EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

28 November 2017

Case Document No. 1

Unione Sindicale di Base (USB) v. Italy
Complaint No. 153/2017

COMPLAINT

Registered at the Secretariat on 13 July 2017

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

For the kind attention of the Executive Secretary of the European Committee of Social Rights, acting on behalf of the Secretary General of the Council of Europe

COLLECTIVE COMPLAINT

in accordance with Article 1(c) of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints

INFORMATION RELATING TO THE COMPLAINANT TRADE UNION ORGANISATION USB

1. *USB – Unione sindacale di base – settore pubblico impiego* (see Statutes, Annex 1), Via dell'Aeroporto 129, 00175 – ROME, Tel: 06.59640004, Fax: 06.54070448, Email: usb@usb.it, Italian tax ID and VAT number 97207930583, represented by its current legal representative, Ms Daniela Mencarelli, born in Peschici on 15 January 1960, Italian tax ID MNCDNL60A55G487P, is a trade union association that represents and assists public sector workers at national level and has attracted a level of membership that makes it one of the most representative.

2. USB's significance as an association is attested by the declaration made by the ARAN (Agency for Representation in Bargaining with the Public Administrations) which certifies that it has significant representative status within the public sector (Annex 2).

3. USB is represented by the above-mentioned Ms Mencarelli in this collective complaint. The email address d.mencarelli@usb.it and telephone number 3473804420 have been chosen as contact details for the purposes of this complaint.

4. For the purposes of this complaint, *USB Unione sindacale di base* is assisted by Counsel Sergio Galleano of the Milan Bar (Italian tax ID GLLSRN52E18F205N), Counsel Ersilia De Nisco of the Rome Bar (DNSRSL79T68A783N) and Counsel Vincenzo De Michele of the Foggia Bar (DMCVCN62A16D643W).

Reference email address: roma@studiogalleano.it

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Contracting party which has violated the European Social Charter: ITALY

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ABSTRACT

5. This complaint relates to the specific circumstances of the Region of Sicily in Italy and concerns not only a violation of the provisions of the European Social Charter, which will be discussed following the statement of facts set out below, but also substantive disregard for EU Directive no. 70 of 1999 on fixed-term contracts by the Italian State within the public sector, and in particular by the Sicily Region, resulting from the approval of national legislation incompatible with the aims of the European Social Charter and EU Directive 1999/70 on fixed-term contracts, in addition to regional legislation which also violates the Convention and EU law mentioned above.

6. Before describing the particular situation in Sicily, it is necessary to make some preliminary remarks concerning the relevant national legislation on fixed-term contracts.

THE ITALIAN LEGISLATION

7. As mentioned above, USB is a national trade union organisation which represents and assists tens of thousands of private and public sector workers, and within the public sector in particular also protects, with particular attention, the precarious workers hired on fixed-term contracts within public administrations, including in particular local government bodies regulated by the national collective labour agreement annexed hereto (doc. 3) and the Consolidated Act on Public Sector Employment laid down in Italian Legislative Decree no. 165/2001 (doc. 4).

8. Before considering the situation in Sicily, it is necessary to present the Italian legislation with which the Sicilian legislation interacts. These considerations have already been largely brought to the attention of this Committee in complaint 73/2017, filed by the trade union organisation ANIEF against the Italian State in relation to precarious workers in schools.

9. By Legislative Decree no. 368 of 6 September 2001 (see annex 5), Italy implemented Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by

ETUC, UNICE and CEEP (see annex 6).[1] As is apparent from paragraphs 7-14 of the *Marrosu-Sardino* judgment of the Court of Justice of the European Union, which was the first to reconstruct the law applicable to fixed-term contracts in Italy (see annex 7), these rules are also applicable to employment relations in all public administrations,[2] as is indeed 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.

10. 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 fixed-term contracts *in accordance with the provisions laid down by Legislative Decree no. 368 of 6 September 2001*". Also, Article 36(5-ter) (introduced by Decree-Law no. 101/2013, converted into Law no. 128/2013 with effect from 1/9/2013) of Legislative Decree no. 165/2001 refers to Legislative Decree no. 368/2001 with regard to all public administrations.

11. 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 non-continuous, entailing equivalent duties for the same employer, following which the fixed-term contract would be deemed to be a permanent contract.

12. However, as maintained by the Italian State in proceedings before the national courts seeking confirmation of the establishment of permanent employment relations in situations involving successive fixed-term contracts in excess of 36 months, this provision was considered inapplicable to employees of the public administrations since, under Article 97 of the Italian Constitution, appointments in the public sector may only be made following successful completion of a competition, "except as provided for by law".

13. In application of that provision of the Constitution, Article 36(5) of Legislative Decree no. 165/2001 (the Consolidated Act on Public Sector Employment) provides "*5. The violation of mandatory provisions concerning the engagement or employment of workers by public administrations may not under any circumstances entail the establishment of permanent*

[1] Moreover, Italian legislation was already compliant with the principles subsequently approved by the Framework Agreement adopted pursuant to Law no. 230 of 1962 (see concerning this issue judgment no. 41/2000 of the Italian Constitutional Court).

[2] Paragraph 13 of the above-mentioned Marrosu-Sardino judgment states that: "Article 10 of Legislative Decree no. 368/2001 contains a list of cases to which the new rules on fixed-term contracts do not apply. None of those cases relates to the public administration)."

employment relations with the said public administrations, notwithstanding any liability or sanctions. The worker concerned shall be entitled to compensation for the damage resulting from the fact that he or she was employed in breach of mandatory provisions. The administrations shall be required to recover any amounts paid on this basis from the directors responsible in the event that the breach occurred wilfully or as a result of gross negligence. Any directors acting in breach of the provisions of this Article shall also bear liability pursuant to Article 21 of this Decree. Consideration shall be given to such violations upon the assessment of the director's performance pursuant to Article 5 of Legislative Decree no. 286 of 30 July 1999."

14. Paragraph 5-ter was introduced into Article 36 by Article 17(26)(d) of Decree-Law no. 78 of 1 July 2009, converted with amendments into Law no. 102 of 3 August 2009, which provides as follows: *The provisions laid down by Legislative Decree no. 368 of 6 September 2001 apply to public administrations, notwithstanding the obligation for all sectors to comply with paragraph 1, the possibility of having 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.*

15. In view of that situation, through the *Affatato* order in Case C-3/10 (see annex 13) the *Tribunale di Rossano Calabro* referred questions for a preliminary ruling concerning the failure to apply Directive 1999/70/EC to all public sector employment.

