EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

12 April 2017

Case Document No. 1

***Confederazione Generale Sindacale* CGS v. Italy**
Complaint No.144/2017

COMPLAINT

Registered at the Secretariat on 7 March 2017

CONFEDERAZIONE GENERALE SINDACALE CGS
Via Salaria 44 – 00198 Rome
Telephone: 06/8845005 – 06/8845095
Fax: 06/84082071
website: www.confederazionecgs.it
email: tom60@inwind.it
email: studiodemichele@gmail.com

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 relating to the complainant trade union organisation Confederazione Generale Sindacale CGS, formerly Confederazione Gilda-Unams CGU

1. The **Confederazione Generale Sindacale CGS**, formerly the Confederazione Gilda-Unams CGU, Italian tax ID 96143130589, with registered office at Via Salaria 44, Rome, is a trade union organisation and signatory of both the National Collective Labour Agreement for the Schools Branch of 29 November 2007 for the regulatory period 2006/2009 as well as subsequent national agreements and contracts for teaching and ATA ("administrative, technical and auxiliary") staff in schools administered by the state of every type and level (see Doc. 1), and the National Collective Labour Agreement for the Advanced Training and Artistic and Musical Specialisation Institutions Branch (AFAM) for the 2006/2009 four-year regulatory period of 4 August 2010, along with subsequent national agreements and contracts for AFAM staff (see Doc. 2).

2. The Confederazione Generale Sindacale CGS (hereafter, CGS) is comprised of the following Federations:

• **Federazione GILDA-UNAMS**, with registered office at Via Salaria 44, Rome, national trade union organisation and signatory of the National Collective Labour Agreement for the Schools Branch of 29 November 2007 for the regulatory period 2006/2009, as well as subsequent national agreements and contracts for teaching and ATA staff in schools administered by the state of every type and level, which represents and assists tens of thousands of workers in 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 with a level of representativeness that is certified by the right to sign the 2007 National Collective Labour Agreement, which is currently applicable, in the manner provided for under Articles 40 et seq. of Legislative Decree No. 165 of 30 March 2001 (Consolidated Act on Public Sector Employment);

• **Federazione Unione Artisti UNAMS**, with registered office at Viale delle Province 184, Rome, national trade union organisation and signatory of the National Collective Labour Agreement for the Advanced Training and Artistic and Musical Specialisation Institutions Branch (AFAM) for the 2006/2009 four-year regulatory period of 4 August 2010, along with subsequent national agreements and contracts for AFAM staff, which represents and assists thousands of workers in the AFAM Branch, including both teaching and administrative, technical and auxiliary staff working for the MEUR under both permanent and fixed-term employment contracts with a level of representativeness that is certified by the right to sign the 2010 National Collective Labour Agreement, which is currently applicable, in the manner provided for under Articles 40 et seq. of Legislative Decree No. 165 of 30 March 2001 (Consolidated Act on Public Sector Employment);
• **Federazione Lavoratori Pubblici e Funzioni Pubbliche FLP**, with registered office in Via Piave 61, Rome, national trade union organisation which the ARAN (see Doc. 3) has recognised as being representative of the new central executive bodies branch (ministries, tax agencies, non-economic public bodies, bodies governed by Article 70 and agencies governed by Legislative Decree No. 300/99), thereby acquiring accreditation as being representative also with the major pension bodies (INPS [National Social Security Institute] and INAIL [National Institute for Insurance Against Occupational Accidents]) along with other important institutions (ACI [Italian Automobile Club], ENIT [National Tourism Agency], professional regulatory bodies and associations, ENAC [Italian Civil Aviation Authority], etc.) previously established within the branch of non-economic public bodies and bodies governed by Article 70, which represents and assists tens of thousands of public sector workers hired under both permanent and fixed-term contracts;
• **Federazione NURSIND**, with registered office at Via Belisario 6, Rome, national trade union organisation for nurses from the health care branch, which the ARAN (see Doc. 3) has recognised as being representative of around 20,000 nurses hired under both permanent and fixed-term contracts.
3. The CGS, through the federations FLP and NURSIND, therefore has a level of representativeness recognised by the ARAN also in other branches of Italian public sector employment, including in particular in the central executive bodies branch and the health care branch (see Doc. 3).
4. In this collective complaint, the national trade union organisation CGS is represented by Prof. Gennaro Di Meglio, born in Torre del Greco on 12 November 1949 and resident at Via De Jenner 12, Trieste, Italian tax ID DMGGNR49S12L259Z, as Secretary General and current legal representative, assisted in an advisory capacity by Counsel Tommaso De Grandis (Italian tax ID DGRTMS60E16D643P) and by Counsel Vincenzo De Michele (Italian tax ID DMCVCN62A16D643W).
5. The service address chosen for the purposes of this collective complaint is Via Salaria 44, Rome (Italy) and/or at the email addresses tom60@inwind.it and studiodemichele@gmail.com.

Contracting party which has violated the European Social Charter: ITALY
****

Statement of facts and the conduct of the Italian State objected to
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) also for employment relations with all public

administrations, including schools, as stipulated in paragraphs 7-14 of the judgment in the *Marrosu-Sardino* case of the Court of Justice of the European Union (see Doc. 7), as "contractualised" public sector work did not fall within the grounds for exclusion from the scope of Legislative Decree No. 368/2001 laid down by Article 10 of that Decree.

7. 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 and health care staff working in the National Health Service [see Article 29(2)(c)], whilst they continue to apply to all public administrations (including schools administered by the state and National Health Service workers) as provided for under Article 36 of Legislative Decree No. 165/2001, which continues to refer to paragraphs 2, 5-*bis* and 5-*ter* of the repealed Legislative Decree No. 368/2001.

8. 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*".

9. 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....*".

