EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

19 April 2018

Case Document No. 5

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

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

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Department of the European Social Charter Directorate General Human Rights and Rule of Law Council of Europe
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COLLECTIVE COMPLAINT NO. 144/2017

Confederazione Generale Sindacale CGS v. ITALY

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OBSERVATIONS and ARGUMENTS IN RESPONSE

by

CGS

concerning the merits and the basis for the complaint

1. We refer to letter no. 44-2018 LV/KOG of 9 February 2018 by which, following the first communication no. 7-2018 LV/KOG of 11 January 2018 with enclosed observations on the merits by the Italian Government in relation to the complaint filed by the trade union organisation CGS against the Italian state, the European Committee of Social Rights forwarded the "additional" observations of the Italian Government and set a (new) time limit of 4 April 2018 for arguments in response from the above-mentioned trade union.

2. First of all, it must be pointed out that when setting out the arguments in its defence in its initial observations, the Italian Government made substantial reference to compliance with the rights and principles enshrined in the European Social Charter, arguing that compliance with those principles derived from two sets of guidelines adopted by the Government, including in particular the guidelines issued by the President of the Council of Ministers to the ARAN [Agency for Representation in Bargaining with the Public Administrations] on 6 July 2017 containing general indications concerning the renewal of national collective agreements

within the public sector, as well as the guidelines issued to the ARAN by the Ministry for Simplification and Public Administration of 19 October 2017 concerning the Education and Research Branch along with the related management sector.

3. According to the Italian Government, as stated under point 2.7 on page 9 of the guidelines issued by the President of the Council of Ministers to the ARAN on 6 July 2017 "**in the contractual regulations on fixed-term employment relationships, in keeping with the general legal standards and the specific rules relating to public employment, without prejudice to the exceptions provided for by these rules and the specific provisions on standards in this sector, the following two related objectives shall be pursued**:

• full implementation of the "principle of non-discrimination" enshrined in EU law and in Article 25 of Legislative Decree no. 81 of 2015, which must be adopted as a "general regulatory principle" to govern contractual arrangements in a consistent and rigorous manner, with the specific aim of improving the "quality of work" for fixed-term workers, and also of avoiding the emergence of future disputes that could result in increased costs for the public purse;

• limitation of the use of this type of employment relationship exclusively to situations that can be classified as involving requirements of "genuine" flexibility and, accordingly, that are "exceptional" or "temporary" in nature, as required under Article 36(2) of Legislative Decree no. 165/2001.

4. Therefore, according to the initial written observations of the Italian Government, the two general principles laid down by Directive 1999/70/EC, which entered into force in July 2001 - that is the principle of non-discrimination compared to the employment conditions of comparable permanent workers (clause 4 of the framework agreement on fixed-term work) and measures to prevent the abuse of fixed-term contracts (clause 5 of the framework agreement) - will be applied **in future** in relation to fixed-term contracts in schools administered by the state only upon the renewal of the national collective agreements for the various branches of public sector employment.

5. In its "supplementary" observations, the Italian Government focuses solely on two branches of public sector employment, namely the Schools Branch and the AFAM [Advanced Training and Artistic and Musical Specialisation Institutions] Branch, whilst disregarding all other fixed-term workers in the other areas of public sector employment, such as fixed-term

workers unlawfully employed within local authorities, in the research and universities sector, the healthcare sector and the honorary justice sector, for which no position is taken regarding the alleged violations of the European Social Charter.

6. It is indeed the case that the CGS is one of the national trade union organisations that has signed both the NCLA [National Collective Labour Agreement] for the Schools Branch and the NCLA for the AFAM Branch.

7. However, the collective complaint of the CGS has been filed in order to denounce violations of the European Social Charter in relation to all public sector fixed-term workers on account of the failure to implement both clause 4 (non-discrimination) and clause 5 (preventive measures and sanctions against abuses) of the framework agreement on fixed-term work implemented by Directive 1999/70/EC.

8. As the collective complaint by the CGS has been ruled admissible, the Italian Government has been required to state its position on the merits in relation to all areas of public sector employment, and not only employment in the Schools Branch and the AFAM Branch, even though, as will be noted below, the initial observations and the supplementary observations of the Italian government appear to be unsatisfactory and incomplete even in relation to schools and to teachers in music conservatories, regarding which it has indeed stated its position.

9. The Committee's attention should also be drawn to the fact that the situation involving the misuse of fixed-term contracts and discrimination against fixed-term workers throughout the public sector in Italy was also discussed and censured within the Committee on Petitions of the European Parliament at the public hearing of 22 November 2017 (see Doc. 1) and further established by the Court of Justice of the EU itself in the "Santoro" judgment of 7 March 2018 (see Docs 2 and 3) in respect of all long-term public sector workers in insecure employment not hired in accordance with public competition procedures (the case in question involved one female worker out of the around 21,000 workers of local authorities in insecure employment in the Sicily Region, who has currently been working for the public administration for around 20 years without interruption).

10. Moreover, contrary to the assertions made by the Italian Government that the EU Commission dropped EU Pilot procedure no. 5943/13/ENPAL on the failure to recognise length of service to school teachers, the misuse of fixed-term contracts and discrimination against fixed-term workers throughout the Italian public sector has been censured by the **EU**

Commission in its written observations filed in proceedings concerning references for a preliminary ruling from the Court of Justice in the following cases:

a) **Case C-494/16 Santoro on long-term public sector workers in insecure employment** (see Doc. 4);

b) **Case C-331/17 Sciotto on the misuse of fixed-term contracts for public sector workers of operatic and orchestral foundations in insecure employment** (see Docs 5 and 6);

c) **Case C-466/17 Motter on discrimination regarding the terms of employment of fixed-term teachers in schools administered by the state** (see Docs 7 and 8);

d) **Case C-494/17 Rossato on effective compensation for the losses suffered by teachers in the AFAM Branch in cases involving the misuse of fixed-term contracts** (see Docs 9 and 10);

e) **Case C-472/17 Di Girolamo on the complete violation of Directives 1999/70/EC and 2003/88/EC in relation to justices of the peace** (see Docs 11, 12 and 13).

11. In addition, the EU Commission has undertaken to inform the EU Ombudsman within three months of the filing of the Santoro judgment by the Court of Justice on 7 March 2018 of the outcome of infringement proceedings 4231/2014, still in the EU Pilot stage (see Doc. 14).

12. Consequently, as situations have arisen following the submission of collective complaint no. 144/2017 by the CGS, reference will be made to all issues that have arisen in the EU Parliament and within preliminary reference proceedings before the Court of Justice concerning insecure public sector employment in Italy within both Case C-494/16 Santoro (concerning questions referred for a preliminary ruling by the *Tribunale di Trapani* by order of 5 September 2016, Doc. no. 47 to the collective complaint) and within the proceedings that are still pending before the EU Court of Justice in the cases Sciotto C-331/17 (the oral hearing for which has been scheduled for 14 June 2018, Doc. 15), Motter C-466/17, Rossato C-494/17 and Di Girolamo C-472/17 in order to confirm that, contrary to the assertions of the Italian Government, all the serious violations of the European Social Charter alleged in the collective complaint have indeed been committed.

The problem of insecure public sector employment in Italy before the European Parliament: the "symbolic" case of honorary judges

13. On 22 November 2017 a public session of the Committee on Petitions was held at the European Parliament in order to discuss the issue of "*Protection of the rights of workers in*

temporary or precarious employment, based on petitions received", i.e. as to how the member states and the EU Institutions have implemented Directive 1999/70/EC on fixed-term work.

14. A very high number of petitions were received from Italian citizens, specifically 28 out of 48, all of which related to insecure public sector employment, with ten concerning healthcare, five concerning schools, nine concerning honorary judges and four concerning Sicilian local authorities.

15. In particular, in relation to honorary judges, when deciding on collective complaint no. 102/2013 brought by the Association of Justices of the Peace against Italy due to the failure to ensure economic, legal and pension rights equivalent to those of stipendiary judges, the European Committee of Social Rights concluded in its report to the Committee of Ministers of 5 August 2016 that the violation of the Charter alleged was indeed well-founded.

