Article 399 of Legislative Decree No. 297/1994 as a means of securing stable access, thereby enabling the MEUR to determine also the quota of "historic" teachers in insecure employment who had qualified but not been included in the ERE, who were to be allocated to the "reserved" competition based on qualifications only.

46. At the same time, in order to rectify the mistaken assertion made by the Court of Cassation in judgments No. 392/2012 and No. 10127/2012 that Legislative Decree No. 368/2001 did not apply respectively to public sector employment both outside and within schools, as of 1 September 2013 the Italian Government reiterated through Article 36(5-ter) of Legislative Decree No. 165/2001 that Legislative Decree No. 368/2001 applied to all public administrations including schools, but that the sanction could not entail the transformation of fixed-term employment contracts into permanent contracts, pending evidently the conclusion of the processes to stabilise public sector workers in insecure employment: *"The provisions laid down by Legislative Decree No. 368 of 6 September 2001 apply to the public administrations, notwithstanding the obligation throughout all sectors to comply with paragraph 1, the right to have recourse to fixed-term contracts of employment exclusively in order to comply with the requirements set forth in paragraph 2 and the prohibition on the transformation of fixed-term contracts of employment into permanent contracts"*.

47. In addition, in order to avoid the repetition of annual supply appointments and fixed-term contracts without any objective justification not in accordance with the stabilisation procedures which the public administrations should have put in place, the Italian Government introduced, again with effect from 1 September 2013, also Article 36(5-quater) into Legislative Decree No. 165/2001, according to which fixed-term contracts, including those concluded within the schools sector, that are not supported by “*exclusively temporary and exceptional*” objective justifications (Article 36(2) of Legislative Decree No. 165/2001, as amended again by Article 4 of Decree-Law No. 101/2013, which replaced the previous wording “*In order to cater for temporary and exceptional requirements*”) shall be automatically void and shall have no effect.

48. In order to reiterate the prohibition on the employment of fixed-term staff for requirements that are not temporary and exceptional, again Article 4 of Decree-Law No. 101/2013 amended Article 36(2) of Legislative Decree No. 165/2001 by introducing a third sentence, which obliged the public administrations to avoid situations of insecure employment, allocating fixed-term contracts to the successful candidates in competitions for permanent positions, thereby co-ordinating with the prohibition on new competitions for expertise already available within existing eligibility ranking lists, as provided for under Article 4(3) of Decree-Law No. 101/2013.

49. Consequently, according to the Italian Government, by the amendments to Article 36 of Legislative Decree No. 165/2001 introduced by Article 4 of Decree-Law No. 101/2013, any supply appointments for the full year or until the end of teaching activities made by head teachers from school year 2014/2015 onwards would all have been automatically void, thereby undermining the predictable effects of the judgment of the Court of Justice which held that the national rules on school recruitment to fixed-term positions were incompatible with Directive 1999/70/EC and the resulting inevitable declaration that Article 4(1) and (11) of Law No. 124/1999 was unconstitutional, in limiting them to situations in existence prior to school year 2013/2014 as the new legislative framework on flexibility in public sector employment, including in schools, would apply in future, which prohibited supply appointments - rendering them automatically void - resulting from structural shortfalls within the workforce.

50. On the other hand, Article 13 of Law No. 270/1982 and Article 444 of Legislative Decree No. 297/1994, which have remained in force and have never been altered, fixed and continue to fix the criteria for determining the teaching workforce within institutes and schools providing secondary and artistic education as identified following the establishment of all teaching positions corresponding to tenured positions or appointments for a set number of hours, which operate from the start of the following school year, taking account of the number of existing classes during the previous school year as at 31 March (Article 13(8) of Law No. 270/1982 and Article 444(1) of Legislative Decree No. 297/1994), with the result that the *de jure* workforce and the *de facto* workforce coincide within the Consolidated Act on Secondary Schools and within special legislation, as moreover provided for expressly also by Article 4 of Presidential Decree No. 81 of 20 March 2009, which lays down the rules on the reorganisation of the school network and the rational and effective use of human resources within schools.

51. The prospect for school recruitment in the urgent legislation laid down in Article 4 of Decree-Law No. 101/2013 and Article 15(1) of Decree-Law No. 104/2013 was to eliminate supply appointments that were not temporary and to designate all vacant and available positions, including those fictitiously designated for supply appointments until the end of teaching activity, but which in actual fact mask staffing shortfalls, for the granting of tenured status in school years 2014/2015, 2015/2016 and 2016/2017, thereby resolving the problem of “effective” insecure employment within schools through the ordinary system of the so-called dual channel for those included in competitive eligibility ranking lists still applicable on 31 December 2016 and those included in the ERE.

52. It should also have been extended to teachers in insecure employment with more than 36 months’ service up to the maximum percentage of 50% of cases involving the granting of tenured status in accordance with the reserved procedure to be launched pursuant to Article 4(6) of Decree-Law No. 101/2013 and in accordance with the arrangements laid down by Article 399 of Legislative Decree No. 399/1994 based on a mere decree of the Minister of Education, Universities and Research, acting in concert with the Minister for the Economy and Finance and with the Minister for Public Administration and Simplification after having concluded a specific round of

negotiations with the trade union organisations concerning contractual interventions for school staff.