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

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

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

13. By the reference for a preliminary ruling made in the case of *Marrosu-Sardino* (Case C-53/04 of 21 January 2004), the *Tribunale di Genova* objected that Article 36(2) (at that time, now Article 36(5)) of Legislative Decree No. 165/2001 violated Directive 1999/70/EC in that it did not provide public sector workers employed under fixed-term contracts with the same protection against sanctions as that in place for private sector workers.

14. By the judgment of 7 September 2006 in Case C-53/04, *Marrosu-Sardino*, the Court of Justice of the European Union ruled that the prohibition on the conversion into permanent contracts laid down by Article 36(2) (at that time, now Article 36(5)) of Legislative Decree No. 165/2001 was, at first sight, compatible, provided that the requirement to pay compensation provided for under the provision, as applied in practice, constituted a sanction equivalent to that imposed for private sector workers.
15. Consequently, the national legislature was forced to launch immediately plans to stabilise staff in insecure situations employed by the public administrations by Article 1(519) and (558) of Finance Law No. 296/2006 for non-school public sector employment and by Article 1(607) of Law No. 296/2006 for supply staff in schools administered by the state (teachers and ATA staff). The granting of tenured status ("stabilisation") under permanent contracts to public sector workers in insecure employment was based, as a prerequisite for requests for stabilisation, on service of at least three years (36 months) for the public sector employer. However, the stabilisation procedure was recognised not as an individual right of the worker concerned, but as a mere discretionary choice of the public administration, with the result that it was not implemented in some sectors, such as Schools, AFAM and Health, whilst in other branches of public sector employment (including in particular in the research and local authority branches) it achieved partial and unsatisfactory results in terms of the granting of tenured status to fixed-term workers who fulfilled the statutory requirements. Conversely (and paradoxically), the individual right to the granting of tenured status with regions and local authorities, upon request, was granted only to the employees of farming consortia, which are companies organised under private law, who had been subjected to mobility arrangements (i.e. collectively dismissed) by the private employer before 29 September 2006, as provided for under Article 1(559) of Law No. 296/2006.
16. 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**. The provision, **which was applicable both to private sector and public sector workers, was the only effective anti-abuse sanction for the latter recognised anywhere under national law**, which reflected the provision previously laid down by Article 1(519) and (558) of Law No. 296/2006.
17. Article 25(3) of the National Collective Labour Agreement for the Schools Branch of 29 November 2007 stipulated as follows in relation to teaching staff: "*3. The individual permanent or fixed-term employment relations of teaching and educational staff in institutions and schools administered by the state of every type and level shall be established and regulated by individual contracts, in accordance with statutory provisions, Community legislation and the applicable national collective agreement.*" Identical provision was made in relation to auxiliary, technical and administrative staff (hereafter, ATA) by Article 44(4) of the 2007 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 2007 NCLA.
18. Article 44(1) and (5) of the NCLA for the AFAM Branch of 6 February 2005, which is a contiguous sector to the Schools Branch and governed by similar or identical recruitment rules (Legislative Decree No. 297/1994 and Article 4 of Law No. 124/1999 apply also to AFAM

employees), on the one hand provided for the application to the employees of musical institutions of the rules on fixed-term contracts laid down in Legislative Decree No. 368/2001 (paragraph 1), whilst on the other hand stipulating that, in the event of their abuse, the application of Legislative Decree No. 368/2001 could not result in the transformation of a fixed-term employment relationship into a permanent employment relationship (paragraph 5) at a time when the rule of 36 months' service as a requirement for the stabilisation of the relationship laid down by Article 1(519) and (558) of Law No. 296/2006 and Article 5(4-bis) of Legislative Decree No. 368/2001 had not yet entered into force.

19. By the circular of 25 October 2008 (see Doc. 9), the MEUR, as the employer of all teaching and ATA staff in schools administered by the state and also all employees from the AFAM Branch, 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).

20. 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"*.

21. 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 solely 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. When the new candidates are included, the positions in the eligibility ranking list of those already included in the permanent eligibility ranking list shall be updated. 3. …"*.

22. 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.

23. 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.

24. In particular, all teachers who qualified through SPQ[1] or AET[2] 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 qualification establishing entitlement to teach was issued after the closure to new members of the provincial permanent eligibility ranking lists, i.e. after 1 January 2007.

25. 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.

26. 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 planned granting of tenured status.

27. For teaching staff from the AFAM Branch, given the absence of any system involving public competitions for the granting of tenured status, the recruitment system is genuinely paradoxical. In fact, with effect from academic year 2013/2014 (1 November 2013 – 31 October 2014) two national eligibility ranking lists have been in operation, the first to be drawn upon until exhaustion, which was established following the enactment of Law No. 143/2004 and comprises teachers who have been in post for 360 days, and is used for permanent appointments or annual supply teaching appointments pursuant to Article 4(1) of Law No. 124/1999 (the same legislation as that applicable to supply appointments in schools administered by the state). On the other hand, the second permanent national ranking list was established pursuant to Article 19(2) of Decree-Law No. 104/2013 for teachers who, at the time the ranking list was established, had not accrued a length of service of at least three years and who had passed a public competition for accreditation or fitness to teach; in this case, the teachers are entitled only to be allocated annual fixed-term teaching appointments, in spite of the fact that the positions in question are vacant and available within the workforce of the individual institutes and despite having passed the public competition establishing fitness.

---

[1] 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.

[2] 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).