16. In its decision on collective complaint no. 102/2013, the ECSR referred to the *O'Brien*[1] judgment of the Court of Justice concerning a similar question in relation to UK honorary judges, who were deemed to be equivalent to ordinary or stipendiary judges in terms of pension rights.

17. In communication DG EMPL/B2/DA-MAT/sk (2016) to the Italian Government, the EU Commission concluded EU Pilot case 7779/15/EMPL with a finding against the member state, giving notice of the impending launch of an infringement procedure concerning the compatibility with EU law of national legislation applicable to the employment of honorary judges and honorary deputy-prosecutors with regard to the misuse of successive fixed-term contracts (clause 5 of the framework agreement implemented by Directive 1999/70/EC), unequal pay (clause 4 of the framework agreement implemented by Directive 1999/70/EC) and discrimination in terms of leave (Article 7 of Directive 2003/88 in conjunction with clause 4 of the framework agreement implemented by Directive 97/81/EC and clause 4 of the framework agreement implemented by Directive 1999/70/EC) and maternity leave (Article 8 of Directive 92/85 and Article 8 of Directive 2010/41).

18. In the communication of 23 March 2017 (prot. D 304831), following the meeting held on 28 February 2017 to discuss petitions no. 1328/2015, 1376/2015, 0028/2016, 0044/2016, 0177/2016, 0214/2016, 0333/2016 and 0889/2016 on the status of justices of the peace in Italy, the President of the PETI Committee of the EU Parliament, Cecilia Wikström called on

[1] Court of Justice, judgment of 1 March 2012 in Case C-393/10, *O'Brien v. Ministry of Justice*, EU:C:2012:110.

the Minister of Justice to find a fair compromise concerning the employment position of Justices of the Peace in order to eliminate the "*clear unequal treatment on a legal, economic and social level between stipendiary and honorary magistrates*".

19. The response from the Italian state to the problem of honorary judges has been contemptuous as, by judgment no. 13721 of 31 May 2017 (see Doc. 16), the Joint Divisions of the Court of Cassation asserted the merely "voluntary" nature of the work of justices of the peace and found that Legislative Decree no. 116/2017 reforming the honorary judiciary had been adopted on that basis, which denies any equivalence on an economic or legislative level or in terms of pension rights between honorary and stipendiary judges, even subjecting the former to a strict hierarchical, organisational and almost servile subordination to the latter. In doing so it has demonstrated that the Italian legislature and government have no intention of resolving the problem of affording effective protection, not only in terms of pension rights, to civil servants who, according to the statistics, resolve 50% of civil and criminal litigation within reasonable time-scales, thereby ensuring that the right to a fair trial is upheld.

20. Furthermore, by judgment no. 99 of 4 January 2018 (see Doc 17), the Court of Cassation rejected a claim brought by a justice of the peace seeking compensation for damage to health and non-material and existential losses resulting from an infection caused by the tuberculosis bacterium contracted whilst working at a Centre for Identification and Expulsion (CIE). The claimant judge, whose health is now seriously compromised, was not only refused the pension rights sought as a worker in respect of an illness contracted at work but was also ordered to pay the considerable costs of the proceedings.

21. The failure by the Italian Government to comply with the ECSR decision on collective complaint no. 102/2013 was subjected to harsh criticism on television in the investigation by the programme *Report* broadcast on RAI 3 concerning the overall situation of the insecure employment of honorary judges (see Doc. 18), which is nothing other than a faithful reflection of the insecure employment situation of all fixed-term public sector workers.

The new interpretative questions submitted to the Court of Justice by the Italian national courts concerning protection of the rights of insecure public sector workers

a) The questions referred to the EU Court of Justice for a preliminary ruling by the Trento Court of Appeal concerning insecure workers in schools

22. As evidence that that Italian government's assertions that no violations of the European Social Charter have been committed in the Schools Branch (and in the AFAM Branch) are not true, by the order of 17 July 2017 in Rossato Case C-494/17 (appended) the Trento Court of Appeal criticised before the Court of Justice dozens of judgments of the Court of Cassation on insecure employment within schools, concluding – convincingly – that the interpretative framework of the Supreme Court and Article 1(131) and (132) of Law no. 107/2015 were at odds with the decisions of CJEU, and in particular with the judgment of 26 November 2014 in *Mascolo* (see Doc. 35 to the collective complaint) and with the order of 12 December 2013 in *Papalia* (see Doc. 33 to the collective complaint).

23. The case at issue in these proceedings concerned the individual right of a teacher from the AFAM Branch who had been granted tenured status after more than 11 years of supply teaching in vacant and available positions, following the failure to hold competition procedures in the sector for more than 25 years, to compensation for the losses suffered as a result of the unlawful imposition of insecure employment due to the failure by the state to apply the sanctions provided for under Legislative Decree no. 368/2001.

24. Contrary to the supplementary observations filed in relation to this complaint, in its written observations in Rossato Case C-494/17 (see Doc. 19) the Italian Government asserts that the AFAM Branch is subject to the same rules as the Schools Branch as regards both the (non-existent) measures to prevent abuse and the principle of (non) discrimination regarding the terms of employment.

25. Having discontinued infringement procedure no. 2010/2124 on insecure workers in schools – in which a reasoned opinion had even been formulated on 21 November 2013 finding a full violation of Directive 1999/70/EC to have occurred in two respects due to the lack of measures to prevent abuse as well as discrimination in terms of career against supply teachers and ATA [administrative, technical and auxiliary] staff – in its **written observations in Case C-494/17 Rossato** (see Doc 10, cited above) filed on 28 November 2017, the **European Commission** reached the diametrically opposite conclusion in relation to the principles of law asserted by the Court of Cassation in the judgments on insecure workers in schools, accepting the doubts concerning a violation of EU law expressed by the Trento Court of Appeal as the referring court: "***Clause 5 of the framework agreement annexed to Council Directive 1999/70/EC of 28 June 1999 must be interpreted as precluding the application of***

national provisions such as those at issue in the main proceedings, which provide for the conversion of temporary teachers' fixed-term contracts into contracts of indefinite duration with respect to the future, without retroactive effect and without compensation for the misuse of fixed-term contracts during the period prior to the entry into force of such provisions, unless the national courts discern within internal law any other remedies that could be capable of duly sanctioning the misuse of fixed-term contracts and of avoiding the consequences of the violation of EU law".

26. It should also be pointed out that dozens of applications have already been filed with the European Court of Human Rights against Italy, which were ruled admissible and joined in application no. 22417/17 *Billeci* as well as application no. 69611/2017 *Tenore and Anief* against the judgments of the Court of Cassation on insecure employment in schools, alleging a violation of the ECHR on the grounds that the Supreme Court had refused all effective compensatory relief and stability of employment to supply teachers in schools.

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b) The references for preliminary rulings to the CJEU concerning the concept of "voluntary" honorary judge

27. By three identical orders, the Justices of the Peace of L'Aquila[2] and Rome[3] submitted references for preliminary rulings to the CJEU objecting to judgment no. 13721/2017 of the Joint Divisions of the Court of Cassation which, pre-empting the provisions contained in the reform of the rules governing honorary judges (Legislative Decree no. 116/2017), held that the employment relationship of justices of the peace could not be classified as public sector employment, quasi self-employment [*lavoro parasubordinato*] or self-employment, asserting that it constituted "voluntary work", such as that of voluntary fire officers in France falling under petitions no. 737-13, 966-13, 1047-13 and 1071/16, which were discussed by the PETI Committee of the European Parliament in the public hearing of 22 November 2017.

[2] Justice of the Peace of L'Aquila, order of 2 August 2017, Case C-472/17, *Di Girolamo v. Ministry of Justice*, Doc. 11, cited above.