53. The reference legislative framework at the start of 2014 before the new Italian Government took office in February 2014 was therefore ideal for a definitive resolution of the problem of “historic” insecure employment in the schools sector also on account of the applicability of three provisions that facilitated both the ordinary use of eligibility ranking lists to be drawn upon until exhaustion as well as the extraordinary recourse to band II institute or district eligibility ranking lists for teachers with 36 months’ service in schools administered by the state, without recourse to any extraordinary legislative plan for the granting of tenured status other than that already authorised by Article 15(1) of Decree-Law No. 104/2013: Article 399(2) of Legislative Decree No. 297/1994, Article 400(17) of the Consolidated Act on Schools and Article 4(6) of Decree-Law No. 101/2013.

54. Article 399(2) of Legislative Decree No. 297/1994, which has remained in force since 25 May 1999, also following the enactment of Law No. 107/2015, provides as follows: “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 reintegrated on the occasion of the next competition procedure.*”

55. Article 400(17) of Legislative Decree No. 297/1994, which applied between 25 May 1999 and 15 July 2015 (having been repealed by Article 1(113)(h) of Law No. 107/2015), provides as follows: “*The eligibility ranking lists for competitions based on qualifications and examinations shall remain valid until the entry into force of the ranking list for the next corresponding competition.*”

56. Ultimately, the MEUR had the opportunity to activate the ordinary plan for the granting of tenured status (and the quota share of the reserved competition) even in the event that the eligibility ranking lists based on qualifications and examinations had been exhausted and did not enable the vacant and available positions to be covered, 50% of which had been authorised for employment under permanent contracts by competition procedure (also for competitions prior to the 2012 competition, in the event that the competition class was not initiated pursuant to Article 400(17) of Legislative Decree

No. 297/1994), with the result that the residual positions (for example even 49% of the positions allocated) were to be added to those allocated to the corresponding permanent ranking list (to which, returning to the previous example, 99% of the positions available for the grant of tenured status would have been allocated: 50% + 49%). 50% + 49%).

57. Naturally, the same mechanism could have been reserved for the (potential) granting of tenured status allocated to the competition reserved for qualified teachers with 36 months' service who were included in the band II institute or district eligibility ranking lists as a result of the express reference to the sectoral legislation laid down by Article 4(6), last sentence of Decree-Law No. 101/2013.

58. The suitability of the Italian Government's plan to resolve the problem of long-standing insecure employment within schools was also highlighted by the lawyers representing workers in the written and oral observations submitted in the Joined Cases decided on in the *Mascolo* judgment, as noted by Advocate General Szpunar in paragraph 47 of the opinion delivered on 17 July 2014 (see Doc. 36), as an appropriate sanction for remedying the evident breach of Directive 1999/70/EC: "*The Italian Government observes that national law could offer solutions in this regard, and this appears to be confirmed by the observations of some of the applicants in the main proceedings, who refer to the recent Decree-Law No 104 of 12 September 2013. According to those applicants, that decree-law could provide stability of employment for employees in the schools sector who have been employed for more than 36 months, by way of their establishment as tenured staff for the period 2014 to 2016.*"

59. In the meantime, by the *Papalia* order of 12 December 2013 in Case C-50/13 (see Doc. 37), 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 without ensuring 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.

60. As could have been foreseen, in the *Mascolo* judgment of 26 November 2014 (Doc. 38) in Joined Cases C-22/13 (*Mascolo*), C-61/13 (*Forni*), C-62/13 (*Racca*), C-63/13 (*Russo*) and C-418/13 (*Napolitano*), 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 Article 5(4-bis) of Legislative Decree No. 368/2001 should be applied as an adequate sanction to public sector employment outside of schools (paragraph 55),⁶ as its correct application by the *Tribunale di Napoli* in the *Racca* case amounted to an act of loyal cooperation with the EU institutions (paragraphs 59-61),⁷ thereby objecting to the position taken by the Court of Cassation in judgment No. 10127/2012.

61. 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 114⁸ and 115⁹ of the *Mascolo* judgment that, although the prohibition of conversion into

⁶ 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 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).*”

⁷ 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.*”

⁸ 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*

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 precarious employment into permanent employment for workers in insecure situations in the schools sector upon completion of 36 months' service due to the presence of provisions that precluded the protection provided for under Article 5(4-bis) of Legislative Decree No. 368/2001, referring to paragraphs 28¹⁰ and 84¹¹ of that judgment. Consequently, the Court of Justice assigned 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 Article 5(4-bis) of Legislative Decree No. 368/2001 and the guarantee of full effect to Directive 1999/70/EC, either by

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."

⁹ 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.**"

¹⁰ 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."

¹¹ 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."

disapplication (the *Tribunale di Napoli*) or by a declaration of unconstitutionality (Constitutional Court).