28. Following the prohibition on conversion within public sector employment laid down in Article 36(5) of Legislative Decree No. 165/2001 and the substantial failure of the procedures for stabilising public sector workers in insecure employment pursuant to Article 1(519) and (558) of Law No. 296/2006 and the three-year plan for the granting of tenured status to school staff pursuant to Article 1(607) of Law No. 296/2006, the *Tribunale di Rossano Calabro* sent a reference for a preliminary ruling in Case C-3/10 *Affatato* (see Doc. 13) concerning the failure to apply Directive 1999/70/EC throughout public sector employment, including schools administered by the state.
29. 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.
30. 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.
31. 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.
32. 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.
33. 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.
34. 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 public sector workers in insecure employment, and did not convert their contracts into permanent contracts, as had been purportedly confirmed by the *Affatato* order of the Court of Justice, which by contrast asserted the exact opposite.
35. Immediately afterwards, by judgment No. 10127 of 20 June 2012 (see Doc. 19), the Court of Cassation asserted that the system of recruitment in schools was a special system compared with that regulated under Legislative Decree No. 368/2001 - legislation which did not apply to supply teaching appointments in schools - and that it was legitimate and compatible with the Community legal order. By judgment No. 10127/2012, the Court of Cassation upheld the non-applicability of Legislative Decree No. 368/2001, disregarding the first sentence of Article

70(8) of Legislative Decree No. 165/2001 and the internal reference to Article 36(2) of the same Decree, thereby concealing the reference to Legislative Decree No. 368/2001 expressly contained in that provision. A technical-professional teacher with more than 36 months' service in a school administered by the state is denied any rights. The Court of Cassation also instructed the national courts to refrain from referring questions to the Court of Justice of the EU in order to request clarification as, according to paragraphs 65-66 of judgment No. 10127/2012, the judgment of the European Court of Human Rights in *Ullens de Schooten and Rezabek v. Belgium* of 20 September 2011 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.

36. Judgments No. 392/2012 and No. 10127/2012 of the Court of Cassation were criticised on the grounds that they violated the ECHR, EU law and national law (see Doc. 20). Following the criticisms, report No. 190 of 24 October 2012 of the Case Law Analysis Office of the Court of Cassation (see Doc. 21) 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).*".

37. 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 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, in accordance with the 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, 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 No. 368/2001), which precludes the application of Article 5(4-bis) of Legislative Decree No. 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.".

38. 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.

39. At the same time, by the judgment in *Valenza and others* of 18 October 2012 (see Doc. 22), the Court of Justice of the EU ruled for the first time, referring to Article 97(3) (now paragraph 4) of the Constitution on access to the public administrations (*Valenza* judgment, paragraph 13) as well as the principle of equality pursuant to Article 3 of the Constitution (*Valenza* judgment, paragraph 12), refuting the interpretation proposed by the Council of State in the references for a preliminary ruling and confirmed by the Court of Cassation itself in judgment No. 392/2012 on the supposed prohibition on conversion within public sector employment as a principle at "Community" level, which was purportedly confirmed by the *Affatato* order of the Court of Justice. The case examined by the Court of Justice in the *Valenza* judgment concerned legislation providing for favourable treatment – Article 75 of Decree-Law No. 112/2008, not converted into law – which had made it possible for former workers of independent authorities in insecure employment, who received salaries that were much higher than those of other public sector employees with equivalent duties as a result of the financial and regulatory autonomy of the public body, to be stabilised urgently on the basis of an "expansive" application of Article 1(519) of Law No. 296/2006 without either a public competition establishing access or a selective procedure for the purpose of stabilisation, subject to a waiver of the length of service accrued for the period of fixed-term employment,

whilst however maintaining the personal salary supplement and the right to retain it in the event of a pay rise.

40. Article 4(5) of Decree Law No. 158 of 13 September 2012, as amended upon conversion into Law No. 189 of 8 November 2012, introduced Article 10(4-ter) of Legislative Decree No. 368/2001 with effect from 11 November 2012, which specified that also health care workers from the National Health Service (as was already the case for school staff under Article 10(4-bis) of Legislative Decree No. 368/2001) were not to be subject (any longer) to Legislative Decree No. 368/2001, and in particular that "successive" fixed-term contracts could never give grounds for conversion into permanent employment after 36 months' service pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001.

41. At the same time, having received national information indicating that Community law obligations towards supply staff in schools were not being respected and concerning the inadequate application of 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.

42. By a written statement of 25 October 2012 (see Doc. 23), the Federazione GILDA-UNAMS, a trade union organisation and signatory of the NCLA for the Schools Branch of 29 November 2007, which is associated with the complainant CGS, intervened in support of the claimant worker pursuant to Article 64(5) of Legislative Decree No. 165/2001 in case No. 57536/2011 R.G. pending before the *Tribunale di Napoli* between the teacher Racca Immacolata and the MEUR. In those proceedings the teacher had requested the transformation of her supply appointment into a permanent relationship, having exceeded a total of 36 months' service on 9 February 2011 as an employee of the MEUR pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001. The Federazione GILDA-UNAMS objected that judgment No. 10127/2012 of the Court of Cassation disregarded the provisions of the NCLA for the Schools Branch of 29 November 2007, which authorised the transformation of supply appointments into permanent contracts subject to the conditions provided for under the applicable legislation, i.e. Legislative Decree No. 368/2001.

43. Accordingly, 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. 24), 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.

44. By four orders made in January 2013 in Joined Cases C-22/13 *Mascolo*, C-61/13 *Forni*, C-62/13 *Racca* (see Doc. 25) 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.

45. The Federazione GILDA-UNAMS submitted written observations to the Court of Justice in the *Racca* case (see Doc. 26). The Italian Government also submitted written observations in the *Racca* case (see Doc. 27), threatening (page 30, paragraphs 52-54) disciplinary action against the *Tribunale di Napoli* as the court making the reference.
46. 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. 28), the EU Commission concluded that Article 36(5) of Legislative Decree No. 165/2001 was incompatible with Directive 1999/70/EC.
47. By preliminary reference No. 207/2013 in Case C-418/13 *Napolitano and others* (see Doc. 29), 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. 30) 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.