[3] Justice of the Peace of Rome, order of 16 October 2017, Case C-600/17, *Cipollone v. Ministry of Justice*; order of 3 November 2017, Case C-626/17, *Rossi and others v. Ministry of Justice*, in which 900 honorary judges/law officers intervened (658 justices of the peace, 102 honorary judges in the courts of first instance and 140 honorary deputy-prosecutors) along with the trade union associations for honorary judges *Unagipa*, *Associazione nazionale Giudici di pace* [National Association of Justices of the Peace], *Coordinamento magistratura giustizia onoraria* [Co-ordination justices of the peace], *Organismo unitario della magistratura onoraria – magistrati onorari uniti* [Unitary Body for Honorary Judges – Honorary Judges United], Doc. 12, cited above.

28. The orders requesting a preliminary ruling submitted by the justices of the peace seek a declaration of equivalence with stipendiary judges in terms of remuneration, legal rights and contributions, in accordance with Directives 2003/88/EC and 1999/70/EC, including in relation to stability of employment, raising also the (central) question of an independent and impartial tribunal to protect the fundamental rights of workers above all where they perform judicial functions.

29. The issue of honorary judges has also taken on the particular air of a challenge between the national legislature on the one hand and the EU Parliament, the European Commission, the Court of Justice and the Council of Europe on the other, following the hearing of the petitions presented by the justices of the peace and as discussed before the PETI Committee at its session of 28 February 2017.

30. Before the adoption of the order by the President of the Court of Justice on 28 November 2017 (see Doc. 20) and the withdrawal by the Justice of the Peace of L'Aquila of the fourth question referred for a preliminary ruling on 18 February 2018 (see Doc. 21), the European Commission had already endorsed the first three questions raised by the referring court, specifically in its written observations in Case C-472/17 Di Girolamo, filed on 23 November 2017 (see Doc. 13, quoted above.):

"***1. Insofar as the justice of the peace provides services for a given period of time to another person and under the direction of the latter in exchange for remuneration, he/she is considered to be a worker within the meaning of Directive 2003/88/EC and Directive 1999/70/EC. However, it falls to the national court to perform that assessment with reference to the said criteria.***

2. Justices of the peace are workers who are comparable to stipendiary judges within the meaning of clause 4 of the framework agreement unless there is some difference resulting from the content of the activity performed and the criteria for access to the respective roles, provided that those criteria: a) require different academic qualifications or experience, b) pertain to the subject matter of those roles and c) are not related to the duration of the employment relationship. However, it falls to the national court to perform that assessment on the basis of the said criteria.

3. Insofar as, on the one hand, different academic qualifications or experience may be required in order to access the roles of justice of the peace and stipendiary judge and, on

the other, the selection procedures may be based on criteria that are pertinent to the subject matter of the roles to be performed and not related to the duration of the appointment, which it is for the national court to assess, the Commission considers that such circumstances may in principle constitute objective justification for a difference in treatment in the enjoyment of the right to paid leave. However, that difference in the criteria for access to the respective roles cannot justify any denial of the right to paid leave to justices of the peace. Clause 5 of the framework agreement does not preclude national legislation under which certain measures are applicable exclusively to justices of the peace, such as measures to prevent and sanction abuses in the recourse to fixed-term contracts."

31. Conversely, in its written observations in Case C-472/17 Di Girolamo, filed on 22 November 2017 (see Doc. 22), the Italian Government objected to the questions referred for a preliminary ruling, arguing that the work carried out by justices of the peace was only occasional in nature and that the criteria for the establishment of an employment relationship, along with the corresponding legislative, economic and social security guarantees, had not been fulfilled, asserting that the position of UK honorary judges under the *O'Brien* judgment of the Court of Justice was different, and disregarding entirely the decision made by this Committee in relation to collective complaint no. 102-2013 brought by A.N.Gi.P., whose President and legal representative Di Girolamo is the very same applicant in Case C-472/17.

32. In addition to the lack of any effective legislative, remunerative and social security protection safeguards for honorary judges, it is necessary to point out the absurd Kafkaesque situation of the former insecure public sector workers from the Italian Red Cross, who were initially engaged as "volunteers" by the public body and subsequently hired under fixed-term contracts of employment, which were then rendered permanent pursuant to Article 1(518) of Law no. 296/2006 and judgment no. 6077/2013[4] of the Joint Divisions of the Court of Cassation due to the accrual of 36 months' service with the same public administration; these workers became subject to redundancy procedures on 1 February 2017 as permanent tenured staff in service in the court registries of the Ministry of Justice, that is in the very same judicial offices in which the honorary judges work, who by contrast are deemed to be volunteers in spite of the fact that they have always worked for the state, in the same way as stipendiary judges.

[4] Court of Cassation, Joint Divisions, judgment no. 6077 of 12 March 2013.

33. Moreover, by the recent judgment no. 17101/2017,[5] the Court of Cassation recognised a "social utility worker" (SUW) as an employee of the Ministry of Justice, clarifying that, with regard to employment as social utility or public utility workers, the legislative classification of that special relationship, which has welfare and training elements, does not preclude the possibility that the actual relationship may have the characteristics of an ordinary employment relationship, thereby resulting in the application of Article 2126 of the Civil Code, and that, for the purposes of the classification as employment of work performed as a *de facto* employee of a public administration, it is a relevant consideration that the worker is actually incorporated into the public organisation and is allocated to a service falling under the institutional purposes of the administration.

34. Finally, as clarified in paragraph 39 of collective complaint no. 144-2017 of the CGS, by the judgment in *Valenza and others* of 18 October 2012 (see Doc. 22 to collective complaint no. 144-2017), the Court of Justice of the EU already 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) and 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.

35. 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.

[5] Cf. Court of Cassation, Employment Division, judgment no. 17101 of 11 July 2017.

36. As mentioned above, the **European Commission** has already argued in its **written observations in Case C-472/17 Di Girolamo** that the fact that a public competition has been held does not constitute a sufficient basis for legitimate discrimination regarding the terms of employment between comparable permanent workers and fixed-term workers within public sector employment.

37. Essentially, the total ban on the conversion of fixed-term contracts into permanent contracts in public sector employment, which the Italian Government infers as a principle inherent within the national constitutional order, has been merely an excuse for discriminating against insecure public sector workers, promoting the stabilisation of employment relations solely for those with "undue support" from the political class, so much so as to be hired and granted tenured status even without a public competition, as occurred in the cases involving the Italian Red Cross and the independent authorities.

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c) **The references for preliminary rulings made to the CJEU by the *Tribunale di Trento* concerning the refusal to apply the principle of equality and non-discrimination in relation to the terms of employment of insecure workers in schools administered by the state (and public sector workers in insecure employment in general)**

38. By the order of 18 July 2017 in Case C-466/17 Motter, the *Tribunale di Trento* objected to the full recognition of length of service for staff working in schools administered by the state in respect of periods falling prior to the granting of tenure, in accordance with a horizontal and direct application of clause 4 of the framework agreement on fixed-term work, on the basis of the supposed fundamental principle of national legislation of the requirement of having passed a public competition as a legitimate criterion for discrimination.

39. In the event that agreement is reached concerning the NCLA for the new "Education and Research" Branch dated 8 February 2018 (see Doc. 23), which will replace the two NCLAs for the Schools and AFAM Branches governing the employment relations of teachers, ATA staff, researchers, technical staff and administrative staff within the branch comprising schools, universities, research and advanced artistic and musical training, the section entitled "Remuneration" (Articles 35 et seq.) does not contain any provision concerning the recognition of length of service for the purposes of remuneration, and more specifically, for

recognition of seniority depending upon whether the service provided was performed under a permanent or a fixed-term contract.

40. In its written observations in Case C-466/17 Motter, filed on 20 November 2017 (see Doc. 24), the Italian Government confirmed for all intents and purposes the applicability of Article 485(1) of Legislative Decree 297/1994, as it did on page 4 of the additional observations in the previous collective complaint procedure, that is of the rule apparently providing for a difference in the treatment of the two types of relationship, which is specifically less favourable for teachers who have worked under fixed-term contracts, who are in fact penalised with a less favourable calculation of length of service for the purposes of salary increases based on length of service.