62. First the Employment Division of the Court of Cassation, by judgment No. 27363/2014 (see Doc. 39), which referred to the *Carratù* judgment and the *Papalia* order of the Court of Justice, asserted in an *obiter dictum* that Article 5(4-bis) of Legislative Decree 368/2001 was applicable.¹² However immediately afterwards, by judgment No. 27481/2014 of 30 December 2014¹³ (see Doc. 40), the Court of Cassation itself held that the *Mascolo* judgment had no value and, in a case involving a precarious public sector worker with more than 36 months' service, denied the right to employment stability and awarded only compensation of between 2.5 and 6 months' salary, according to a provision that was not applicable to the case in question – Article 8 of Law No. 604/1966 – inventing the concept of so-called “Community damage”.

63. Following the *Mascolo* judgment of the Court of Justice, by judgment No. 529/15 of 21 January 2015 (see Doc. 41) in case No. 5288/12 R.G. concerning the applicant Raffaella Mascolo, assisted by ANIEF lawyers, the *Tribunale di Napoli* accepted the worker's request for a declaration of permanent employment, applying Article 5(4-bis) of Legislative Decree No. 368/2001 and disapplying Article 4(14-bis) of Law No. 124/1999.

64. By judgment No. 260/2015 (see Doc. 42) the Constitutional Court also applied the *Mascolo* judgment and converted an unlawful fixed-term employment relationship with

¹² Judgment No. 27363/2014 of the Court of Cassation held as follows: “*However, since the question must be examined also with regard to the abuse of legitimate fixed-term contracts, it must in any case be reiterated that the ECJ has clarified (Papalia order in Case C-50/13 and ‘Carratù’ judgment in Case C-361/12) that ‘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 measures provided for by national legislation, such as that at issue in the main proceedings, which, in the event of misuse by a public employer of successive fixed-term employment contracts, provides solely for the right for the worker concerned to obtain compensation for the damage which he considers himself to have therefore incurred, without any transformation of the fixed-term employment relationship into an employment relationship for an indefinite period, where the right to that compensation is subject to the obligation on that worker to prove that he was forced to forego better work opportunities, although the effect of that obligation is to render impossible in practice or excessively difficult the exercise by that worker of rights conferred by European Union law. It is for the referring court to assess to what extent the provisions of domestic law aimed at penalising the misuse by the public administration of successive fixed-term employment contracts or relationships comply with those principles’, giving effect to the conversion of fixed-term contracts into permanent contracts for all successive fixed-term employment relationships with the same public sector employer after 36 months of precarious service, even if not continuous, pursuant to Article 5(4-bis) of Legislative Decree No. 368 of 2001.*”

¹³ Subsequently fully upheld in judgment 5072/2016 of the Joint Divisions, see below.

the public administrations (operatic foundations) into permanent employment due to a lack of temporary objective justifications for each individual fixed-term contract.

65. Following the *Mascolo* judgment of the Court of Justice, after having decided not to implement the previous plan for stabilising precarious non-school public sector workers set out in Decree-Laws No. 101 and 104 of 2013, by enacting Article 1(98) 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”, see Doc. 43) without any involvement on the part of the trade union organisations that had signed the 2007 NCLA, the Italian State made provision (following the change in Government in February 2014) for an extraordinary plan for the hiring of permanent staff with effect from school year 2015/2016, 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 not included in the ERE with more than 36 months’ service.

66. Article 1(131) of Law No. 107/2015 also provided as follows: “*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 36 months, even if not continuous*”.

67. Accordingly, whilst a teacher who has successfully passed a public competition for appointment with tenured status or a teacher included in the provincial eligibility ranking lists to be drawn upon until exhaustion (ERE) who is hired under a permanent contract under the extraordinary appointments mechanism provided for under Law No. 107/2015, without ever having worked for one single day in a school administered by the state (tens of thousands of teachers find themselves in similar circumstances!) has a probationary period of one year, a teacher in insecure employment with an SPQ or AET qualification who has not been included in the ERE, and therefore will not benefit from the extraordinary plan for the grant of tenured status, who has completed 36 months’ service even if not continuous with effect from 1 September 2016 in positions that are vacant and available will lose the opportunity to continue working under annual supply

appointments within schools administered by the state, “as a result” of the excessive duration of the insecure work already performed.

68. However, this does not represent the full extent of the unreasonable treatment. After the period of extraordinary appointment, Article 1(180)(b), No. 2 of Law No. 107/2015 provides that a Legislative Decree, as yet to be issued, shall launch a regular system of national competitions for the appointment, under remunerated three-year fixed-term training contracts, of teachers to secondary schools administered by the state, which are reserved to holders of a masters-level degree or a second level academic diploma for artistic and musical subjects, in line with the competition regulatory class. Consequently, a teacher in insecure employment already qualified to teach with more than 36 months’ service as an employee working for schools administered by the state who passes a further competition relating to teaching work that he/she has already carried out will regress in career terms and will have to complete a three-year traineeship, being denied the right to work as an employee, in clear violation of the case law of the Court of Justice since the *Lawrie-Blum* judgment,¹⁴ which concerned a similar case under the German law on teacher training.

69. According to the Italian State on the other hand, in enacting Law No. 107/2015, repeated supply appointments for an overall period exceeding 36 months, even if not continuous, for vacant and available positions will establish entitlement only to pecuniary damages, for which a dedicated fund has been established for any payments ordered by the courts (Article 1(132)), whilst both the Court of Justice in the *Mascolo* judgment and order No. 207/2013 of the Constitutional Court have categorically excluded the application of Article 36(5) of Legislative Decree No. 165/2001.