The unsuccessful attempt by the legislature in 2013 to stabilise public sector insecure employment

48. 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. 31) 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 in accordance with 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 and, for the schools branch, in accordance with 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.
49. 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.
50. 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 on condition that the necessary expertise required for 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.

51. 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.

52. 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. 36), 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, 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.

53. 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*".

54. 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.

55. 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.

56. 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.

57. 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.

58. Ultimately, 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.

59. 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.

60. The reference legislative framework at the start of 2014 before the new Italian Government took office 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.

61. 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*."

62. 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*."

63. 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 granting of tenured status would have been allocated: 50% + 49%).

64. 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.

65. 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 and the Federazione GILDA-UNAMS in the written and oral observations submitted in the

Joined Cases decided on in the *Mascolo* judgment, as noted by Advocate General Szpunar in footnote 47 of the opinion delivered on 17 July 2014 (see Doc. 32), 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.*"

The *Papalia* order and the *Mascolo* judgment of the Court of Justice of the European Union

66. As a result of this complex legislative framework, by the *Papalia* order of 12 December 2013 in Case C-50/13 (see Doc. 33), the CJEU ruled that Article 36(5) of Legislative Decree No. 165/2001 was incompatible with Directive 1999/70/EC in laying down a prohibition on conversions into permanent contracts of employment within the public sector due to a violation of mandatory statutory provisions because it did not ensure adequate and equivalent preventive protection and protection through penalties, thereby objecting to judgment No. 392/2012 of the Court of Cassation which precluded any type of protection through penalties.

67. As could have been foreseen, in the *Mascolo* judgment of 26 November 2014 (Doc. 35) 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),[3] as its correct application by the *Tribunale di Napoli* in the *Racca* case amounted to an act of sincere co-operation with the EU institutions (paragraphs 59-61),[4] thereby objecting to the position taken by the Court of Cassation in judgment No. 10127/2012.

---

[3] 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).*"

[4] 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***

68. In paragraph 14 of the *Mascolo* judgment the Court of Justice acknowledged that, according to all of the references for a preliminary ruling, Legislative Decree No. 368/2001 applied to the schools sector, whilst stressing in paragraph 89 that the ERE included teachers who had completed courses leading to the award of a qualification by secondary teaching specialisation schools without any public competition, thereby obtaining qualifications equivalent to the SPQ or AET. The court noted in paragraphs 114[5] and 115[6] of the *Mascolo* judgment that, although the prohibition of conversion into permanent employment did not apply within public sector employment and no compensation was payable in the event of a breach of mandatory statutory provisions, pursuant to Article 36(5) of Legislative Decree No. 165/2001, it was not possible to transform 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 28[7] and 84[8] of that judgment. Consequently, the Court of Justice assigned to the national courts that had

---

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."

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

[6] 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***."

[7] 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*."

[8] 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*."

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

The Constitutional Court and the *Tribunale di Napoli* apply the *Mascolo* judgment of the Court of Justice, whilst the Employment Division of the Court of Cassation is uncertain

69. First the Employment Division of the Court of Cassation, by judgment No. 27363/2014 of 23 December 2014 (see Doc. 36), 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.[9] However immediately afterwards, by judgment No. 27481/2014 of 30 December 2014[10] (see Doc. 37), the Court of Cassation itself held that the *Mascolo* judgment had no value and, in a case involving a public sector worker in insecure employment with more than 36 months' service, denied the right to employment stability and awarded only compensation of between 2.5 and 6 months' salary, pursuant 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".

70. Following the *Mascolo* judgment of the Court of Justice, by judgment No. 529/15 of 21 January 2015 (see Doc. 38) in case No. 5288/12 R.G. concerning the applicant Raffaella Mascolo, 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.

71. By judgment No. 260/2015 (see Doc. 39) the Constitutional Court also applied the *Mascolo* judgment and converted an unlawful fixed-term employment relationship with the public administrations (operatic foundations) into permanent employment due to a lack of temporary objective justifications for each individual fixed-term contract.

The refusal by the legislature to disapply the decisions of the EU Court of Justice and to ensure continuity to the plans adopted in 2013 for stabilising public sector workers in insecure employment

---

[9] 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***."

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

72. Following the change in government in February 2014, the Italian State decided not to implement the previous plan for stabilising non-school public sector workers in insecure employment with 36 months' service set out in Decree-Law No. 101/2013, and in any case refused to apply Article 5(4-bis) of Legislative Decree No. 368/2001, as suggested by the Court of Justice in paragraph 55 of the *Mascolo* judgment, even going so far, by Article 55(1)(b) of Legislative Decree No. 81 of 15 June 2015, as to repeal Legislative Decree No. 368/2001 in its entirety without replacing it with any other legislation to implement Directive 1999/70/EC for fixed-term workers in public sector employment.
73. In fact, Article 29(2)(c) and (d) of Legislative Decree No. 81/2015 provides for the exclusion of the protections granted under clauses 4 and 5 of the framework agreement on fixed-term work both in respect of supply teaching and ATA staff in schools and health care staff working in the National Health Service (letter c), reproducing in one single provision those laid down by Article 10(4-*bis*) and (4-*ter*) of Legislative Decree No. 368/2001 and in respect of fixed-term university researchers falling under Law No. 240/2010 (letter d). In a contradictory manner, and again with the aim of negating any protection against abuse, Article 29(4) of Legislative Decree No. 81/2015 in addition provides that "*the foregoing shall be without prejudice to Article 36 of Legislative Decree No. 165 of 2001*", which still refers to paragraphs 2, 5-*bis* and 5-*ter* for the purpose of the application of the repealed Legislative Decree No. 368/2001.
74. As far as the Schools Branch is concerned, having decided not to apply the three-year plan for the granting of tenure provided for under the combined provisions of Article 4(6) of Decree-Law No. 101/2013 and Article 15(1) of Decree-Law No. 104/2013, 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 for the Schools Branch, the Italian government made provision 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.
75. 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*".
76. 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 granting 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.