41. In the reference for a preliminary ruling, the *Tribunale di Trento* takes account of the objective discrimination under Italian law against fixed-term teachers who are subsequently granted tenured status by running through eligibility rankings to be drawn upon until exhaustion and asked the Court of Justice whether that discrimination could be justified by the sole fact that the teacher had passed a competition.

42. However, as is apparent from the **conclusions** contained in the appended **written observations of the European Commission in Case C-466/17 Motter** (see Doc. 8, cited above), that legislative provision is clearly discriminatory since work as a teacher in Italy is dependent upon on accreditation to teach (as accreditation is a precondition for working as a teacher for both types of worker, whether hired under a fixed-term contract or following a public competition) and not upon the fact of having been successful in a public competition, which is a prerequisite solely for public sector positions (cf. moreover the additional observations of the Italian Government, page 1, paragraph 3, first sentence) and is certainly not a benchmark for the quality of the service performed: "***Clause 4 of the framework agreement on fixed-term work annexed to Council Directive 1999/70/EC of 28 June 1999 (in OJEC L 175 of 10 July 1999, p. 43), precludes a provision such as that at issue in the main proceedings that limits the consideration of length of service accrued under fixed-term contracts of employment whilst permitting the consideration of that length of service in full for tenured teachers, unless the fact of having successfully completed a competition procedure is such as to entail a quality of teaching service that is greater compared to that provided by a fixed-term worker. It falls to the national court to perform such an***

assessment, provided that the justification for the difference in treatment is based on requirements pertaining to the position that must be filled through the recruitment procedure and provided that those requirements are not related to the specific duration of the employment relationship."

43. It is therefore apparent that we are far from a situation in which there is effective equality of treatment in terms of salary between fixed-term workers and permanent workers. Moreover, this applies not only for the new "Education and Research" Branch but also for public sector workers with a fixed-term contract of employment, whose terms of employment are less favourable than those of comparable permanent workers, unless they have been privileged or, more correctly, unfairly favoured by a particular politician.

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d) The request for a preliminary ruling from the Rome Court of Appeal in Case C-331/17 Sciotto concerning workers in in insecure employment in operatic and orchestral foundations

44. By the order of 15 May 2017 in Case C-331/17 Sciotto, the Rome Court of Appeal sent a request for a preliminary ruling to the Court of Justice, setting out a position under national legislation characterised by the total lack of any preventive measures provided for under clause 5(1) of the Community framework agreement on fixed-term work for public sector fixed-term workers employed by operative and orchestral foundations.

45. The Rome Court of Appeal essentially attempted to defend the "living law" [i.e. uniform and settled case law] of the Court of Cassation on schools (judgments no. 22552, 22553, 22554, 22555, 22556 and 22557 of 7 November 2016), applying the "edict" of the former First President of the Supreme Court of 7 November 2016 (prot. no. 0022549, see Doc. 49 to the CGS collective complaint and paragraph 90 of the complaint) on public sector workers in insecure employment (judgment no. 5072/2016 of the Joint Divisions) and on fixed-term contracts that do not contain any objective reasons for the fixed term concluded by the public state body (see the **Carratù**[6] judgment of the Court of Justice, Doc. 25) *Poste italiane* (judgment no. 11374/2016 of the Joint Divisions, Doc. 26) and to move towards ensuring protection under the clause stipulating a maximum of 36 months in service solely and exclusively through compensation and without conversion into a permanent contract.

[6] Court of Justice, judgment of 12 December 2013 in Case C-361/12 *Carratù v. Poste Italiane* , EU:C:2013:830.

46. The main dispute concerned the case of the worker Sciotto, who had not requested application of the legislation on successive contracts (which does not apply to operatic and orchestral foundations pursuant to Article 11(4) of Legislative Decree no. 368/2001) and could not request that it be applied as the various fixed-term contracts had not reached the limit provided for under Article 5(4-bis) of Legislative Decree no. 368/2001, although she failed to specify that the consolidated case law of the Court of Cassation,[7] the Constitutional Court,[8] the Court of Justice in its judgment in *Commission v. Grand Duchy of Luxembourg* (the only formal judgment concerning a failure to implement Directive 1999/70/EC) had for some time asserted the principle within the performing arts sector that objective reasons should apply as the sole preventive and punitive measure to ensure the lawful inclusion of a contractual term, including in relation to the first and only fixed-term contract.

47. **In paragraph 56 of its written observations, filed on 19 September 2017** (see Doc 6, cited above), **the EU Commission responded** to the Rome Court of Appeal, which had invoked in the reference for a preliminary ruling the authority of the "living law" laid down by judgment no. 11374/2016 of the Joint Divisions on fixed-term contracts containing no objective reasons concluded by *Poste italiane*, arguing that the framework agreement – and in particular clause 5 – precluded any internal legislation, such as that at issue in the main proceedings, that does not provide for any measure required under that clause in order to prevent the misuse of fixed-term contracts of employment.

48. In paragraphs 7 and 8 of its written observations in Case C-331/17 Sciotto, the EU Commission points out that the temporary objective reasons provided for under clause 5(1)(a) of the framework agreement transposed in Directive 1999/70/EC even as regards the first, and potentially only, fixed-term contract continue, notwithstanding the "Jobs Act", to constitute the preventive measure applicable in the national legal system, except in relation to operatic and orchestral foundations (paragraph 9 of the Commission's written observations) to which the provisions of Article 1(01) and (2) of Legislative Decree no. 368/2001 do not apply, as provided for under Article 3(6) of Decree-Law no. 64/2010 (converted with amendments into Law no. 100/2010).

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[7] Cf. Court of Cassation, judgments no. 208/2017, 18512/2016, 17064/2015, 10924/2014, 10217/2014, 10124/2014, 10123/2014, 10122/2014, 243/2014, 6547/2014, 5749/2014, 5748/2014, 18263/2013, 11573/2013 and 247/2011.

[8] Constitutional Court, judgment no. 260 of 11 December 2015.

49. In fact, according to the EU Commission, Article 1(1) and (2) of Legislative Decree no. 368/2001, as applicable to the particular case (prior to the issue of Decree-Law no. 34/2014) were replaced by provisions of identical content, respectively Article 1(1) and Article 19(4) of Legislative Decree no. 81/2015 in that, according to clause 5(1) of the framework agreement, having regard also to point 7 of the general considerations contained in the framework agreement, "*27. .....an abuse is committed whenever successive fixed-term contracts are used without any objective justifications. 28. In the above-mentioned judgment in Commission v. Luxembourg concerning casual workers in the performing arts sector, the Court recalled in this regard the objective of clause 5(1) of the framework agreement, which is to prevent the recourse to successive fixed-term employment contracts or relationships, which are considered as a potential source of abuse of workers, specifically by laying down a certain number of provisions offering 'minimum protection' with the aim of avoiding the creation of a situation of insecurity for employees (...). 32. In the judgment cited, the Court therefore concluded that national legislation that does not make the employment of fixed-term staff dependent on specific legal requirements related to the nature of the activity carried out, but that allows for that employment option in a general and abstract manner, so much so as to enable such workers to be hired under fixed-term contracts also for tasks that, on account of their nature, are not temporary, is not compatible with clause 5 of the framework agreement*." (written observations of the Commission in Case C-331/17 Sciotto, paragraphs 27-28 and 32).

50. The EU Commission continues in paragraphs 35-38 of its written observations in Case C-331/17 Sciotto to discuss the need for temporary objective reasons to justify the inclusion of the term in the employment contract, perfectly in line with the position already set out by the Constitutional Court in judgment no. 260/2015 on the unconstitutionality, and inconsistency with EU law, of legislation precluding stability of employment for public sector workers in insecure employment in operatic and orchestral foundations.