16. In its written observations in the *Affatato* Case C-3/10 (see annex 14) the Italian Government asserted that the totality of Legislative Decree no. 368/2001, including in particular Article 5(4-bis), was applicable to public administrations.

17. This assertion was received by the European Commission on 10 May 2010 (see annex 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.

18. Consequently, by an order issued in the *Affatato* case on 1 October 2010 (see annex 16) the Court of Justice of the European Union ruled 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 given effective application.

19. In that context, with regard to a long series of proceedings brought by schools' staff, 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 2011, nos. 283 and 284 (see annex 17), on the ground that there were no appropriate measures to sanction the abuse of fixed-term contracts. Similar referral orders were made by the *Tribunale di Roma* and the *Tribunale di Lamezia Terme*.

20. In order to avoid a proliferation of disputes concerning compensation for the abuse of fixed-term contracts within public sector employment, through judgment no. 392/2012 of 13 January 2012 (see annex 18) the Employment Division of the Court of Cassation laid down a principle of law whereby it fell exclusively to the employee to prove damage suffered in the event of abuse of fixed-term contracts in public sector employment and Legislative Decree no. 368/2001, including in particular Article 5 on successive contracts, did not apply to precarious public sector workers, and did not convert their contracts into permanent contracts, as had allegedly been confirmed by the *Affatato* order of the Court of Justice, which had in fact asserted the exact opposite. The Rapporteur concerned refused to write and sign the decision, a task which was taken on by the President of the Court.

21. Judgment no. 392/2012 of the Court of Cassation was “protected” regarding its incontrovertible assertion of compatibility of national law with EU law by the 2011 report on the administration of justice, dated 26 January 2012, which refers on page 18 (see annex 19) to the judgment given on 20 September 2011 by the European Court of Human Rights in the case *Ullens de Schooten and Rezabek v. Belgium*, whereby the Court held that failure to comply with the obligation to request a preliminary ruling from the Court of Justice, which is incumbent upon courts against whose decisions there is no judicial remedy pursuant to Article 267 of the Treaty on the Functioning of the European Union, does not constitute a breach of Article 6(1) ECHR where sufficient reasons are provided by the Court of Cassation for the failure to do so. This is implicitly tantamount to asserting that a court against whose decisions there is no judicial remedy need but give reasons for any failure to comply with the obligation to seek a preliminary ruling.

22. In the meantime, by a decree of 1 March 2012 (see annex 20), the President of the Milan Court of Appeal reorganised the hearing schedules for the Employment Division of the Court of Appeal for 1,080 cases which were defined as “serial” (including hundreds relating to the stabilisation of precarious employment in schools pursuant to Article 5(4-bis) of Legislative Decree no. 368/2001). All of the cases were allocated to judge rapporteurs who were not formally

assigned to the Employment Division of the Milan Court of Appeal and resulted in decisions against the supply teachers, refusing any protection, whether in terms of employment stability or compensation, in judgment no. 709/12 of 15/5/2012 (see annex 21), which was written by the President of the Milan Court of Appeal himself and copied in full by the other judges (see annex 22).

23. Immediately afterwards, by judgment no. 10127 of 20 June 2012 (see annex 23), the Court of Cassation upheld the judgment of the Milan Court of Appeal on supply staff in schools administered by the state, asserting that the system of recruitment in schools was a special system with regard to Legislative Decree no. 368/2001 – which did not apply to supply teaching appointments in schools – and that it was lawful and compatible with the EU provisions. By judgment no. 10127/2012, the Court of Cassation upheld the non-applicability of Legislative Decree no. 368/2001 via a legal sleight of hand, whereby it disregarded 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. The unfortunate teacher denied any rights was a technical and commercial institute teacher with more than 36 months' service in a school administered by the state.[3]

24. In addition, the Court of Cassation instructed the national courts to refrain from submitting references for preliminary rulings to the EU Court of Justice in order to request clarifications 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* allowed lawful, duly reasoned decisions not to seek a preliminary ruling and the unrestrained use of the EU preliminary reference procedure had led to delays in the resolution of proceedings and high socio-economic costs.

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[3] Article 70(8) of Legislative Decree 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 provisions laid down by *Article 21 of Law no. 59 of 15 March 1997* and *Legislative Decree no. 35 of 12 February 1993*. There shall be no consequence for the procedures for recruiting school staff laid down by *Legislative Decree no. 297 of 16 April 1994* as amended and supplemented". Article 36(2) in turn provides: "2. In order to meet requirements that are exclusively temporary or exceptional in nature, public administrations may use the flexible contractual arrangements for the hiring and employment of staff provided for under the Civil Code and the laws governing employment relations within enterprises, in accordance with the applicable recruitment procedures. Without prejudice to the power of the administrations to identify organisational needs in accordance with the requirements laid down by law, national collective agreements shall regulate the issue of fixed-term employment contracts, training and work experience contracts, other training arrangements and the provision of employment and ancillary work pursuant to *Article 70 of Legislative Decree no. 276/2003*, as amended and supplemented, in application of the provisions of *Legislative Decree no. 368 of 6 September 2001*".

25. In parallel with this judicial policy of denying protection to the fundamental rights of precarious public sector workers, by circular no. 65934 of 14 May 2012 the Ministry of Justice intervened with an interpretation of the provisions contained in Article 37 of Decree-Law no. 98/2011 on the costs of justice, exacerbating the distortion of the principles of a fair trial which already resulted from the exemption from liability for costs granted to all public administrations by Article 158 of Presidential Decree no. 115/2002 (see annex 24). In particular, from that moment a *contra legem* administrative practice emerged whereby, in all proceedings involving individual disputes concerning employment or public sector work relationships and disputes concerning welfare and mandatory assistance before the Court of Cassation, it remains mandatory to pay the single court fee of € 1,036.00 (initially € 900.00), whereas that payment is not due when the appellant worker does not earn annual "personal" income (i.e. not family income) in excess of € 34,585.23, as attested by their most recent tax return; and in the event that the individual income threshold is exceeded, (only) a € 518 fee need be paid, provided that the amount in dispute in the proceedings is indeterminable (Article 13(1) and Article 9(1--*bis*,) of Presidential Decree no. 115/2002).

26. Judgment no. 10127 of 2012 of the Court of Cassation has been heavily criticised by legal writers (doc. 25) on the ground that it breaches the ECHR, EU law and national law, as well as for the implications which it is said to have had – and has in fact had – in all proceedings concerning public sector employment.