77. 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.

78. 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,[11] which concerned a similar case under the German law on teacher training. 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.

The Joint Divisions of the Court of Cassation have also refused to apply the sanction of employment stabilisation to public sector workers in insecure employment

79. In contrast to the Constitutional Court, following the *Mascolo* judgment of the Court of Justice, the approach of the Joint Divisions of the Court of Cassation has been characterised by decisions that have seriously violated the fundamental rights of public sector workers in insecure employment, both within the schools sector and within non-school public sector employment, in keeping with the choices set out by the government in Legislative Decree No. 81/2015 and Law No. 107/2015.

80. 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. 41) accepted four identical appeals filed by the Municipality of Massa against four identical judgments of the Genoa Court of Appeal, which had awarded compensation of 20 months' salary to public sector workers in insecure employment as damages for the abuse of fixed-term contracts, annulling the decisions insofar as the grounds of appeal were accepted and 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. 34).

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

81. 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. 42) – filed on the following day – 15 March 2016 – concerning the *Marrosu-Sardino* case to which the judgment of the Court of Justice was applied. Judgments Nos. 4911, 4912, 4913 and 4914 of 2016 did not contain any reasons in support also of the refusal to make a preliminary reference pursuant to Article 267(3) TFEU in response to the preliminary request made by the workers in their written statements filed pursuant to Article 378 of the Code of Civil Procedure (see Doc. 43).

82. The "parent" judgment No. 5072/2016 of the Joint Divisions of the Court of Cassation of 15 March 2016 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, which is applicable in any case to all public administrations, including schools,[12] 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.

83. The following principle of law was asserted by the Joint Divisions of the Court of Cassation by judgment No. 5072/2016: "*Under the regime applicable to public sector employment, in the event of the abuse of fixed-term contracts by a public administration, an employee whose employment status has been unlawfully rendered insecure is entitled, notwithstanding the prohibition on the transformation of the employment contract from fixed-term into permanent as laid down by Article 36(5) of Legislative Decree No. 165 of 30 March 2001, to compensation of damages as provided for under that provision and is exempt from the requirement to furnish proof within the limits laid down by Article 32(5) of Law No. 183 of 4 November 2010, and accordingly in an amount equal to an all-inclusive indemnity of between a minimum of 2.5 and a maximum of 12 monthly payments of the last global de facto remuneration, having regard to the criteria indicated in Article 8 of Law No. 604 of 15 July 1966.*".

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

84. On the other hand, entirely disregarding judgment No. 5072/2016 of the Joint Divisions of the Court of Cassation, by judgment No. 187 of 20 July 2016 (see Doc. 44) the Constitutional Court declared unconstitutional Article 4(1) of Law No. 124/1999 (the only provision subject

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

to constitutional review) on annual supply appointments with effect *ex tunc*, further specifying that permanent stabilisation is the only sanction capable of resolving the consequences of the contractual abuse. At the same time, the Constitutional Court expressly held that the *Mascolo* judgment constituted a *ius superveniens* within national law (see orders Nos. 194 and 195 of 2016, Doc. 45).

85. By order No. 195/2016, the Constitutional Court intervened in a case involving teachers in insecure employment from the AFAM Branch with more than 36 months' service for the MEUR. Also in this case the Italian State had failed to apply Article 5(4-bis) of Legislative Decree No. 368/2001 and to conclude more than one thousand fixed-term contracts with AFAM teaching staff, refusing to apply the *Mascolo* judgment of the Court of Justice and order No. 195/2016 of the Constitutional Court.

86. Following judgment No. 187/2016 of the Constitutional Court, which held that the 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. 46), acting contrary to the solution of Community damage laid down by the Joint Divisions of the Court of Cassation in judgment No. 5072/2016, the *Tribunale di Trapani* sent two new references for a preliminary ruling to the CJEU concerning the principle of equivalence and the efficacy of the sanction laid down Article 32(5) of Law No. 183/2010 which provides only for the payment of compensation: "*1) Is the granting of compensation in the amount of between 2.5 and 12 monthly payments of the last overall salary payment (Article 32(5) of Law No 183/2010) to a public employee, who is a victim of the unlawful successive renewal of fixed-term contracts, who may obtain full compensation only by proving the loss of other work opportunities or by proving that, if he 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. 47) of 14 September 2016, issued with reference to judgment No. 187/2016 and orders Nos. 194 and 195 of 2016 of 20 July 2016 of the Constitutional Court, the Court of Justice made a finding of full equivalence in terms of sanctions between the public and private sectors, concluding as follows: "*1) Clause 5(1) of the framework agreement on fixed-term work, concluded on 18 March 1999, which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, from being applied by the national courts of the Member State concerned in such a manner that, in the event of abuse resulting from the use of successive fixed-term employment contracts, a right to maintain the employment relationship is granted to persons employed by the authorities under an employment contract governed by the rules of employment law, but that right is not conferred, in general, on staff employed by those authorities under administrative law, unless there is another effective measure in the national law to penalise such abuses with regard to the latter staff, which it is for the national court to*

determine. 2) The provisions of the framework agreement on fixed-term work which is set out in the annex to Directive 1999/70, read in conjunction with the principle of effectiveness, must be interpreted as precluding national procedural rules which require a fixed-term worker to bring a new action in order to determine the appropriate penalty where abuse resulting from the use of successive fixed-term employment contracts has been established by a judicial authority, to the extent that it results in procedural disadvantages for that worker, in terms, inter alia, of cost, duration and the rules of representation, liable to render excessively difficult the exercise of the rights conferred on him by EU law.".