51. Finally, in paragraphs 46-51 of its written observations in Case C-331/17 Sciotto, the EU Commission objects to the "horizontal" discrimination "*between the fixed-term workers employed by operatic and orchestral foundations and workers employed by other employers, for whom the recourse to fixed-term contracts must be justified by objective reasons*".

52. The EU Commission – convincingly – proposes that the national court "disapply" the internal rule that precludes protection, which has moreover already been applied within the

consolidated case law of the Court of Cassation referred to in relation to the employees of operatic and orchestral foundations, asserting the direct applicability of the "objective" reasons as a justification for the inclusion of a fixed-term in the contract and restoring the situation whereby the permanent contract constitutes the rule and the fixed-term contract the exception.

53. The EU Commission is essentially proposing that the Court of Justice invite the national court, in the light of the Community concept of objective reasons set forth in the Adeneler judgment[9] of the Court of Justice (see Doc. 27), to move beyond (i.e. disapply) the internal law that completely precludes the application of any preventive measure or sanction against the abusive use of fixed-term contracts in the "public" operatic and orchestral performance sector, but that in actual fact precludes the application of any measure of effective sanctions whatsoever throughout all public sector employment, as is apparent in the Santoro judgment of the Court of Justice of 7 March 2018, a decision concerning long-term or extremely long-term (in excess of 36 months) insecure public sector employment where competition procedures have not been followed.

54. On the other hand, in its **written observations filed on 21 September 2017 in Case C-331/17 Sciotto** (see Doc. 28). the **Fondazione Teatro dell'Opera di Roma** asserts in paragraphs 10 to 12 on pages 11-14 the continuing validity of the sole preventive measure of temporary objective reasons also within the public sector of operatic and orchestral foundations, referring to and submitting within the proceedings the fundamental judgment no. 12985/2008 of the Court of Cassation (see Doc. 29) on the first and potentially only fixed-term contract concluded by the state public body *Poste italiane*, held to be unlawful pursuant to Article 1(1) and (2) of Legislative Decree no. 368/2001 on account of the lack of temporary objective reasons:

"***10. In actual fact however, the non-application to operatic and orchestral foundations of the provisions of Article 1(01) and (2) of Legislative Decree no. 368 of 6 September 2001 does not mean that there is no reason for the inclusion of a term and therefore does not affect the application of the measure to prevent abuse pursuant to letter a) of clause 5.***

The stance of the Rome Court of Appeal is in actual fact based on a mistaken interpretation of the aforementioned provision contained in Article 1(2) of Legislative Decree no. 368/01: and in fact, that provision is limited to imposing a formal burden, namely the requirement

[9] Court of Justice, Grand Chamber, judgment of 4 July 2006 in Case C-212/04 *Konstantinos Adeneler et al v. Ellinikos Organismos Galaktos (ELOG)*, EU:C:2006:443.

to specify the reason in writing, the contents of which are referred to in paragraph 1. It is paragraph 1 (providing that a fixed-term appointment may be made for technical, organisation or production requirements or for the purpose of replacing another worker) that constitutes implementation of one of the three measures (the first, provided for under letter a) indicated in clause 5 of the Framework Agreement. Moreover, paragraph 1 has not been impacted by Article 3(6) of Law no. 100/2010 and is clearly applicable also to operatic and orchestral foundations.

To conclude on this point, it is hardly necessary to point out that the measure provided for under Clause 5 of the Framework Agreement stipulates only the requirement that fixed-term appointments be based on 'objective reasons', but does not in any sense require them to be formally stated in writing, which therefore places Article 2(1) "outside" the protective measures under discussion.

This means that, under Legislative Decree no. 368/2001, and despite the legislative changes introduced by Article 3(6) of Law no. 100/2010, the fixed-term contracts concluded by operatic and orchestral foundations and the related renewals will continue to be based on 'objective reasons', with the result that the contested provision is fully compliant with Community law.

D) ……

10. The Rome Court of Appeal notes (in paragraph 12 of the order) the lack of provision in Italian law for compensation for losses 'construed as a direct consequence of the recognition of the existence of a permanent employment relationship ab initio', given that no such relationship can be considered to exist (for operatic and orchestral foundations) as the principle of permanent employment no longer applies as a typical form of employment contract.

11. ……

D1) The right to the conversion of a fixed-term contract into a permanent contract as an inherent feature of national law

12. In any case, the fact that operatic and orchestral foundations are not subject to Article 1(01) of Legislative Decree no. 368/01 has not prevented the courts from ordering the conversion of fixed-term contracts into permanent contracts.

The issue may be expanded also beyond the operatic and orchestral sector, as it must be pointed out here that the original formulation of Legislative Decree no. 368/2001 did not contain any provision such as that laid down in Article 1 of Law no. 230/1962 on the 'residual' nature of fixed-term contracts, according to which the permanent contract constitutes the common form of employment relations.

That principle was reintroduced by Article 1(39) of Law no. 247 of 24 December 2007, with effect from 1 January 2008.

For that reason, during 2001 and 2007, interpreting bodies and legal practitioners were required to address the problem as to whether or not the sanction of conversion still applied in the event that a fixed term had been included unlawfully.

The case law has always considered the fact that an employment contract is presumed as a rule to be permanent as a principle inherent within our legal order.

In point of fact, the argument that has been afforded absolute precedence by the courts, including the Court of Cassation, was that the principle laid down by Article 1 of Law no. 230/1962 remained a kind of general rule of employment law, with the result therefore that the sanction of the conversion of a fixed-term contract into a permanent contract remained in the event that the clause stipulating the term proved to be invalid.

In particular, the Court of Cassation (Employment Division, judgment no. 12985/2008) has clarified that:

'The Court observes first and foremost that, even prior to the explicit introduction of the sentence 'setting out the maxim' by the recent Law no. 247 of 24 December 2007 ('An employment contract shall as a rule be permanent'), Article 1 of Legislative Decree no. 368 of 2001 (implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work) has without doubt confirmed the general principle that an employment relationship must normally be permanent, as the inclusion of the term always constitutes an exception from that principle'.".

55. Conversely, in its written observations filed on 28 September 2017 (see Doc. 30) in Case C-331-17, the **Italian Government** argues that the only effective punitive measure against the misuse of fixed-term contracts in public sector employment is the compensation provided for under Article 32(5) of Law no. 183/2010, as imposed by judgment no. 5072/2016 of the Joint Divisions, which is available in the event of service in excess of 36 months and not for the failure to state objective reasons.

56. With regard to the absolute lack of protection for fixed-term public sector workers hired on the basis of legitimate public competition procedures under a single fixed-term contract, which is deemed to be unlawful due to the failure to state temporary objective reasons, the opposite view has been asserted within the proceedings pending before the European Court of Human Rights in applications nos. 3247/2018 *Cantaro v. Italy* (see Docs 31 and 32) and 3277/2018 *Bizzarri v. Italy*, which have already been declared admissible, challenging decisions of the Court of Cassation that have refused any protection, including compensation under Article 32(5) of Law no. 183/2010 as required under judgment no. 5072/2016 of the Joint Divisions of the Court of Cassation, which has been interpreted within the subsequent case law of the Supreme Court as being applicable only in the event that the limit of 36 months' service in the public administration is exceeded.

57. Case C-331/17 Sciotto will be discussed before the 10th Chamber of the Court of Justice at the public hearing of 14 June 2018 (see Doc. 15, cited above).