27. Following the criticisms against the two judgments no. 392/2012 and no. 10127/2012 of the Court of Cassation and the "temporary placing under administration" of the Employment Division of the Milan Court of Appeal, report no. 190 of 24 October 2012 of the Case Law Analysis Office of the Court of Cassation (see annex 26) "Precarious employment in schools and the protection of rights under EU and national law and case law: the dichotomy between the need for specialisation and the principle of equality" immediately refuted the conclusions reached in judgment no. 10127/2012 of the court, which had commissioned the Research Centre to study the very subject of the interpretative "coherence" of judgments delivered against precarious employees 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 in schools administered by the state, the principles contained in EU case law on the abuse of fixed-term contracts, taking account of the public sector nature of the service, the principle of recruitment based on a competition and the existence of specific sectoral rules and rules on non-*

discrimination (with particular reference to remuneration and seniority-based pay increases).”

28. In fact, the Case Law Analysis Office concluded as follows in report no. 190/2012: “*Based on the examination of EU case law and the national rulings referred to above, and taking account of the criticisms made by legal writers, it would appear that the following conclusions can 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 employees 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).

(...)

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 rankings is inherent in the national system, and is, formally speaking, legal, although it does not appear to be compliant with EU rules, and it is therefore necessary to resolve the conflict between the legal systems in accordance with general principles, as laid down in the indications concerning this matter contained in EU case law.

Setting 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 EU law – for abuse of a fixed-term contract, as other technical legal instruments may also be adopted by the state in order to achieve the purpose established in the EU Directive, provided however that these are specific effective instruments intended to prevent and sanction abuse.

In the case under consideration, if conversion of the relationship cannot be allowed, the abuse of fixed-term employment would not de facto incur any sanction as compensation for the damage, which is moreover difficult to quantify and prove in practical terms; nor would it concern failure to continue the relationship as a result of the expiry of the time-limit, but only different damage which may have been suffered in the past (which would be difficult to establish except for periods between one contract and another in the case of staff with regular remuneration), and nor could it have the nature of a sanction (as punitive damages are not permitted under our system): it must

therefore 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.

(...)

Finally, it must be recalled that the principle of equal treatment, which has direct effect, entails an unconditional guarantee – benefiting any fixed-term employee whose relationship is not converted into a permanent one – of equal pay (compared to permanent workers) and the recognition of seniority-based pay increases without any restriction under national law, which must be deemed inapplicable insofar as it conflicts with that principle."

29. In essence, report no. 190 of 24 October 2012 by the Case Law Analysis Office of the Court of Cassation recognised 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, notwithstanding the existence of 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 submitted to constitutional review in order to remove them definitively from the legal order.

30. At the same time, having received information from the national authorities indicating that EU law obligations towards supply teachers 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 opened the infringement procedure no. 2124/2010 on 25 October 2012, initially solely in respect of administrative and auxiliary staff, although subsequently extending it by a reasoned opinion of 21 November 2013 also to teaching staff, on the ground of failure to apply Directive 1999/70/EC concerning the framework agreement concluded by ETUC, UNICE and CEEP with regard to fixed-term employment within the Italian schools sector.

31. Following the report by the Case Law Analysis Office of the Court of Cassation, by its order of 3 January 2013 in Case C-50/13 *Papalia*, the *Tribunale di Aosta* (see annex 27), which awarded compensation equal to 20 months' salary for an abuse of fixed-term contracts in public sector employment, made a new request for a preliminary ruling concerning Italian public sector

employment against the Court of Cassation's judgment no. 392/2012, which had required precarious public sector workers to furnish proof of the damage suffered, a proof impossible to provide if associated with a prohibition on conversion. The case concerned Mr Rocco Papalia, leader of the musical band of the Municipality of Aosta, who had worked as a precarious employee without interruption for almost 30 years!

32. At the same time, by four orders made in January 2013 in the joined cases C-22/13 *Mascolo* (see annex 28), C-61/13 *Forni*, C-62/13 *Racca* and C-63/13 *Russo*, the *Tribunale di Napoli* sought a preliminary ruling concerning the compatibility with Directive 1999/70/EC of national legislation on fixed-term contracts in public sector employment, both inside and outside of schools.

33. In Case C-22/13 the applicant Raffaella Mascolo submitted written observations on 6 May 2013 (see annex 29). The Italian Government submitted written observations in the joined cases *Mascolo and others* (see annex 30) C-22/13, C-61/13, C-62/13, C-63/13 and C-418/13, threatening (page 30, paragraphs 52-54) disciplinary action against the *Tribunale di Napoli* as the court seeking the ruling.

34. Concurrently, in its written observations filed on 25 April 2013, regarding the request for a preliminary ruling in *Papalia* C-50/13 by the *Tribunale di Aosta* (see annex 31), the EU Commission concluded that Article 36(5) of Legislative Decree no. 165/2001 was incompatible with Directive 1999/70/EC, thereby modifying the "agnostic" position adopted in the *Marrosu-Sardino* Case C-54/04 and the *Affatato* Case C-3/10.

35. By a request for a preliminary ruling no. 207/2013 in case C-418/13 *Napolitano and others* (see annex 32), the Constitutional Court also voiced doubts concerning the compatibility of the legislation on recruitment in schools with Directive 1999/70/EC, proposing that an interpretative request be sent to the EU Court of Justice pursuant to Article 267 TFEU for the first time in interlocutory constitutionality proceedings. At the same time, by order no. 206/2013 (see annex 33) it clarified the applicability of Legislative Decree no. 368/2001 to supply staff in schools, notwithstanding the effect 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 only be removed from national law by the Constitutional Court (as suggested in report no. 190/2012 by the Case Law Analysis Office of the Court of Cassation) under a 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.

36. In an attempt to comply with orders 206 and 207 of the Constitutional Court, issued in 2013, the Italian Government adopted Article 4(6) of Decree-Law no. 101 of 31 August 2013 (converted with amendments into Law no. 125/2013, annex 34) setting out a plan to stabilise precarious employment in the public sector, including schools, which was to be implemented before 31 December 2016 and was based on the accrual of at least 36 months' service, even if not continuous, by so-called "historic" precarious workers.