The Employment Division of the Court of Cassation insists on refusing any effective protection to public sector workers in insecure employment in the Schools Branch who have been unlawfully used, refusing also to award compensation

88. Conversely, by six identical judgments of 7 November 2016 on workers in insecure employment in schools - Nos. 22552, 22553, 22554, 22555, 22556 and 22557 (see Doc. 48) - the Court of Cassation:

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

• upheld as well founded the arguments contained in judgment No. 10127/2012 of the same Court and reiterated once again, and 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 it did not wish to depart from judgment No. 10127/2012 of the Court of Cassation;

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

• deprived the 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*".

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

compensation or to stabilisation, as Article 5(4-bis) of Legislative Decree No. 368/2001 does not apply.

90. 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. 49)) concerning "disputes involving workers in insecure employment in schools" addressed to all court of appeal presidents, the First President of the Court of Cassation instructed all employment judges in all courts and courts of appeal throughout the country to give effect "as a matter of priority" to the judgments of the Court of Cassation on insecure employment in schools: ***"****Please find the enclosed copy of the press release announcing that the Employment Division of this Court has published several judgments concerning the dispute regarding fixed-term contracts of workers in insecure employment in schools (teachers and ATA staff). I am therefore informing you of the position adopted regarding this matter by the Court of Cassation in order that you may bring it to the attention of the 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.

91. Moreover, repudiating the assertion made by the Constitutional Court in judgments No. 153/2011 (see Doc. 50) and No. 260/2015 concerning the public status of operatic foundations, by order No. 27465 of 29 December 2016 adopted in chambers (see Doc. 51), 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.

92. Finally, by judgment No. 484/2017 of 12 January 2017 (see Doc. 52) in case No. 12357/2015 R.G., the Regional Administrative Court for Lazio rejected the appeal filed by the Federazione GILDA-UNAMS, associated with the complainant trade union organisation CGS, against the exclusion of SPQ and AET qualified teachers with more than 36 months' service from the extraordinary plan for the granting of tenured status pursuant to Article 1(98) et seq. of Law No. 107/2015 and upheld as lawful the extraordinary recruitment by simply running through eligibility ranking lists to be drawn upon until exhaustion (ERE) even for those who have not worked in schools administered by the state, disregarding the *Mascolo* judgment of the CJEU.

****

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.

112. [sic] Article 39(4) of the Italian Constitution provides that collective labour agreements have mandatory effect for all members of the sectors to which the contract applies where they are concluded by registered trade unions. This mandatory effect of collective labour agreements is at present reserved only to collective labour agreements concluded for public sector workers by trade union organisations that are recognised as having a minimum level of representativeness according to the procedure laid down by Articles 40 et seq. of Legislative Decree No. 165/2001.

94. The complainant CGS has signed the Collective Labour Agreement for the Schools Branch of 29 November 2007 for the regulatory period 2006/2009 as well as subsequent national

agreements and contracts for teaching and ATA ("administrative, technical and auxiliary") staff in schools administered by the state of every type and level, along with the National Collective Labour Agreement for the Advanced Training and Artistic and Musical Specialisation Institutions Branch (AFAM) for the 2006/2009 four-year regulatory period of 4 august 2010, along with subsequent national agreements and contracts for AFAM staff.

95. In addition, the complainant CGS also comprises the Federazione Lavoratori Pubblici e Funzioni Pubbliche FLP, a national trade union organisation which the ARAN has recognised as having representative status within the new central executive bodies branch (ministries, tax agencies, non-economic public bodies, bodies governed by Article 70 and agencies governed by Legislative Decree No. 300/99), which represents and assists tens of thousands of public sector workers both permanent and fixed-term, as well as the Federazione NURSIND, a national trade union organisation of nurses from the public health branch, which the ARAN has recognised as having representative status for around 20,000 nurses employed under both permanent and fixed-term contracts.

96. The CGS is therefore entitled as a trade union association to take action to protect the employment interests of its members, including within national proceedings (see European Court of Human Rights, *Unison v. United Kingdom*, judgment of 10 January 2002, application No. 53574/99). Article 64 in particular of Legislative Decree No. 165/2001 recognises the right to intervene in labour law disputes involving public sector employment disputes in order to protect the claimant worker and to submit arguments in favour of him/her in matters relating to the interpretation, validity and application of provisions of the collective labour agreement signed by the trade union organisation.

97. Italian law **has denied any protection to all non-school fixed-term public-sector workers** in cases involving the abuse of fixed-term contracts in continuing to apply Article 36(5) of Legislative Decree No. 165/2001, a provision which lays down a prohibition on the conversion of a fixed-term contract into a permanent contract in the event of the breach of mandatory statutory provisions on access to and treatment within work, notwithstanding that this provision does not contain any effective sanction other than a generic reference to compensation which the worker who has suffered the abuse is unable to prove, as he/she does not have any right to the provision of stable employment, and notwithstanding that Article 36(5) of Legislative Decree No. 165/2001 was for this reason found to be incompatible with Directive 1999/70/EC in the *Papalia* order of the Court of Justice of 12 December 2013.

98. The Italian State has continued to deny the right to the transformation of successive contracts into a permanent contract after 36 months' service pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001, including through the case law of the Joint Divisions of the Court of Cassation in judgment No. 5072/2016, despite having asserted before the European institutions, and in particular in the *Affatato* case C/10 before the CJEU, that it would apply the protection of stable employment contained in the above rule/sanction, which is also applied to private sector workers. In addition, the Italian State has not sought to apply the *Mascolo* judgment of the Court of Justice, paragraph 55 of which expressly identified Article 5(4-bis) of Legislative Decree No. 368/2001 as a suitable sanction for the definitive removal of the abuse of fixed-term contracts within non-school public sector employment in order to avoid a failure to ensure sincere co-operation with the EU institutions (*Mascolo* judgment, paragraphs 59-61).