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e) The Santoro judgment of the EU Court of Justice on long-term precarious public sector employment of staff hired without following competition procedures

58. In the Santoro judgment of 7 March 2018 (see Doc. 2, cited above), accepting the opinion delivered by Advocate General Szpunar (see Doc. 3, cited above), the Court of Justice responded as follows to the requests for a preliminary ruling submitted by the *Tribunale di Trapani*: "***Clause 5 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 not precluding national legislation which, on the one hand, does not punish the misuse of successive fixed-term contracts by a public sector employer through the payment of compensation to the worker concerned for the lack of conversion of the fixed-term employment relationship into an employment relationship of indefinite duration, but, on the other hand, provides for the grant of compensation of between 2.5 and 12 times the last monthly salary of that worker together with the possibility for him to obtain full compensation for the harm by demonstrating, by way of presumption, the loss of the opportunity to find employment or that, if a recruitment competition had been duly organised, he would have been successful, provided that such legislation is accompanied by an effective and dissuasive penalty mechanism, a matter which is for the referring court to verify.***"

59. The *Tribunale di Trapani* had disputed the adequacy of the sanction adopted by the Joint Divisions of the Court of Cassation in judgment no. 5072/2016 comprising a lump sum set at between a minimum of 2.5 and a maximum of 12 monthly salary payments as punishment for the misuse of fixed-term contracts for a precarious employee of a Sicilian local government body, the Municipality of Valderice, who had performed continuous service (and was still working) at the same body in order to cover structural staffing requirements for more than 20 years, initially under contracts for social utility workers, subsequently under "continuous collaboration contracts", and finally under formal fixed-term contracts, without any selection procedure either at the start of public sector employment or during the employment relationship, within an 'environmental' context characterised by around 21,000 workers in identical circumstances, who were still employed as workers in insecure employment as

Sicily Region had not held public competitions for access to the local public administrations since 1958.

60. As regards the inadequacy and inefficacy of the lump sum penalty imposed by the Joint Divisions in judgment no. 5072/2016 with reference to the repealed Article 32(5) of Law no. 183/2010, the **EU Commission is very clear in paragraphs 35-44 of its written observations in Case C-494/16** (see Doc. 4, cited above), sharing the puzzlement of the court that made the reference for a preliminary ruling and objecting to the argumentation followed by the Court of Cassation, above all in the light of the evident contrast between the position stated by the Court of Cassation and the view taken by the Court of Justice in the *Papalia* order, with the Commission also endorsing the comparison with fixed-term workers in the private sector, which appeared to have been excluded in the initial part of its written observations:

"*As regards the effectiveness of the remedies indicated in judgment no. 5072/2016 of the Joint Divisions, the Court has already stipulated that, if a member state decides to penalise a violation of EU law through a remedy of compensation,* ***that compensation must first and foremost be effective and have a suitable dissuasive effect in the sense of enabling: a) adequate redress for the harm suffered; b) full compensation for that harm and c) redress in excess of purely token compensation.***" (Paragraph 35).

61. In fact, the EU Commission asserts that "***in the reference for a preliminary ruling, the referring court expresses strong doubts regarding the specific availability of such further compensation for losses and the Commission considers that these considerations are well founded, above all because it does not appear that the Joint Divisions provided the additional information required by the Court in Papalia regarding the damage for loss of opportunity: as is noted by the referring court, the Joint Divisions have not excluded the need for allocating the burden of proof for damage for loss of opportunity***." (Paragraph 41).

62. As regards the second reference for a preliminary ruling made by the *Tribunale di Trapani* concerning the search for an alternative sanction to that endorsed by the Joint Divisions that can ensure equivalence of protection for insecure public sector workers, the EU Commission bases its position on paragraphs 47-59 of its written observations in Case C-494/16 between on the one hand the conversion of the fixed-term contract into a permanent contract in addition to the lump sum compensation, as is the case for private sector workers, referring in

note 35 in paragraph 51 to the judgment in *Martínez Andrés and Castrejana López*, and on the other, compensation in lieu of reinstatement with 15 months' remuneration (again in addition to the lump sum compensation), pursuant to Article 18(5) of Law n. 300/1970, as in force prior to the amendments introduced by Law no. 92/2012:

"*as demonstrated by the proceedings that resulted in judgment no. 5072/2016 of the Joint Divisions, decided at first instance by the Tribunale di Genova in the light of the judgment of the Court in the Marrosu and Sardino case, which was however subsequently annulled by the Joint Divisions by judgment no. 5072/2016, workers who are unable to convert their fixed-term employment relationship into a permanent relationship, such as those who have concluded a fixed-term employment contract with the public administration, may nevertheless claim compensation due to the failure to reinstate them into their job, a remedy which is expressly provided for under Italian law in the event of unfair dismissal, as stated by the Commission in paragraph 19 of its written observations, to which it refers*." (Paragraph 58).

63. As regards the principle of equivalence, the written observations of the EU Commission in Case C-494/16 Santoro appear to allude to the equivalent sanction which the national legislature was forced to put in place through Article 1(509) of the Finance Law no. 296/2006 in the light of the *Marrosu-Sardino* judgment of the Court of Justice, putting in place a plan for stabilising fixed-term public sector employees with more than 36 months' service, drawing a distinction depending upon whether the previous fixed-term contract had been concluded "*by selection procedures involving a competition or provided for by law*" or "*by other procedures*", with the obligation in the latter eventuality to carry out reserved selection tests.

64. **In his opinion** (see Doc. 3, cited above), in particular in the statement of reasons, **Advocate General Szpunar** endorses the written observations of the EU Commission as regards the answers to be provided to the national court.

65. In particular, **regarding the question as to whether the scope of the lump sum compensation provided for under Article 32(5) of Law no. 183/2010 constitutes a sufficiently effective and dissuasive sanctions measure**, Advocate General Szpunar concludes in paragraphs 61-62 and 64-66 that it does not:

"*61. With regard to the lump sum compensation of between 2.5 and 12 monthly payments at the rate of the last salary payment provided for in Article 32(5) of Law No 183, according to*

the indications given by the referring court, where a fixed-term contract is converted in the private sector, such compensation replaces only the income that would have been received 'pending' a successful outcome for the worker. However, so far as the public sector is concerned, lump sum compensation, although purely ancillary, is in practice the only measure for penalising abuse and cannot therefore be regarded as an effective deterrent.

62. In a case of misuse of fixed-term contracts, it may be that the infringement has been repeated and systematic over a number of years. Conversion of such contracts into a single contract of indefinite duration would make it possible to penalise such misuse and permanently nullify its consequences, irrespective of when it took place. However, in the present case, there is no such possibility and the compensation measures provided for in Italian law appear to apply without distinction to all forms of abuse within the limits laid down in Article 32(5) of Law No 183.

64. It is true that under Article 32(5) of Law No 183, the final amount of the lump sum compensation of between 2.5 and 12 months' pay is set by the national court, taking into account the criteria laid down in Italian law, which allows the circumstances of the case to be taken into account in determining the amount of compensation. In that regard, the Commission has stated that those criteria also relate to the 'conduct' of the employer – which makes it impossible to support the view that lump sum compensation was not intended as a penalty measure – and, hence, that they permit the duration of the abuse to be taken into account.

65. However, when the abuse reaches a certain level, the penalty comes up against a ceiling. As a result, earlier infringements are not penalised proportionately in cases of manifest abuse. Also, this standardising of penalties, instead of making it possible to avoid repetition of abuse, may encourage it, owing to the existence of a universal limit that cannot be exceeded, despite the repeated nature of the abuse. I share the Commission's view that the lack of proportion between the potential extent of the abuse, which may have had consequences over a number of years, and the lump sum compensation, which cannot exceed twelve monthly salary payments, is likely to weaken the deterrent effect of the penalties.

66. Therefore, in order to remedy persistent abuse, the limits of the lump sum compensation could be adjusted to take into account the length of the period of employment under fixed-

term contracts entered into in breach of the rights conferred by EU law, while at the same time respecting the general principle of proportionality."

66. As regards the **question as to whether the burden of demonstrating the loss of opportunity renders a sanction ineffective**, Advocate General Szpunar confirms the position previously stated in this regard by the Court of Justice in paragraphs 55-57 of the Papalia order:

"*55. Compensation for loss of opportunity, according to the referring court, is purely theoretical, since it is legally impossible for a worker to prove, even with the help of conjecture, as required by the Corte suprema di Cassazione (Court of Cassation) in judgment No 5072/2016, that if the public authority had held a competition, he would have been successful, or that he was deprived of other employment opportunities as the result of successive fixed-term employment contracts. The referring court indicates that, contrary to what is stated in judgment No 5072/2016, conjecture is of no real assistance to a worker who has been harmed and that, furthermore, the authorities never hold a competition.*

56. As regards the obligation to prove loss of employment opportunities and the loss of income resulting from this, ***the Court held in the order in Papalia, (41) whilst leaving final consideration in that regard to the national court, that it cannot be excluded that that requirement is such as to make it impossible in practice or excessively difficult for such a worker to exercise the rights conferred by EU law****.*

57. ***The same applies in the main proceedings****, so that it is also for the national court to carry out the necessary verifications in that regard*."