37. In order to reiterate the prohibition on employment of fixed-term staff for requirements that are not temporary or exceptional, Article 4 of Decree-Law no. 101/2013 also amended Article 36(2) of Legislative Decree no. 165/2001 by introducing a third sentence, which obliged public administrations to avoid situations of precarious employment, through the award of fixed-term contracts to successful candidates in competitions for permanent positions, thereby bringing it into line with the prohibition on new competitive procedures for expertise already available within the existing eligibility rankings, as provided for under Article 4(3) of Decree-Law no. 101/2013.

38. In addition, Article 4(1)(b) of Decree-Law no. 101 of 31 August 2013, converted with amendments into Law no. 125 of 30 October 2013, introduced paragraph 5-quater into Article 36 of Legislative Decree no. 165/2001, which provides as follows: *Any fixed-term contracts concluded in breach of this Article shall be void and shall result in liability for loss of revenue. Directors acting in breach of the provisions of this Article shall also bear liability pursuant to Article 21. A director who is responsible for the improper use of flexible work may not be paid the performance-related bonus.*

39. Consequently, according to the Italian Government, following the amendments to Article 36 of Legislative Decree no. 165/2001, introduced by Article 4 of Decree-Law no. 101/2013, any subsequent fixed-term contracts were to be deemed void by law, thereby undermining the foreseeable effects of any ruling in favour of the workers by the Court of Justice, determining that the national legislation on fixed-term recruitment in schools and throughout the public sector is incompatible with Directive 1999/70/EC, and the resulting inevitable finding that Article 4(1) and (11) of Law no. 124/1999 is unconstitutional, limiting those effects to situations in existence prior to school year 2013-2014, as for the future the new legislation on flexibility in public sector employment, including in schools, would have to apply, which prohibited and rendered void by

law recruitments made to cope with structural staff shortages.

40. The plan for stabilising precarious employment set out in Decrees-Law nos. 101 and 104 of 2013, which provided for the progressive regularisation of all precarious employees in the public sector, was never implemented due to the change of government in 2014.

41. In the meantime, by the *Papalia* order of 12 December 2013 in Case C-50/13 (see annex 37), the CJEU ruled that Article 36(5) of Legislative Decree no. 165/2001 was incompatible with Directive 1999/70/EC since it prohibited conversions into unlimited duration contracts within the public sector without establishing appropriate, adequate and equivalent preventive protection and sanctions, thereby censuring judgment no. 392/2012 of the Court of Cassation which precluded any type of protection through sanctions.

42. As was foreseeable, in the *Mascolo* judgment of 26 November 2014 (Annex 38) in the 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 then ruled that the system used to recruit supply staff in schools administered by the state was incompatible with Directive 1999/70/EC, with the implication that Article 5(4-bis) of Legislative Decree no. 368/2001 constituted an appropriate sanction in respect of public sector employment, including outside of schools (paragraph 55),[4] as its correct application by the *Tribunale di Napoli* in the *Racca* case amounted to an act of loyal cooperation with the EU institutions (paragraphs 59-61),[5] thereby censuring the position taken by

[4] *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)."*

[5] *In paragraphs 59-61 of the Mascolo judgment the Court of Justice stated as follows: "59 Furthermore, the Comune di Napoli, the Italian Government and the European Commission call into question the admissibility of the fourth question in Cases C-22/13, C-61/13 and C-62/13 and the third question in Case C-63/13, essentially on the ground that the answer to those questions is, in whole or in part, not relevant to the disputes in the main proceedings. 60* ***Those questions, whose wording is identical, are, as has already been stated in paragraph*** 32 ***of this judgment, based on the premiss that the interpretation of national law put forward by the Italian Government in the case which gave rise to the order in Affatato (EU:C:2010:574, paragraph 48), to the effect that Article 5(4a) of Legislative Decree no. 368/2001 is applicable to the public sector, is incorrect and therefore amounts to an infringement by the Member State concerned of the principle of sincere cooperation. 61 As is apparent from paragraphs 14 and 15 of this judgment, that interpretation corresponds, however, in all respects to the interpretation which has been presented in this instance by the Tribunale di Napoli****, and in the light of which – in accordance with settled case-law – the Court must consider the present references for a preliminary ruling (see, inter alia, judgment in Pontin, C-63/08, EU:C:2009:666, paragraph 38).* ***The Tribunale di Napoli in fact states explicitly in its orders for reference that, in its view, the national legislature did not intend to exclude application of Article 5(4a) of Legislative Decree no. 368/2001 to the public sector****."*

the Court of Cassation in judgment no. 10127/2012.

43. In paragraph 14 of the *Mascolo* judgment the Court of Justice noted that, according to all of the references for a preliminary ruling, Legislative Decree no. 368/2001 applied to the schools sector – and thus throughout Italian public sector employment – while stating, in paragraph 89, that the ERE ["eligibility rankings to be drawn upon until exhaustion"] 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 ["special qualifying pathways"] or AET ["active educational traineeship"]. Paragraphs 114[6] and 115[7] of the *Mascolo* judgment noted that, although the prohibition on conversion into permanent employment did not apply within the public sector 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 unlimited duration employment for precarious workers in schools 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, while referring to paragraphs 28[8] and 84[9] of that judgment.

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[6] *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****."*

[7] *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****."*

[8] 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."*

[9] 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***

Consequently, the Court of Justice entrusted to the national courts that had sought the preliminary rulings (the *Tribunale di Napoli* and the Constitutional Court) the power/duty to ensure effective protection to supply staff in schools, by eliminating the provisions that precluded the application of Article 5(4-bis) of Legislative Decree no. 368/2001 and the full effect of Directive 1999/70/EC, either through disapplication (the *Tribunale di Napoli*) or by a declaration of unconstitutionality (Constitutional Court).

44. First, the Employment Division of the Court of Cassation, by judgment no. 27363/2014 (see annex 39), which referred to the *Carratù* judgment and the *Papalia* order of the Court of Justice, asserted in an *obiter dictum*, that Article 5(4-bis) of Legislative Decree 368/2001 was applicable. [10] However, immediately afterwards, by judgment no. 27481/2014 of 30 December 2014[11] (see annex 40), the Court of Cassation disregarded the *Mascolo* judgment and, in a case involving a precarious public sector worker with more than 36 months' service, denied the right to employment stability and awarded only compensation of between 2.5 and 6 months' salary, according to a provision that was in fact not applicable to the case in question - Article 8 of Law no. 604/1966[12] – inventing the concept of so-called "Community damage".