70. Finally, as regards the full range of staff working in public education (in both schools and universities), in parallel with Law No. 107/2015, Article 29(2)(c) and (d) of Legislative Decree No. 81 of 15 June 2015 excludes the protection available under clauses 4 and 5 of the framework agreement on fixed-term work both for supply teachers and ATA staff in schools (letter c), reiterating the provisions of Article 10(4-*bis*) of Legislative Decree No. 368/2001, which was repealed by Article 55 of Legislative Decree No. 81/2015, and for fixed-term university researchers under Law

¹⁴ Court of Justice of the European Communities, judgment of 3 July 1986 in Case C-66/85 *Lawrie-Blum v. Land Baden-Württemberg*.

No. 240/2010 (letter d). In a contradictory manner, Article 29(4) of Legislative Decree No. 81/2015 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.

71. In contrast to the Constitutional Court, following the *Mascolo* judgment of the Court of Justice, the approach of the Court of Cassation has been characterised by decisions that have seriously violated the fundamental rights of precarious public sector workers, 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.

72. In fact, by four identical judgments (Nos. 4911, 4912, 4913 and 4914/2016 of 14 March 2016 the Joint Divisions of the Court of Cassation (see Doc. 44) 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 precarious public sector workers as damages for the abuse of fixed-term contracts, annulling the decisions insofar as the grounds of appeal were accepted and referring the proceedings to the Genoa Court of Appeal, composed of different judges. The Court asserted the principle of law that the workers were entitled only to compensation of between 2.5 and 12 months’ salary, in accordance with an application by analogy of Article 32(5) of Law No. 183/2010, a provision which was moreover 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 where it is applied retroactively in favour of the state and the public administrations (see Doc. 45).

73. Judgments Nos. 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. 46) – filed on the following day – 15 March 2016 – concerning the *Marrosu-Sardino* case to which the judgment of the Court of Justice was applied ten years previously. 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 (see Doc. 47).

74. The “parent” judgment No. 5072/2016 of the Joint Divisions of the Court of Cassation asserted - in contrast to the *Mascolo* judgment of the Court of Justice and judgment No. 260/2015 of the Constitutional Court - 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, 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.

75. The third extension *ad personam* of the retirement age occurred against the backdrop of this deteriorated jurisprudential context characterised by a denial or significant reduction of effective protection for the fundamental rights of public sector workers in insecure employment, which was destined on this occasion to favour only a few senior judges at the Court of Cassation, including in particular First President¹⁵ Giovanni Canzio and the President of the 4th Employment Section, Luigi Macioce.

76. In fact, rather than endorsing the proposal of the National Association of Judges to set the ordinary retirement age for all judges at 72, with the stated aim of ensuring the swift resolution of disputes pending before the Court of Cassation according to the “Canzio” method, by Article 5 of Decree-Law No. 168 of 31 August 2016, which was approved as an urgent measure,¹⁶ the Government limited the deferral of the retirement

¹⁵ The affair has been clearly described, with particular reference to the First President of the Court of Cassation, by B. Manfellotto, *Un supermagistrato più uguale degli altri* [One super-judge more equal than others], in *L’Espresso*, 6 November 2016, p. 38.

¹⁶ Article 5 of Decree-Law No. 168/2016, converted with amendments into Law No. 197/2016, provides as follows: “1. In order to ensure continuity in senior positions, high-level directors and directors in service at the Supreme Court of Cassation and the Office of the Attorney General at the Court of Cassation, in view of the multiple reform initiatives adopted in order to resolve the high number of disputes pending before the Court, the effects of Article 1(3) of Decree-Law No. 90 of 24 June 2014, converted with amendments into Law No. 114 of 11 August 2014, shall be further deferred until 31 December 2017 for judges holding senior positions, high-level directors and directors in service at the Supreme Court of Cassation and the Office of the Attorney General who are younger than 72 years of age on 31 December 2016 and who will be required to retire during the period falling between 31 December 2016 and December 2017. The final deadline for remaining in service laid down by Article 1(3) of Decree-Law No. 90 of 2014 shall apply to all other ordinary judges.”

age until 31 December 2017 only for senior positions, high-level directors and directors in service at the Court of Cassation, thereby enabling the First President, by one single day, to defer his retirement until his 73rd birthday.

77. 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. 48) 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 *ex tunc* effect, 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 Nos. 194 and 195 of 2016, Doc. 49).

78. After the adoption of judgment No. 187/2016 of 20 July 2016 of the Constitutional Court applying the *Mascolo* judgment of the Court of Justice, which had in turn criticised judgment No. 10127/2012 of the Court of Cassation on workers in insecure employment in schools, a barrage of publicity was launched in response by the Court of Cassation. The aim of this was to protect its First President from any liability resulting from the inconceivable situation in which two judgments of the Court (no. 392 and 10127/2012) had been strongly criticised by the Court of Justice, respectively by the *Papalia* order and the *Mascolo* judgment, and also by the Constitutional Court which, in judgment No. 260/2015, upheld the right of public sector workers of operative foundations in insecure employment to be granted permanent status in the event that a fixed-term had been included in their individual contracts of employment without any objective justification. By judgment No. 5072 of 15 March 2016, the Joint Divisions of the Court of Cassation had refused to implement this decision, reiterating by contrast the principle of the absolute prohibition on conversion into permanent contracts within the public sector and the discrimination between public sector and private sector workers in terms of protection through penalties, under which the former were allowed only to claim damages (and not stable employment with the public sector employer).