67. There is a manifest difference in nature of the "Sicilian" case of Santoro compared to the case in which recruitment for a fixed-term had legitimately occurred pursuant to Article 16 of Law no. 56/1987, where "*from 1996 to 2002, Ms Giuseppa Santoro worked as a provider of socially useful services for the Comune di Valderice (municipality of Valderice, Italy). She then worked for that municipality under a continuous and coordinated contractual relationship until the end of 2010. On 4 October 2010 she entered into a part-time contract of employment with that municipality, which was due to end on 31 December 2012. The contract, which was extended three times, ended on 31 December 2016 and thus lasted in total more than five years*." (Opinion of the Advocate General, paragraph 10).

68. Consequently, the reference by Advocate General Szpunar in the final part of his opinion to the public competition and the burden of proof in this respect borne by the worker appears to be a mere "flash of humour", as would later be demonstrated by the judgment of the CJEU.

69. With regard to the question as to whether the **imposition of liability on the manager can make up, along with the loss of opportunity, for the deficit in protection solely through lump sum compensation**, Advocate General Szpunar answers in paragraphs 67-68 and 72-73 that it cannot:

"*67. The referring court observed that the Corte suprema di Cassazione (Court of Cassation), in judgment No 5072/2016, accepted as capable of fulfilling the conditions laid down in the case-law of the Court not only the compensation measures but also measures concerning the liability of the manager to whom the unlawful use of a fixed-term contract may be attributed. In that context,* ***I wonder whether such penalties can offset the deficiencies of lump sum compensation which stem from the fact that such compensation does not constitute a sufficient deterrent permitting earlier infringements to be penalised and repeated infringements to be avoided****.*

68. It is apparent from the national regulatory framework described by the Italian Government that the Italian legislature adopted at least three measures[10] *in respect of persons responsible for the misuse of fixed-term contracts. Curiously, those provisions were not taken into account by the referring court in its request for a preliminary ruling. However,*

[10] Advocate General Szpunar refers to the position stated by the Italian Government in paragraph 74 of its written observations, which are set out below: "*National law has provided other instruments for this purpose, which are effectively summarised in the above-mentioned judgment of the Court of Cassation as follows: 'First and foremost - Article 36(5) of Legislative Decree no. 165 of 2001 provides that the administrations are obliged to recover any amounts on this basis from the managers who are responsible in the event that the breach occurred wilfully or as a result of gross negligence. In reformulating Article 36, cited above, Article 3(79) of Law no. 244 of 24 December 2007 (Finance Law 2008) added in paragraph six the requirement that any public administrations operating in breach of the requirements of that provision could not hire any employees on any basis for three years following such a breach. Subsequently, when reformulating further Article 36, cited above, Article 49 of Law no. 133 of 6 August 2008, converting into law Decree-Law no. 112 of 25 June 2008 added that any managers operating in breach of the requirements of that provision shall be liable also pursuant to Article 21 of Decree-Law no. 112 and that consideration should be given to such breaches when assessing the performance of the manager pursuant to Article 5 of Legislative Decree no. 286 of 30 July 1999. 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'.*"

it seems to me that it is not each of the penalties taken individually but the whole system of penalty measures which needs to be sufficiently effective and a sufficient deterrent*.*

72. However, ***it should be noted that at least one of the penalties provided for in the national legislation described by the Italian Government is conditional on the misuse of fixed-term contracts being intentional or resulting from serious misconduct****. It is for the referring court to assess* ***whether or not, in practice, such a condition does in fact make it possible for those responsible to evade the penalties systematically, which would deprive the measures concerned of any effectiveness or deterrent effect****. The same applies with regard to any exemptions from liability that may be granted by the authorities when they decide on the consequences of abuse for managers.*

73. Moreover, ***the plurality of penalty measures must not lead to dilution of the effectiveness of any one of the measures concerned by rendering it incompatible with EU law****. Member States are required to guarantee the result imposed by EU law. In any event, the principle of effectiveness and – if an appropriate comparison can be found in domestic law – the principle of equivalence, must be guaranteed. The discretion conferred on the Member States must also be exercised in compliance with EU law and its general principles, in particular, where the right of appeal is at issue, the principle of effective judicial protection. It follows that, notwithstanding the plurality of penalty measures, where a Member State has introduced compensation measures,* ***a token penalty can never be regarded as constituting proper and effective implementation of the Framework Agreement, since negligible compensation cannot constitute adequate redress****.* ***For the same reasons, although lump sum compensation may be introduced by a national legislature, it cannot totally replace full compensation for the loss sustained****.*"

70. In order to resolve the problem of effective protection against abuse, in the Santoro judgment the Court of Justice establishes **presumptions in favour of the public sector worker in insecure employment** of full redress for the loss of employment given the absence of **positive evidence**, to be borne in full by the public administrations in the main proceedings, and **the application** by the public sector employer and its managers (and with regard to those managers) **of the statutory provisions identified by the Italian Government itself in its written observations** (see Doc. 33) **and by judgment no. 5072/2016 as**

dissuasive provisions to prevent and punish the misuse of fixed-term contracts, namely Article 36(5), (5-quater) and (6) of Legislative Decree no. 165/2001.

71. In point of fact, the Court starts from the assumption that, given the difficulties inherent in demonstrating the existence of a loss of opportunity, it should be noted that a mechanism of presumption designed to guarantee a worker who has suffered a loss of employment opportunities, due to the misuse of successive fixed-term contracts, the possibility of nullifying the consequences of such a breach of EU law is such as to satisfy the requirement of effectiveness (Santoro judgment, paragraph 50); and that the fact that the measure adopted by the national legislature in order to penalise the misuse of fixed-term contracts by private sector employers constitutes the most extensive protection that may be granted to a worker cannot, in itself, result in a reduction of the effectiveness of the national measures applicable to workers in the public sector (Santoro judgment, paragraph 51).

72. At this stage, the Court finds in paragraph 52 that the national legislation provides for other measures to prevent and sanction the misuse of fixed-term contracts:

• Article 36(5) of Legislative Decree No 165/2001 provides that the authorities are required to recover from the managers responsible the sums paid to workers as compensation for the harm suffered as a result of the infringement of the provisions concerning recruitment or employment, where that infringement is intentional or the result of gross negligence;

• Article 36(5-quater) of Legislative Decree no. 165/2001 provides that the breach of the law involving the invalid hiring of the worker, due to the failure to hold a public competition and the failure to satisfy the exceptional or temporary criteria that could justify it, should be taken into account for the purposes of assessing the performance of such managers who, on account of the said breach, may not receive a performance-related bonus;

• furthermore, Article 36(6) of the Consolidated Act on Public Sector Employment [TUPI] provides that public authorities which have acted in breach of the provisions concerning recruitment or employment cannot proceed with recruitments, for any reason whatsoever, during the three years following that breach.

73. It must be added that it is also presumed that the public administration called a public competition in order to cover the vacant position temporarily filled by the insecure worker, who is thereby offered the opportunity to secure stable employment by participating in a public selection procedure, which was not available at the time he or she entered the public

administration, thereby demonstrating the validity (or invalidity) of the presumption that, had a proper competition been organised, he or she would have been successful (Santoro judgment, paragraph 54).