45. After the *Mascolo* judgment of the Court of Justice, by judgment no. 529/15 of

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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."*

[10] 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 indefinite duration contracts for all successive fixed-term employment relationships with the same public sector employer after thirty six months of precarious service, even if not continuous, pursuant to Article 5(4-bis) of Legislative Decree no. 368 of 2001."*

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

[12] This legislation governs the consequences of dismissal within companies with less than 15 employees, in which the Italian legislator considered that it would not be appropriate to order the reinstatement of the worker on account of the small size of the production facility, limiting the remedy in the event of unfair dismissal to the payment of a limited sum of money; it is evident that such a scenario is not comparable to the position of the public administrations, which employ tens of thousands of workers.

21 January 2015 (see annex 41) in case no. 5288/12 R.G. lodged by the applicant Raffaella Mascolo among others, the *Tribunale di Napoli* accepted the worker's request for recruitment on an indefinite basis, applying Article 5(4-bis) of Legislative Decree no. 368/2001 and disapplying Article 4(14-bis) of Law no. 124/1999.

46. By judgment no. 260/2015 (see annex 42) the Constitutional Court also applied the *Mascolo* judgment and converted unlawful fixed-term employment relationships with public administrations (operatic foundations) into employment of indefinite duration given the absence of objective temporal justifications for each individual fixed-term contract.

47. The following year, in a judgment adopted by the Joint Divisions – no. 5072 of 2016 (see annex 46) of 15 March 2016 – concerning the *Marrosu-Sardino* case, in relation to which the Court of Justice had ruled ten years previously, the Italian Court of Cassation dealt with compensation payable to public sector workers who had been unfairly treated.

48. Judgment no. 5072/2016 – in contrast with the *Mascolo* judgment of the Court of Justice and judgment no. 260/2015 of the Constitutional Court – held that public sector workers who have been improperly employed under fixed-term contracts cannot be given permanent status in accordance with the various provisions laid down in Legislative Decree no. 368/2001, because a public competition is necessary in order to access public sector employment and that, for lack of provisions laying down sanctions regarding the public sector and since the equivalent sanctions regime in the private sector cannot be applied, the damage awarded does not constitute compensation for the loss of a job but rather so-called "Community" damage of between 2.5 and 12 months' salary.

49. Entirely disregarding judgment no. 5072/2016 of the Joint Divisions of the Court of Cassation, in judgment no. 187 of 20 July 2016 (see annex 48) the Constitutional Court declared unconstitutional Article 4(1) of Law no. 124/1999 (the only provision subject to constitutional review) on annual supply appointments with effect *ex tunc*, further specifying that stabilisation of employment for an indefinite duration is the only appropriate sanction (the "*most far-sighted*" according to the Court) 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, annex 49).

THE SITUATION IN SICILY

50. We now turn to the specific object of this complaint.

51. For more than twenty years, the municipalities of the Sicily Region have employed workers first under “social utility contracts” and, from 2005 until around the present day, under fixed-term contracts concluded in accordance with specific regional legislation which permits the infinite repetition of fixed-term contracts (in breach of clause 5 of the Directive, due to the complete absence of any prevention measures and of sanctions aimed at avoiding the misuse of successive fixed-term employment contracts) and which almost all Sicilian case law considers to constitute an exception to national and Community law.

52. The number of workers affected (as can be seen from the draft legislation tabled in the Sicilian Parliament on 18 April 2014 and the declaration by the Regional Department for Families of 14 July 2015, including in particular the table on page 3: docs 51 and 52) is around 16,700, hired pursuant to a regional law (Regional Laws nos. 85/1985 and 24/1996) initially as social utility workers and subsequently, after the year 2000, gradually removed from the group of social utility workers and hired under ordinary fixed-term contracts.

53. In fact, since the start of their employment – and at any rate from the time the relationship was converted into a fixed-term contract – all the persons mentioned have been working for Sicilian municipalities on permanent and stable posts, which should have been filled by public competition (at least for the most senior categories),[13] and which moreover became vacant following the retirement of tenured employees or were established as a result of an expansion of the services provided to residents.

54. In order to make the singular nature of the situation in Sicily clear to the Committee, the following paragraphs will focus on three municipalities from this Region, while it can be noted that the factual and legal framework is substantially identical for most other local authorities:

a. As can be seen from the municipal decision of 22 September 2014 (doc. 53), the Municipality of Regalbuto in the province of Enna has 7,290 residents. The municipal administration is allocated the equivalent of 119 staff, including 64 posts held by staff working under indefinite duration contracts. For more than ten years, these workers have been supplemented by workers (26 at present) hired in the 1990s as social utility workers under Regional Law no. 85 of 1995,

[13] For the lower categories, involving the performance of simple tasks, Article 16 of Law no. 56 of 1987 provides that recruitments are made following a reference by a public employment office on the basis of ranking lists according to the type of task and the date of registration.

which provided for an initiative to activate employment policy, with the formal aim of expanding the productive base in order to create new employment opportunities. In 2006 and 2007, in accordance with Regional Laws no. 16 of 2004 and no. 17 of 2006, these workers were subsequently "placed on a regular footing" with fixed-term contracts. As expressly provided for under Article 77(2) of Regional Law no. 17/2004 "*the provisions laid down in Legislative Decree no. 368/2001 shall not apply to fixed-term contracts intended to stabilise persons subject to the transitional regime for social utility workers*". In reality, from the start of the employment relationship, or in any case during the years immediately thereafter, all of these workers were used in order to perform ordinary tasks within the competence of the Municipality of Regalbuto. Proof of this can be found in the decision of the Regalbuto Municipal Council of 31 October 2012 (doc. 54) which states: "*Within the Sicily Region, for more than 12 years, this type of flexible work, which is normally permitted for temporary requirements, has been used in order to cover permanent requirements associated with the ordinary needs of the local authorities, [and] this category of worker has acquired over these years the necessary expertise and professionalism to perform certain tasks and, given the lack of regular turnover, to guarantee the basic essential services of this authority, as further confirmation of the need for the often indispensable contribution of these workers and above all these human resources to the running of the authority...*"

b. The Municipality of Barcellona di Pozzo di Gotto, which is part of the province of Messina, has a population of 41,719 persons. Its workforce amounts to 436 staff (doc. 55), 242 of whom are employed under indefinite duration contracts. These persons are currently supplemented by 232 workers employed under fixed-term contracts, which are repeatedly renewed in accordance with the legislation mentioned above in relation to the Municipality of Regalbuto. Here too, the fixed-term workers perform duties attaching to stable and permanent posts within the Municipality. In fact, decision no. 334 of the Municipal Council of 22 December 2011 states: *Having regard to the persistence of the needs and documented institutional requirements to ensure services that are already being provided, and the fact that this Administration therefore has an interest in extending the contracts referred to below, taking account also of the specific expertise of the workers currently used throughout all administrative structures of this authority, as moreover reported by the sectoral directors in the memorandum of 14 December 2011, ref. 51714; considering moreover that the failure to renew the contracts would cause serious difficulties in the operation of the institutional*

services provided by the local authority; (...); having concluded that the renewal provided for under the legislation referred to above will enable existing contracts to remain valid without any further substantive obligations for the authority (...) resolves (...) to approve the renewal for a further five-year period, with effect from 1 January 2012 [sic.] and until 31 December 2016 of the part-time contracts for 24 hours per week concluded with the workers appearing on the appended list.