79. In fact, according to the press release of 25 July 2016 (see Doc. 50), the 4th Employment Division of the Court of Cassation, presided over by Mr Luigi Macioce, scheduled around 80 pending cases involving the abuse of fixed-term contracts for teaching and ATA staff in schools for a hearing on 18 October 2016 before the

Employment Division “*in order to discuss uniform interpretative approaches in this area*”.

80. Pending the conversion into law of Decree-Law No. 168/2016, by decree of 14 September 2016 (see Doc. 51), which has been contested in the literature (see Doc. 52), First President Canzio issued instructions to the judges at the Court of Cassation concerning the drafting of judgments in simplified form within the civil sector, obliging the division presidents to control the number of judgments adopted by each judge in simplified form for the purpose of assessing their professionalism, thereby abrogating the functions of the Supreme Council of the Judiciary over the internal career progression of judges on the Court of Cassation.

81. In addition, by Article 1 of Decree-Law No. 168/2016, without regard to the rules of the judicial system and the allocation of appointments to judges by the Supreme Council of the Judiciary, the Government introduced two new paragraphs into Article 117 of Royal Decree No. 12/1042 providing for the temporary allocation to the divisions of the Court of Cassation for the purpose of carrying out the judicial functions of the Court by the First President of the Court of Cassation for a non-renewable period not exceeding three years of judges attached to the Case Law Analysis Office and Case Management Office who have served in the said office for at least two years and who have completed at least the third assessment of professionalism.

82. Judges attached to the Case Law Analysis Office and Case Management Office, who evidently do not write decisions because they are busy studying (an activity which would now appear to be superfluous for judges), are much more useful as unskilled labour in order to write judgments on the basis of the standard forms drawn up pursuant to the Canzio decree of 14 September 2016, without running the risk that impartial judges (who have however not yet become Counsellors to the Court of Cassation) might study, understand and write on the basis of national law and in accordance with the national Constitution and supra-national law, and thereby dare to challenge the judgments written by the Court of Cassation in breach of *the ius civilis* and the *ius gentium*, but will comply with the directions of the super-judge Canzio.¹⁷

¹⁷ In relation to the matters described herein, the National Association of Italian Judges decided in protest not to participate in the inauguration of the 2017 judicial year held on 26 January at the Court of

83. As has been highlighted, in report No. 190 of 24 October 2012, the Case Law Analysis Office of the Court of Cassation had also previously objected to the errors committed by the “Canzio” judgments of the Milan Court of Appeal, which were upheld by the Employment Division of the Court of Cassation by judgment No. 10127/2012, which had denied all rights to supply staff (teachers and ATA staff) in schools in terms of permanent employment, compensation and length of service, in breach of Directive 1999/70/EC, which resulted in an exponential increase in litigation also before supranational bodies. The temporary allocation to the divisions of the Court of Cassation in order to carry out the judicial functions of the Court on the “exclusive” initiative of First President Canzio of the Court of Cassation therefore represents a clear response to the objections brought against the super-judge’s judgments of 11-15 May 2012 as President and Rapporteur of the Employment Division of the Milan Court of Appeal.

84. Again pending the conversion into law of the “Canzio” Decree-Law No. 168/2016 (as defined by the President of the National Association of Judges, Mr Davigo) and despite the negative views both of the National Association of Judges and the Supreme Council of the Judiciary regarding the discrimination between judges, the Chamber of Deputies approved the government amendment which altered Articles 375, 376, 377, 379, 380-*bis*, 380-*ter*, 390, 391 and 391-*bis* of the Code of Criminal Procedure, and introduced Article 380-*bis*.1 (i.e. a “*bis bis*” Article) into the Code of Criminal Procedure, which thereby had a profound effect on the regulatory structure of civil litigation before the Court of Cassation by removing the opportunity to make representations during the oral stage in the vast majority of disputes, which will be resolved in chambers without the parties and the public prosecutor before a single chamber (Article 380-*bis*.1 of the Code of Criminal Procedure) and in relation to decisions on motions to settle the issue of jurisdiction and competence (Article 380-*ter* of the Code of Criminal Procedure).

85. On 19 October 2016, Decree-Law No. 168/2016 was converted into law (Law No. 197/2016), having been associated with a confidence vote in the Senate, despite the extremely harsh criticisms regarding the unjustified privilege of deferring the retirement age (for the first time in the history of the Republic, the parliamentary record contains

Cassation. See regarding this issue: <http://www.associazionemagistrati.it/doc/2477/no-a-un-governo-che-sceglie-i-magistrati-da-mantenere-in-servizio.htm>

extremely serious accusations against the beneficiary of the operation, Mr Giovanni Canzio), which had been reserved only for a select few senior judges on the Court of Cassation and the clear discrimination against other judges.