74. In order to make clear the reversal of the burden of proof upon the public administration as to whether or not the conditions have been met that limit or annul the right of the worker in insecure employment who has suffered the "abuse" not only to the lump sum indemnity, to which he or she is in any case entitled, but also to full redress for the loss of employment opportunity, the Court requires the domestic court to verify whether those aspects, concerning the penalties that may be imposed on public authorities and their managers in the event of misuse of fixed-term contracts, are effective and dissuasive so as to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective (Santoro judgment, paragraph 53).

75. It is clear that the Santoro judgment of the Court of Justice causes considerable upheaval to the rules governing flexibility in the hiring of public sector workers, not because those rules have been altered by the *dictum* of the CJEU, but rather because they take on an effective punitive effect which they have not hitherto had, as provisions that fall under the well-known category of "purely notional" rules, or if one prefers rules that were adopted in such a manner as never to be applied or applicable.

76. Consequently, in the proceedings the public employer must prove that it carried out all of the following acts and fulfilled all of the following conditions: a) forwarding to the Court of Auditors of the case file to initiate the public liability action against the manager who hired the fixed-term worker without a competition and/or in the absence of the objective exceptional or temporary reasons for his or her appointment; b) the withholding of the performance-related bonus of the manager who committed the abuse; c) negative appraisal for the purposes of career progression of the manager who committed the abuse, as a consequence of the abuse; d) no hiring of any employees on any basis during the three years following the misuse of flexible contracts; e) proper public competitions duly called for the appointment of permanent employees, granting the opportunity (preferential or reserved, it should be added) to the precarious worker who suffered the abuse in accessing employment.

77. If such positive proof is not furnished (which moreover amounts to ordinary management activity on the part of the public administration, which should be carried out on the initiative

of the managers themselves who committed the abuses, as stressed by Advocate General Szpunar in his opinion), the only consequence can be full compensation of the loss suffered by the worker as a result of the abuse, which has resulted in the definitive loss of the opportunity of stable employment, which would inevitably trigger not only the compensation of damages totalling billions of euros due to the still considerable number of entitled persons, but also the obligation to launch public liability actions against both the managers responsible and the public administrators who failed to exercise oversight.

78. It appears to be extremely clear that the Santoro judgment of the Court of Justice, if correctly applied in internal law (which is doubtful, considering the conduct of the Italian Government, also in the context of this collective complaint), would require all public administrations where flexible contracts (not only fixed-term contracts, but also in consideration of the equivalence of services with other types of flexible contract, as provided for under Article 20(2) of Legislative Decree no. 75/2017 for the purposes of the right to participate in stabilisation procedures) have been misused, even in the past, to take steps immediately to conclude swiftly and successfully the procedures for granting tenured status to all workers in insecure employment who have worked for at least three years for the public administration.

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In conclusion, as it has been possible to establish in the light of the preliminary reference proceedings pending before the Court of Justice concerning Italian public sector precarious employment and the issues highlighted in the Santoro judgment of the CJEU, the "internal" situation has not changed following the submission of the collective complaint, other than for the worse, which confirms on the one hand the absolute lack of legislative measures to prevent the misuse of fixed-term contracts and the violation of the principle of non-discrimination, and on the other hand the fact that the breach of the law by the Italian State in the area of public sector precarious employment – not only in schools and in the AFAM sector – and the breaches of the European Social Charter objected to in the collective complaint are currently being challenged before other international bodies on the grounds of the additional violation of the European Convention on Human Rights and Directive 1999/70/EC on fixed-term work.

For all of the reasons set out above, and for the reasons indicated in greater detail in the complaint, to which reference is made, the European Committee of Social Rights is invited, within the limits of its jurisdiction, to make findings concerning the violations objected to of the European Social Charter as committed by the Italian State and call for their cessation.

In addition, **it is requested that the parties be heard**, considering the many omissions by the Italian Government from its written observations in these proceedings with regard to the violations objected to involving discrimination against fixed-term public sector workers and the measures to prevent abuse in sectors other than the Schools Branch and the AFAM Branch.

In particular, the Italian Government has not even clarified whether the procedures for granting tenure to long-term public sector precarious workers (36 months in service) provided for under Article 20(1) and (2) of Legislative Decree no. 75/2017 (known as the "Madia reform") will have any effect or will be merely sporadic, dilatory or even "purely notional" in nature in order to resolve this highly serious structural problem of incomprehensible precarious public sector employment, under which even those dispensing justice and performing the same judicial functions as stipendiary judges have been forced for many years into a situation of absolute employment uncertainty without any social security provision.

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

1- Report by Vincenzo De Michele, as an expert, to the Petitions Committee of the EU Parliament at the public hearing of 22 November 2017 concerning the "*Protection of the rights of workers in temporary or precarious employment, based on petitions received",* in English;

2- Judgment of the Court of Justice of the EU of 7 March 2018 in Case C-494/16 Santoro, in English;

3- Opinion of Advocate General Szpunar delivered on 26 October 2017 in Case C-494/16 Santoro, in English;

4- Written observations of the EU Commission in C-494/16 Santoro;

5- Reference for a preliminary ruling from the Rome Court of Appeal of 15 May 2017 in Case C-331/17 Sciotto;

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

7- Reference for a preliminary ruling from the Trento Court of Appeal of 18 July 2017 in Case C-466/17 Motter;

8- Written observations of the EU Commission in C-466/17 Motter;

9- Reference for a preliminary ruling from the Trento Court of Appeal of 13 July 2017 in Case C-494/17 Rossato;

10- Written observations of the EU Commission in C-494/17 Rossato;

11- Reference for a preliminary ruling from the Justice of the Peace of L'Aquila of 31 July 2017 in Case C-472/17 Di Girolamo;

12- Reference for a preliminary ruling from the Justice of the Peace of Rome of 17 October 2017 in Case C-626/17 Rossi;

13- Written observations of the EU Commission in C-472/17 Di Girolamo;

14- Communication by the EU Mediator of the decision of 19 March 2018 concerning complaint no. 338/2018/LM that the EU Commission has decided to announce the results of procedure NIF 4231/2014 concerning all Italian public sector precarious workers within three months of the filing of the Santoro judgment of the Court of Justice of 7 March 2018;

15- Communication from the Registry of the Court of Justice scheduling an oral hearing in Case C-331/17 Sciotto for 14 June 2018;

16- Judgment no. 13721 of 31 May 2017 of the Joint Divisions of the Court of Cassation;

17- Judgment no. 99 of 4 January 2018 of the Court of Cassation;

18- Full transcript of the programme "IN-Giustizia" by *Report* on RAI 3 broadcast on 19 March 2018 concerning the circumstances of precarious honorary judges in Italy;

19- Written observations of the Italian Government in Case C-494/17 Rossato;

20- Order of the President of the EU Court of Justice in relation to the reference for a preliminary ruling in Di Girolamo C-472/17, in French;

21- Order of 14 February 2018 of the Justice of the Peace of L'Aquila withdrawing the fourth question referred for a preliminary ruling in Case C-472/17 Di Girolamo;

22- Written observations of the Italian Government in Case C-472/17 Di Girolamo;

23- Draft agreement concerning the new NCLA for "Education and Research" of 8 February 2018;

24- Written observations of the Italian Government in Case C-466/17 Motter;

25- Judgment of the Court of Justice of 12 December 2013 in the Carratù case, in English;

26- Judgment no. 11374 of 31 May 2016 of the Joint Divisions of the Court of Cassation;

27- Judgment of the Court of Justice of 4 July 2006 in the Adeneler case, in English;

28- Written observations of Fondazione Teatro dell'Opera di Roma in Case C-331/17 Sciotto;

29- Judgment no. 12985/2008 of the Court of Cassation;

30- Written observations of the Italian Government in Case C-331/17 Sciotto;

31- Individual application no. 3247/2018 Cantaro v. Italy to the European Court of Human Rights;

32- Communication from the Registry of the European Court of Human Rights concerning the admissibility of application no. 3247/2018 Cantaro v. Italy;

33- Written observations of the Italian Government in Case C-494/16 Santoro;

Rome, 4 April 2018

Gennaro Di Meglio _____

Tommaso de Grandis _____

Vincenzo De Michele _____