c. The Municipality of Agrigento which is the capital of the eponymous province, has around 59,000 inhabitants. According to decision no. 62 of 7 May 2013 (doc. 57), the workforce of the Municipality consists of 533 posts, 407 of which are held by staff on indefinite duration contracts. The remaining 126 are held by staff hired under fixed-term contracts in accordance with the legislation described above. As can be seen from decision no. 51 of 28 February 2014 (doc. 58), "*considering the Regional Stability Law no. 5 of 28 January 2014, Article 30 of which lays down provisions applicable to precarious workers, implementing the national legislation laid down by Article 4 of Decree-Law no. 101/2013, converted with amendments into Law 125/2003, which lays down the rules governing the processes for stabilising precarious jobs in public administrations, introducing to that effect a transitional recruitment regime to be concluded before 31 December 2016;* c*onsidering in addition circular no. 5500 of 3 February 14, published in the Official Journal of the Sicily Region, part I, no. 7 of 14 February 2014, whereby the Regional Department for Work, Employment, Guidance, Services and Training, issuing instructions concerning the implementation of Article 30 of Regional Law no. 5/2014, clarified that, pending the launch of the procedure for stabilising precarious jobs in accordance with Article 30(3), in view of the continuing organisational requirement and the proven institutional need to ensure services already being provided, the contracts due to expire on 31 December 2013 or thereafter may be renewed without any interruption in employment until 31 December 2014; considering the memoranda appended to this decision, of which they constitute a substantive and integral part, whereby the directors of the sectors in which the staff concerned work have attested the ongoing organisational need and the service requirements, in order to ensure the services being provided, (...) it is proposed that their renewal until 31 December be ordered (...*)". In addition, an attestation of 12 February 2014 issued by the local police sector of the Municipality of Agrigento (doc. 59) indicates: "*the Agrigento local police force has an effective workforce of 76 persons (...) a. police men and women: 25 assistants/officers (...)22 of whom are on fixed-term contracts (20*

at 36 hours and 2 at 24 hours); b. administrative staff (...) 1 under a permanent contract (category B); 1 under a permanent contract (category A); 8 under fixed-term contracts (...); c. manual labourers (workers responsible for road signs) 4 manual labourers responsible for road signs (category A) 3 of whom are on fixed-term contracts) (...) d. staff assigned to the Civil Protection Service, 1 fixed-term official (category D), 3 fixed-term officials (category C), 1 fixed-term official (category B) and 1 administrative worker (category C). The fixed-term and part-time human resources constitute an integral and indispensable part of the staff complement and have a significant impact on the functional dynamics and operational efficiency of the sector, above all if the staff shortfall is considered in the light of the complexity of the objectives allocated and the specificity of the tasks performed".

55. We have confined ourselves here to illustrating, with reference to the documentation of the Sicilian administrations, the situation of three municipalities on the island, also to avoid over-burdening the Committee with descriptions of other situations that are practically identical in most municipalities and other public [bodies] (provinces, healthcare bodies, chambers of commerce, etc.), and the complainant reserves the right to submit any further arguments or evidence in the event that the situation described is disputed by the Italian State.

56. This is in fact the practical context common to almost all Sicilian local authorities (only some of which have voluntarily made arrangements to stabilise their precarious workers), resulting in a de facto situation that has already been condemned on various occasions by the European Court of Justice. Indeed, that court recently stated in the operative part of the order of 14 September 2016 issued in the Diego Porras Case C-596/14 that: *1) Clause 5(1)(a) of the framework agreement on fixed-term work, concluded on 18 March 1999, 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 the application of national legislation, such as that at issue in the main proceedings, by the authorities of the Member State concerned in such a way that: – the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified by 'objective grounds', within the meaning of that clause, on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to ensure the provision of certain services of a temporary, auxiliary or extraordinary nature when, in fact, those needs are fixed and permanent; – there is no obligation on the competent authority to create additional permanent posts in order to bring an end to the employment of occasional regulated staff and it is permitted*

to fill the permanent posts created by hiring 'temporary' staff, so that the precarious situation of workers is perpetuated, where there is a structural deficit of regulated staff posts in that sector in the Member State concerned.

57. As can be seen, according to the official documentation of the Sicilian municipalities there is no need for further comments since the situation is exactly the same as that which was found to violate Directive 1999/70 of the European Union on fixed-term work.

58. In fact, over the last twenty years the municipalities concerned have continued – in accordance with specific, ill-conceived regional legislation (which, where necessary, will be untangled and clarified during the course of the proceedings) maintained even following the entry into force of the European legislation laid down by Directive no. 70 of 1999 – to perpetuate an unlawful situation by concluding successive fixed-term contracts, which we consider is without parallel in any other Member State.

59. It is absolutely clear that the majority of the fixed-term contracts concluded by the local authorities are intended to cover stable and permanent posts, also in consideration of the repeated freezes on recruitment by public competition within the sector,[14] whereas, in accordance with Article 36 of Legislative Decree no. 165/2001, the local authorities should make fixed-term appointments only upon the completion of appropriate competitive procedures,[15] and moreover the conversion of such relations is precluded – paradoxically – precisely by the fact that the