86. 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. 52), 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 (Doc. 53): “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 had participated in an open competition, he 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?”*.

87. By the judgment in *Martínez Andrés and Castrejana López* (see Doc. 54) 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 Doc. 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 Doc. 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.”.

88. Conversely, upon completion of the hearing of 18 October 2016, 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. 54), the President of the 4th Employment Division of the Court of Cassation, Mr Luigi Macioce:

- 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, from which it did not seek to depart, and reiterated once again, and contrary to 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 by judgment No. 187/2016;
- ignored the *Mascolo* judgment of the Court of Justice, asserting that he did not wish to depart from judgment No. 10127/2012 of the Court of Cassation;
- deprived the 2007 NCLA of any normative content, specifying in paragraph 108 that *“in providing that the contract may only be transformed 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”*;
- refused any compensation to teachers working in the *“de facto”* workforce, unless the worker is otherwise able to prove that the position held was vacant, in breach of the principle that the burden of proof must fall on the party to which the fact alleged most closely pertains as well as the Court’s previous case law;
- asserted that, in the event that a teacher had been hired permanently for any reason following the payment of damages for the abuse of fixed-term contracts during the previous stages of the proceedings, he/she will be required to pay back the amount on the grounds that stabilisation *“eliminated”* the unlawful act and covered any loss.

89. According to the position adopted by the Court of Cassation in the judgments of 7 November 2016 on insecure employment within schools, 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.

90. As a result of the unjustified rejection of all claims or counter-claims made by workers within schools in the proceedings discussed at the hearing of 18 October 2016 before the Employment Division of the Court of Cassation, along with the order that

each party should bear its own costs, the State Council received significant earnings from inappropriate fees (which are estimated to amount to at least 20,000 euros for the three instances of proceedings, according to the tariff rates laid down in the 2012 Ministerial Decree), which it may request its “commissioning client” the MEUR to draw down “on a substitutive basis” from the 10,000,000 euro compensation fund, which had been established pursuant to Article 1(132) of Law no.107/2015 to compensate the losses suffered by workers in insecure employment in schools as a result of the abuse of fixed-term contracts as ascertained by the Court of Justice, which current or former workers in insecure employment in schools may now no longer receive as a result of the unbelievable decisions of the Court of Cassation, as well as being required to repay any compensation that may have fallen due within previous stages of the proceedings.

91. 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. 56)) concerning “disputes involving workers in insecure employment in schools” addressed to all court of appeal presidents, the First President of the Court of Cassation, Mr Giovanni Canzio, “ordered” 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 courts dealing with the merits 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.

92. Moreover, repudiating the assertion made by the Constitutional Court in judgments No. 153/2011 (see Doc. 57) and No. 260/2015 concerning the public status of operatic foundations, by order No. 27465 of 29 December 2016 adopted in chambers (see Doc. 58), pronounced by President Giovanni Canzio, the Joint Divisions of the Court of

Cassation held that a foundation for the production of music recognised as a national theatre, and hence as a national body governed by public law, had private law status, without however providing any explanation.

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

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

94. 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).

95. The fixed-term recruitment of teaching and ATA 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 44 and 60 of the 2007 NCLA for the Schools Branch expressly provided that specific statutory provisions, such as those contained in Article 5 of Legislative Decree No. 368/2001, enable supply appointments of school staff to be transformed into permanent contracts in the event that successive contracts are used, at any rate after 36 months' service even if not continuous, pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001.

96. The application of Article 5(4-bis) 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(4-bis) of Legislative Decree No. 368/2001, without any express retroactive effect, which prohibit the transformation of

supply appointments into permanent contracts, an anti-abuse sanction provided for under Article 5(4-bis) of Legislative Decree No. 368/2001.

97. Accordingly, following the *Mascolo* judgment of the CJEU, tens of thousands of SPQ and AET qualified supply teachers and tens of thousands of ATA supply staff with more than 36 months' service, even if not continuous, performing equivalent tasks for the same public sector employer, the MEUR, 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 Article 5(4-bis) of Legislative Decree No. 368/2001.

98. After having drawn up a three-year plan for the granting of tenured status to supply staff in schools with more than 36 months' service for the MEUR, based on the combined provisions of Article 4 of Decree-Law No. 101/2013 and Article 15 of Decree-Law No. 104/2013, the Italian Government, by means of Law No. 107/2015, dispensed with that solution for stabilising "historic" insecure employment (i.e. with long periods of services in schools administered by the state) and drew up an unimaginable extraordinary plan for the granting of tenured status only to teaching staff (thus excluding ATA staff), which was entirely focused on "emptying" the eligibility ranking lists to be drawn upon until exhaustion according to a reserved and secret procedure, notwithstanding Article 399 of Legislative Decree No. 297/1994, which 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 in 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 in which they were included in the ERE.

99. 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 a single day as a teacher, having been allocated a tenured position in their province of residence and inclusion in 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 extraordinary 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 in the eligibility ranking lists to be drawn upon until exhaustion. 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.

100. On the other hand, 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 plan for stabilising “historic” workers in insecure employment which the Government had put in place pursuant to Decree-Laws 101 and 104 of 2013. 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 school year 2015/2016, 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.