99. Indeed, in order to preclude any form of judicial protection for non-school public sector employment, Italian lawmakers have enacted a series of provisions, subsequent to Article 36(5) of Legislative Decree No. 165/2001, which prevent the recognition of the protection

available to private sector workers and the application of Article 5(4-bis) of Legislative Decree No. 368/2001, such as Article 10(4-ter) of Legislative Decree 368/2001 for staff from the National Health Service, Article 36(5-ter) and (5-quater) of Legislative Decree No. 165/2001 and Article 55(1)(b) of Legislative Decree No. 81/2015, which even repealed Legislative Decree No. 368/2001 without replacing it with any national legislation to implement Directive 1999/70/EC for public sector employment.

100. The processes for stabilising public sector workers in insecure employment outside the Schools Branch with more than 36 months' service, even if not continuous, with the public sector employer as provided for initially under Article 1(519) and (558) of Law No. 296/2006 and subsequently incorporated into Article 4(6) of Decree-Law No. 101/2013 have, at least so far, had little impact, as regards the former, on satisfying requests for stable employment and absolutely no consequences as regards the latter.

101. The situation characterised by a lack of effective protection has been made even more evident by the fact that almost all fixed-term employment relations within non-school public sector employment have been correctly established in compliance with recruitment procedures via public selection provided for under Article 35 of Legislative Decree No. 165/2001, and therefore without violating any mandatory statutory provisions, with the paradox that not even a public competition is suitable for establishing stable access to public sector employment when the public administration decides that the selection procedure concerns a fixed-term contract and not a permanent contract, even where the temporary employment masks structural shortages in the workforce, as is demonstrated by the long periods of service in excess of 36 months.

102. Hundreds of thousands of fixed-term workers in the various branches and sectors of public sector employment other than the schools branch (health care, AFAM, university, research, non-economic public bodies, local authorities etc.) currently lack effective protection equivalent to that available to private sector workers in the same situation, despite having accumulated more than [36] months' service with the same public sector employer, even if not continuous. By order No. 195/2016, the Constitutional Court intervened in a case involving teachers in insecure employment from the AFAM Branch with more than 36 months' service for the MEUR. Also in this case the Italian State had failed to apply Article 5(4-bis) of Legislative Decree No. 368/2001 and to conclude more than one thousand fixed-term contracts with AFAM teaching staff, refusing to apply the *Mascolo* judgment of the Court of Justice and order No. 195/2016 of the Constitutional Court.

103. 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.

104. 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, as mentioned above, 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.

105. Accordingly, following the *Mascolo* judgment of the CJEU, tens of thousands of SPQ and AET qualified supply teachers and many 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.

106. 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).

107. The Italian Government in fact drew up an unimaginable extraordinary plan for the granting of tenured status only to teaching staff (therefore 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.

108. 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.

109. 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.

110. 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.

111. Evidence of this discriminatory conduct may be obtained from the data of the General Accounting Office [*Ragioneria dello Stato*] and the Court of Auditors, to which reference is made for closer analysis. To summarise, the data of the General Accounting Office 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 ("apparent") creation of tens of thousands of positions within the notional workforce, so much so that the report itself takes note of the pathological situation of workers in insecure employment above all in the schools and health care branches: "*This branch* (editor's note: school) *is that within which the need is most strongly felt to reduce the scale of the phenomenon of insecure employment to manageable limits by reabsorbing the non-stable excess workers who have emerged over the years. The most homogeneous stabilisation solutions can therefore cover only the third macro-aggregate, which makes up just over one third of the total, i.e. around 105,000 units. More than half of these units are concentrated within the regions and local government branch (including bodies that apply contracts different from the national agreement), whilst another third is made up of the health care branch*" (cf. page 37 of the "Commentary on the principal data contained in the annual accounts for the period 2007/2015" of the General Accounting Office, Doc. 53).

112. On the other hand, in the "*2016 report on the cost of public sector employment"* (see Doc. 54), the Court of Auditors identified a fall in spending for remuneration for all state employees, as may be determined in tables 7-8 and 9 on pages 58 et seq. of that report, stressing that the so-called "national interest" in cutting expenditure would not preclude the stabilisation of workers in insecure employment (cf. pages 58 et seq. of the "Report" cited).

113. In any case, those most penalised within schools administered by the state 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.

114. 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.

115. Therefore, the Federazione GILDA-UNAMS, associated with the complainant trade union organisation CGS, was forced to intervene pursuant to Article 64(5) of Legislative Decree No. 165/2001 in case No. 57536/2011 R.G. before the *Tribunale di Napoli* in order to defend the right of the teacher Racca Immacolata to stable employment in accordance with the statutory (Article 5(4-bis) of Legislative Decree No. 368/2001) and contractual (Article 44 of