[14] In recent years, and in particular by the amendments contained in Decree-Law no. 78/2010, the legislator has imposed more stringent staffing limits on the regions and local authorities with the aim of achieving greater structural cost savings. In probable contradiction with the case law of the Constitutional Court on the coordination of public finances, the legislator has not only imposed an overall limit on staffing expenditure, a concept which has been further expanded by recent legislation, but has set down precise restrictions on spending, such as, for the regions, by Article 9(28) of Decree-Law no. 78/2010 on the containment of the cost of flexible employment contracts (50% of the expenditure incurred in 2009) or by Article 76(7), which provides that spending on staff by bodies subject to the Stability Pact may not exceed 40 percent of current spending and that staff may be hired in accordance with that limit up to a level of 20 percent of the amount spent on equivalent workers who have ceased employment. This limit of 20 percent, which was imposed by the legislator in particular as a control over the conclusion of permanent contracts, and thus structural spending, significantly reduces the organisational autonomy of the local authorities and is only subject to an explicit exception in relation to the hiring of local police officers in the event of compliance with a more virtuous ratio – 35 percent – between spending on staff and current expenditure. Bodies that are not subject to the Stability Pact remain subject to the obligation to comply with Article 1(562) of Law no. 296/2006, in addition to the overall spending limit for staff of 40% of current expenditure. Finally, an absolute prohibition remains applicable both in the event of failure to comply with the internal Stability Pact as well as in the event that more than 40 percent of current expenditure is dedicated to staff, a limit laid down by Article 76(7) of Decree-Law no. 112/2008.

[15] The foregoing is without prejudice to their possibility of drawing on the valid ranking lists established following public competitions for permanent positions or to fill available positions, up to the limit of each body's own stipulated workforce, using eligible candidates from the ranking lists established following public competitions approved by other administrations in the same contractual segment. Furthermore, pursuant to Article 3(61) of Law no. 350 of 24 December 2003, public administrations may use the ranking lists established following public competitions approved by other administrations, subject to agreement between the administrations involved.

persons concerned allegedly failed to pass a competition.

60. Accordingly, in line with this complex and chaotic legislative situation, in this case too the hypothesis considered by the European Court has materialised, that of a breach through the repetition of fixed-term contracts, with the result that it is necessary to apply sanctions aimed at the *definitive elimination of the consequences of the breach*, to paraphrase the expression used by the European Court in the *Mascolo* judgment (paragraph 79).

61. It can in fact be seen that most local authorities have not held competitions in order to fill vacant posts and, notwithstanding that it is expressly prohibited by law,[16] continue to use fixed-term staff for periods well in excess of 36 months, even amounting to decades.[17] In this sense the case of Rocco Papalia[18] – the conductor of the Aosta Municipal Band, who was employed for 29 years and six months, only to be dismissed when, after he had worked for six days following the expiry of the contract, the municipality decided not to renew it – is not by

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[16] Article 36 of Legislative Decree no. 165/2001 provides for recourse to flexible contracts solely and exclusively for "temporary and exceptional" reasons until the approval of *Article 4(1)(a) and (a-bis) of Decree-Law no. 101 of 31 August 2013*, "other than due to seasonal requirements or for periods not exceeding three months, without prejudice to replacements for workers on maternity leave in autonomous local government bodies", as stipulated in the text in force between 1 January 2008 and 24 June 2008, and "according to collective agreements" in the text previously in force. Article 7 of the National Collective Labour Agreement [NCLA] for local authorities applicable at the time (14 September 2000) provided that:

Pursuant to and by way of supplement to Law no. 230/1962, as amended, and Article 23(1) of Law no. 56/1997, the authorities may conclude individual fixed-term contracts of employment in the following cases:

a) to replace staff who have taken a leave of absence, including staff who have been seconded to a trade union and those who have taken leave in accordance with Articles 4 and 5 of Law no. 53/2000; in situations involving planned absences from work (except strikes), the fixed-term appointment may be brought forward by up to thirty days in order to ensure induction by the worker who is due to take a leave of absence;

b) in order to replace staff who are absent on maternity and parental leave, in situations involving mandatory or optional absences pursuant to Articles 4, 5 and 7 of Law no. 1204/1971 and Articles 6 and 7 of Law no. 903/1977, as amended by Article 3 of Law no. 53/2000; in these cases, the fixed-term appointment may also be made thirty days prior to the start of the period of absence;

c) in order to satisfy the organisational requirements of the authority in situations involving the temporary transformation of employment relations from full-time to part-time work, for a period of six months;

d) in order to carry out seasonal activity in accordance with applicable legislation;

e) in order to satisfy particular extraordinary requirements, including those resulting from the assumption of new services or the introduction of new technologies that cannot be dealt with by the staff in service, up to a maximum limit of nine months;

f) for activities associated with the implementation of specific projects or programmes drawn up by the authorities where these cannot be dealt with by the staff in service, up to a maximum limit of twelve months;

g) in order to provide temporary cover for vacant positions within the various categories for a maximum period of eight months, provided that procedures are launched to cover those positions.

Although this provision has been replaced by Legislative Decree no. 368/2001, is has been referred to in all subsequent NCLAs.

[17] Time-limit laid down by Article 5(4-bis) of Legislative Decree no. 368 of 2001, now Article 19 of Legislative Decree no. 81 of 2015.

[18] See: http://www.studiogalleano.it/corte-di-giustizia-ue---le-pronunce-carratu-e-papalia.html and http://www.europeanrights.en/public/commenti/De_Michele_copy_l.pdf.

any means an isolated case, thus establishing an ideal national unity from north to south, as it is precisely in Sicily that there is one of the highest percentages of precarious public sector employment and no competitions have been held since 1952.[19]

62. Among other reasons, as a consequence of the budgetary restrictions that have characterised the policy of the Italian State, in recent years the contracts of precarious Sicilian workers have been continuously rolled over from year to year, and are often renewed late; in addition remuneration is often also paid late.

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63. Although this situation characterised by an officially established breach of national and above all European law has been repeatedly brought before the Sicilian courts, those courts have however refused to grant any protection, dismissing the employees' appeals (with certain exceptions, such as the *Tribunale di Catania*, the *Tribunale di Siracusa* and above all the *Tribunale di Trapani*, which made a reference for a preliminary ruling to the CJEU concerning the amount of compensation due for the misuse of fixed-term contracts, registered as Case C-494/16 (doc. 60), in which the European Commission filed observations confirming the criticisms raised against judgment no. 5072/2016 of the Joint Divisions of the Italian Court of Cassation (doc. 61)).

64. The Sicilian courts have always maintained that not only is it impossible to convert such contracts into permanent contracts, due to the requirement of holding a competition, but also that the damage to be compensated must be proven by the employee, even after the CJEU's *Papalia* order, as mentioned above.

65. However, even following judgment no. 5072/2016 – which in any case awarded "Community" damage to the employee – the case law of the Sicilian courts remained negative.