101. In any case, those most penalised have been SPQ and AET qualified teachers with more than 36 months’ service who were not granted any opportunity under Law No. 107/2015 to achieve tenured status, not having been included in the ERE but only in the band II institute or district eligibility ranking lists.

102. 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.

103. Therefore, the ANIEF, acting through its lawyers and legal advisers before the Court of Justice, asserted the right of the teacher Raffaella Mascolo to stable employment in accordance with the statutory (Article 5(4-bis) 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.

104. The *Mascolo* judgment of the Court of Justice of 26 November 2014 confirmed in paragraph 55 the well-founded status of the right of teachers and ATA staff to benefit from Article 5(4-bis) of 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 Nos. 194 and 195 of 2016 asserted that the *Mascolo* judgment constituted *ius superveniens* within national law.

105. 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 its arguments previously made in judgment No. 10127/2012, 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) Legislative Decree No. 368/2001.

106. 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 ordinary 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(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 – that preclude recognition of the right to employment stability upon fulfilment of the prerequisite of 36 months' service pursuant to Article 5(4-bis) 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, in its triple capacity as legislator, judge and employer, has failed to honour both the commitment towards tens of thousands of teachers and ATA staff working in schools administered by the state 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 living in an occupation freely entered upon by rendering employment insecure;
- **Article 4**, commitments 1 and 4 as the Italian State has failed as an employer to honour both the commitment towards tens of thousands of teachers and ATA staff in schools under the administration of the state to recognise sufficient remuneration such as will guarantee them and their families a dignified standard of living by transforming annual supply appointments into supply appointments until the end of teaching activity, thereby depriving supply staff of remuneration during July and August of each school year and paying under all circumstances the minimum contractual amounts without recognising any career progression on account of the service already carried out, along with the commitment to recognise the right of supply staff to a reasonable period of notice for termination of employment;
- **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 Court of Cassation in such a manner as to impair it, even flouting 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 the right of workers in schools administered by the state to collective action through the complainant ANIEF in cases of conflicts of interest because the collective action (provided for by law) brought before the Court of Justice of the European Union was deprived by the Court of Cassation of its effect of protecting rights;

• **Article 24**, because the Italian State, as an employer and through legislation and the judiciary, has not recognised for tens of thousands of teachers and ATA staff who were unlawfully hired under fixed-term contracts to vacant positions within the workforce the right of all workers not to have their employment terminated 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.

107. Each of the violations of the European Social Charter mentioned above was committed in parallel with the violation of **Article E of the [Revised] European Social Charter** and the commitment of the Italian State **not to discriminate** against supply teachers and ATA staff with more than 36 months' service to be granted tenured / permanent status within the public administration for the schools sector compared with both private sector workers who are stabilised pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001 and supply teaching staff included in the ERE who have been hired permanently with legal effect from 1 September 2015 in accordance with the extraordinary plan for the granting of tenured status pursuant to Article 1(98) et seq. of Law No. 107/2015, despite not having worked for even one single day for a school administered by the state or having worked for fewer than 36 months.

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 ANIEF

3- NCLA for the Schools Branch of 29 November 2007;

4- Legislative Decree No. 165/2001 (Consolidated Act on Public Sector Employment);

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

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

7- Court of Justice judgment in *Marrosu-Sardino* of 7 September 2006 in Case C-53/04;

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

9- MEUR circular of 25 September 2008 acknowledging the applicability of Legislative Decree No. 368/2001 to workers in schools;

10- Circular of 19 September 2012 of the Department of Public Administration on the applicability of Legislative Decree No. 368/2001 to school services;

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

12- Article 4 of Law No. 124/1999;

13- Reference for a preliminary ruling to the CJEU from the *Tribunale di Rossano Calabro* of December 2009 in Case C-3/10 *Affatato v. ASL Cosenza*;

14- Written observations by the Italian Government filed on 7 May 2010 in Case C-3/10 *Affatato v. ASL Cosenza*;

15- Answer of 10 May 2010, prot. E-2354/2010, of the EU Commission to a parliamentary question on the application by Italy of Article 5(4-bis) of Legislative Decree No. 368/2001 to public sector employment;

16- Court of Justice order in *Affatato* of 1 October 2006 in Case C-3/10;

17- Referral orders to the Constitutional Court No. 283 and 284 of 27 September 2011 from the *Tribunale di Trento* concerning Article 4(1) of Law No. 124/1999;

18- Judgment No. 392/2012 of 13 January 2012, Employment Division of the Court of Cassation;