the 2007 NCLA) provisions which the Court of Cassation had unbelievably ordered the ordinary courts not to apply in judgment No. 10127/2012.
116. 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 which the *Tribunale di Napoli* consistently set aside in judgment No. 528/2015 in case No. 57536/11 R.G., applying the *Mascolo* judgment and the internal rules on effective relief. By judgments No. 260/2015 and No. 187/2016, the Constitutional Court applied the *Mascolo* judgment of the Court of Justice, and by orders no.194 and 195 of 2016 asserted that the *Mascolo* judgment constituted *ius superveniens* within national law.
117. 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.
118. By judgment No. 484/17, the Regional Administrative Court for Lazio also followed the position taken by the Court of Cassation in excluding SPQ qualified teachers with more than 36 months' service from the right to stabilisation.
119. Judgment No. 5072/2016 of the Joint Divisions of the Court of Cassation, 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 36(5), (5-ter) and (5-quater) of Legislative Decree No. 165/2001; Article 4(14-bis) of Law No. 124/1999; Article 10(4-bis) and (4-ter) of Legislative Decree No. 368/2001; Article 29(2)(c) of Legislative Decree No. 81/2015 – 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 hundreds of thousands of public sector fixed-term workers 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 hundreds of thousands of public sector fixed-term workers to recognise sufficient remuneration such as will guarantee them and their families a dignified standard of living with stable employment, along with the commitment to recognise the right of public workers in insecure employment 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 complainant CGS 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 signed by the complainant 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 CGS in cases of conflicts of interest because the collective action (provided for by law) brought before the Court of Justice of the European Union by the associated Federazione GILDA-UNAMS 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 hundreds of thousands of public sector fixed-term workers 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.

120. 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 hundreds of thousands of public sector fixed-term workers with more than 36 months' service to be granted tenured/permanent status within the public administration compared with both private sector workers who are stabilised pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001 and other categories of public sector fixed-term worker, such as 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.

121. The European Committee of Social Rights is therefore requested to intervene in order that, acting within the limits of its competence, it finds that the Italian state has violated the European Social Charter on the grounds cited above and recommends that those violations be rectified.

****

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

1- NCLA for the Schools Branch of 29 November 2007, signed by the CGS, formerly the CGU;

2- NCLA for the AFAM Branch of 4 August 2010, signed by the CGS, formerly the CGU;

3- finding by the ARAN concerning trade union representativeness within public sector employment for the three-year period 2016/2018, along with the data relating to the complainant CGS;

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-54/04;

8- Articles 19-29 and 55 of Legislative Decree No. 81/2015, repealing Legislative Decree No. 368/2001;
9- MEUR circular of 25 October 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 2001 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- Judgment No. 10127/2012 of 20 June 2012 of the Court of Cassation;
20- 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;
21- 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"];
22- Court of Justice judgment of 18 October 2012 in Joined Cases C-302/11 to C-305/11, *Valenza and others*;
23- Intervention of 25 October 2012 by the Federazione GILDA-UNAMS, associated with the complainant trade union organisation CGS, pursuant to Article 64(5) of Legislative Decree No. 165/2001 in case No. 57536/2011 R.G. before the *Tribunale di Napoli* between the claimant teacher Racca Immacolata and the MEUR;
24- Reference for a preliminary ruling to the CJEU from the *Tribunale di Aosta* of 3 January 2013 in Case C-50/13 *Papalia*;
25- Reference for a preliminary ruling to the CJEU from the *Tribunale di Napoli* of 29 January 2013 in Case C-62/13 within the proceedings registered under case No. 57536/2011 R.G. between the teacher Racca Immacolata and the MEUR, with intervention by the Federazione Gilda-Unams;
26- Written observations of 10 June 2013 by the Federazione Gilda-Unams filed with the Court of Justice in Case C-62/13 *Racca v. MEUR*;
27- 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 (*Racca*) and C-63/13;

28- 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;
29- Order No. 207/2013 of the Constitutional Court of 18 July 2013;
30- Order No. 206/2013 of the Constitutional Court of 18 July 2013;
31- Article 4 of Decree-Law No. 101/2013;
32- 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;
33- Order of 12 December 2013 issued by the CJEU in Case C-50/13 *Papalia*;
34- Judgment of the CJEU in Case C-361/12 *Carratù*;
35- *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;
36- Judgment No. 27363/2014 of 23 December 2014 of the Employment Division of the Court of Cassation;
37- Judgment No. 27481/2014 of 30 December 2014 of the Employment Division of the Court of Cassation;
38- Judgment No. 528/15 of 21 January 2015 of the *Tribunale di Napoli* in case No. 57536/11 R.G. between the claimant Racca Immacolata and the MEUR;
39- Judgment No. 260/2015 of the Constitutional Court of 11 December 2015;
40- Law No. 107 of 13 July 2015;
41- Judgments Nos. 4911, 4912, 4913 and 4914 of 14 March 2016 of the Joint Divisions of the Court of Cassation;
42- Judgment No. 5072 of 15 March 2016 of the Joint Divisions of the Court of Cassation;
43- 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;
44- Judgment No. 187/2016 of the Constitutional Court of 20 July 2016;
45- Orders Nos. 194 and 195/2016 of the Constitutional Court of 20 July 2016;
46- Reference for a preliminary ruling to the CJEU from the *Tribunale di Trapani* of 5 September 2016 in Case C-494/16 *Santoro*;
47- Judgment of the CJEU of 14 September 2016 in Joined Cases C-184/15 and 195/15 *Martínez Andrés and Castrejana López*;
48- Judgments Nos. 22552, 22553, 22554, 22555, 22556 and 22557 of 7 November 2016 of the Employment Division of the Court of Cassation;
49- 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 appended press release;
50- Judgment No. 153/2011 of the Constitutional Court on the public status of operatic foundations;
51- Order No. 27465 of 29 December 2016 of the Joint Divisions of the Court of Cassation;
52- Judgment No. 484/2017 of 12 January 2017 of the Regional Administrative Court for Lazio in case No. 12357/2015 R.G. brought by GILDA-UNAMS and other trade union organisations against the MEUR;
53- General Accounting Office [*Ragioneria dello Stato*], Commentary on the principal data contained in the annual accounts for the period 2007/2015;
54- Court of Auditors, 2016 report on the cost of public sector employment, May 2016, extract.

Rome, 28 February 2017

Gennaro Di Meglio, as legal representative of the CGS _____
Tommaso de Grandis, as advisor to the CGS _____
Vincenzo De Michele, as advisor to the CGS _____