- 19- Extract from page 18 of the 2011 report on the administration of justice of 26 January 2012;
- 20- Decree of 1 March 2012 of the President of the Milan Court of Appeal on the reorganisation of roles
- 21- Judgment No. 709 of 11-15 May 2012 of the Employment Division of the Milan Court of Appeal;
- 22- Judgment No. 764 of 11-25 May 2012 of the Employment Division of the Milan Court of Appeal;
- 23- Judgment No. 10127/2012 of 20 June 2012 of the Court of Cassation;
- 24- Article by V. De Michele and S. Galleano, *Le spese di giustizia nel giusto processo del lavoro tra legge e prassi amministrativa* [Employment law and the costs of a fair trial: the law and administrative practice], published in “Il lavoro nella giurisprudenza, 2016, No. 8-9;
- 25- Article by V. De Michele, “*Il Tribunale aquilano demolisce la sentenza antispread della Cassazione sul precariato scolastico*” [“The L’Aquila court demolishes the anti-spread judgment of the Court of Cassation on insecure employment in schools”], published in “Il Lavoro nella giurisprudenza”, 2012, No. 8-9;
- 26- Report No. 190 of 24 October 2012 of the Case Law Analysis Office of the Court of Cassation concerning “*Il precariato scolastico e la tutela dei diritti nella disciplina e giurisprudenza comunitaria e nazionale, tra esigenze di specialità e principio di eguaglianza*” [“Insecure employment in schools and the protection of rights under Community and national case law: between the need for special provision and the principle of equality”];
- 27- Reference for a preliminary ruling to the CJEU from the *Tribunale di Aosta* of 12 December 2013 in Case C-50/13 *Papalia*;
- 28- Reference for a preliminary ruling to the CJEU from the *Tribunale di Napoli* of January 2013 in Case C-22/13 concerning the claimant Raffaella Mascolo, assisted by ANIEF lawyers;
- 29- Written observations of 6 June 2013 by the teacher Raffaella Mascolo filed by ANIEF lawyers with the Court of Justice in Case C-22/13 against the MUIR;
- 30- Written observations of 14 May 2013 from the Italian Government filed with

- the Court of Justice in Joined Cases C-22/13, C-61/13, C-62/13 and C-63/13;
- 31- Written observations filed with the Court of Justice on 25 April 2013 by the EU Commission regarding the reference for a preliminary ruling in *Papalia* C-50/13;
- 32- Order No. 207/2013 of the Constitutional Court of 18 July 2013;
- 33- Order No. 206/2013 of the Constitutional Court of 18 July 2013;
- 34- Article 4 of Decree-Law No. 101 of 31 August 2013;
- 35- Article 15 of Decree-Law No. 104 of 12 September 2013;
- 36- Written opinion of 17 July 2014 delivered by Advocate General Szpunar in Joined Cases C-22/13, C-61/13, C-62/13, C-63/13 and C-418/13;
- 37- Order of 12 December 2013 issued by the CJEU in Case C-50/13 *Papalia*;
- 38- 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;
- 39- Judgment No. 27363/2014 of 23 December 2014 of the Employment Division of the Court of Cassation;
- 40- Judgment No. 27481/2014 of 30 December 2014 of the Employment Division of the Court of Cassation;
- 41- Judgment No. 529/15 of 21 January 2015 of the *Tribunale di Napoli* in case No. 5288/12 R.G. between the claimant Raffaella Mascolo and the MEUR;
- 42- Judgment No. 260/2015 of the Constitutional Court of 11 December 2015;
- 43- Law No. 107 of 13 July 2015;
- 44- Judgments Nos. 4911, 4912, 4913 and 4914 of 14 March 2016 of the Joint Divisions of the Court of Cassation;
- 45- Judgment of the CJEU in Case C-361/12 Carratù;
- 46- Judgment No. 5072 of 15 March 2016 of the Joint Divisions of the Court of Cassation;
- 47- Article by F. Putaturo Donati, *PA e contratti illegittimi: note critiche sul riconoscimento del danno (extra)comunitario*, [“The public administrations and unlawful contracts: critical notes on the award of (extra-)Community damages”] published in “Massimario della giurisprudenza del lavoro, 8-9, 2016, p.603-614;
- 48- Judgment No. 187/2016 of the Constitutional Court of 20 July 2016;
- 49- Orders Nos. 194 and 195/2016 of the Constitutional Court of 20 July 2016;

- 50- Press release of the Court of Cassation of 25 July 2016 announcing the scheduling of the hearing for 18 October 2016 concerning fixed-term contracts of teachers and ATA staff in schools;
- 51- Decree of 14 September 2016 of the First President of the Court of Cassation;
- 52- Article by G. Scarselli, "In difesa della pubblica udienza in Cassazione" ["In defence of the public hearing before the Court of Cassation"], 1 December 2016, on www.ordineavvocatifirenze.eu;
- 53- Reference for a preliminary ruling to the CJEU from the *Tribunale di Trapani* of 5 September 2016 in Case C-494/16 *Santoro*;
- 54- Judgment of the CJEU of 14 September 2016 in Joined Cases C-184/15 and 195/15 *Martínez Andrés and Castrejana López*;
- 55- Judgments Nos. 22552, 22553, 22554, 22555, 22556 and 22557 of 7 November 2016 of the Employment Division of the Court of Cassation;
- 56- Communication of 7 November 2016 from the First President of the Court of Cassation to the presidents of the court of appeal instructing the immediate application of the judgments of the Court of Cassation on insecure employment within schools, with annexed press release;
- 57- Judgment No. 153/2011 of the Constitutional Court on the public status of operatic foundations;
- 58- Order No. 27465 of 29 December 2016 of the Joint Divisions of the Court of Cassation.

Rome, 10 March 2017

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