66. Indeed, by judgment no. 534 of 14 June 2016 (President Civilletti, author Alcamo, decision of 28 April 2016 (doc. 62)) and later judgments, the Palermo Court of Appeal, the highest judicial authority on the island, decided an appeal brought against a judgment of the *Tribunale di Termini Imerese* whereby the legislation on fixed-term contracts (EU Directive no. 70 of 1999 and Legislative Decree no. 368 of 2001, which was applicable *ratione temporis*, and Article 35 of

[19] As the representative of the Office of the President of the Sicily Region, Mr Gaetano Aiello, stated in his presentation of the legislation of this region at the convention "*Posto fisso o posto variabile?*" ["Permanent jobs or casual jobs"], organised by AGI Sicilia in Messina on 22 November 2014.

Legislative Decree no. 165 of 2001) was not applicable to contracts such as those at issue in the proceedings, concluded in accordance with Sicilian legislation and in particular due to "requirements of a political and social nature aimed at moving beyond the clientelist relationship established by social utility work and at securing professionalism and qualification for staff falling under that category" (to cite the Court of Appeal judgment mentioned above).

67. In fact the court, which had until that time doggedly refused to award compensation in cases in which an abuse was established, on the ground that the employee had failed to prove the damage suffered,[20] was obliged to take account of judgment 5072 of 15 March 2016 of the Joint Divisions of the Italian Court of Cassation, as well as the subsequently issued judgment no. 187 of 2016 of the Constitutional Court, and, in order to avoid submitting to the *dictum* of the Supreme Court, considered it appropriate to adopt the fanciful hypothesis of the *Tribunale di Termini Imerese*, as mentioned above, which, based on the supposed derogatory status of Sicilian regional legislation, purportedly enables the European law on fixed-term contracts to be disregarded,[21] and moreover allegedly excludes such contracts from the scope of EU Directive 1999/70 in accordance with clause 2 of the directive itself, thereby avoiding outright the employees' claims to justice even in the case of an established abuse.[22]

68. In reality, as far as the fixed-term contracts to which this complaint relates are concerned, the regional legislation is without relevance in establishing a derogation, as it is beyond doubt that national law prevails, not to mention European law, given that Article 17 of the Statute of the Sicily Region[23] (doc. 65) subjects the legislative activity of the region: (1.) *to the principles and general interests that guide State legislation* and in particular, in the area of employment and social security, expressly provides that legislative power shall be exercised ... (F.) ... *in*

[20] Even following the *Papalia* order of the European Court of 12 December 2013 (Case C-50/13).

[21] Which was however later invoked, in a contradictory manner, in support of the incontrovertible need for fixed-term contracts.

[22] It should be noted that at the very time the very same judge from the *Tribunale di Termini Imerese* (perhaps astounded that the Palermo Court of Appeal had upheld his judgment), when confronted with similar cases, referred a question of constitutionality (doc. 64) concerning precisely Article 77 of Regional Law no. 17 of 2004, namely the law providing for the disapplication of national and EU law on fixed-term contracts.

[23] Under the consolidated text of the Special Statute of the Sicily Region, approved by Royal Decree-Law no. 455 of 15 May 1946 (published in the Official Journal of the Kingdom of Italy no. 133-3 of 10 June 1946), converted into Constitutional Law no. 2 of 26 February 1948 (published in the Official Journal of the Italian Republic no. 58 of 9 March 1948), and amended by Constitutional Law no. 1 of 23 February 1972 (published in the Official Journal of the Italian Republic no. 63 of 7 March 1972), Constitutional Law no. 3 of 12 April 1989 (published in the Official Journal of the Italian Republic no. 87 of 14 April 1989) and Constitutional Law no. 2 of 31 January 2001 (published in the Official Journal of the Italian Republic no. 26 of 1 February 2001).

accordance with the minimum requirements laid down in State law.[24]

69. It therefore seems evident that the Sicily Region is empowered to legislate *secundum legem*, but certainly not *contra legem.*

70. This is not to mention the attempt to evade EU law, in flagrant breach of Articles 11 and 117 of the Constitution.

71. Nor can any relevance be ascribed to Article 77(2) of Regional Law no. 17 of 28 December 2004 (doc. 66), advanced by the Sicilian courts as justification for the disapplication of the national and EU laws, which provides that: *the provisions laid down by Legislative Decree no. 368 of 6 September 2001 shall not be deemed applicable to fixed-term contracts aimed at stabilising the situation of persons who benefit from the transitional regime for social utility workers.*

72. In fact, having realised the absurdity of these provisions, the regional legislature provided as follows in Article 5 of Law no. 24 of 27 December 2010 (doc. 67):

73. *Stabilisation procedures and renewal of contracts*

74. *Article 5 Provisions applicable to employment.*

1. The regional administration and the authorities falling under Article 1 of Regional Law no. 10 of 30 April 1991, as amended and supplemented, shall in respect of requirements relating to staffing needs make appointments solely under permanent employment contracts, in accordance with the fundamentals and principles laid down in Article 35 of Legislative Decree no. 165 of 30 March 2001.

2. The use of flexible employment contracts shall be permitted within the limits laid down by Article 36 of Legislative Decree no. 165/2001 and in accordance with the principles laid down in Legislative Decree no. 368 of 6 September 2001.

75. Furthermore, Law no. 10 of 30 April 1991 (Sicily Region – administrative organisation) *Administrative provisions and regulation of offices)*, which is thus a genuine "framework law"

[24] With regard to the specific matter of fixed-term contracts, reference must therefore be made to Law no. 230/1962 and Legislative Decree no. 368/2001 (in addition, in particular, to Article 5(4-bis) of the Decree, as will be shown below) and insofar as relevant to the provisions of Article 36 of Legislative Decree no. 165/2001 on the prerequisites for the lawfulness of determination of a term. Directive EU 1999/70 – including specifically clause 5 – on the abuse of fixed-term contracts also applies, alongside clause 4 on equal treatment.

(doc. 68), as amended in 2011, provides in turn as follows:

76. *TITLE I*

77. *Principles*

78. *Article 1*

79. *Scope and general principles applicable to administrative activity* [(4)] [(5)].

1. The administrative activity of the Region, of the authorities, institutions and companies coming under the Region and/or otherwise subject to its control, protection or oversight, of the local and/or institutional authorities and of the authorities, institutions and companies coming under them or otherwise subject to their control, protection or oversight, shall pursue the aims laid down by law and shall be governed by the criteria of value for money, efficacy, publicity, impartiality and transparency in accordance with the arrangements laid down in this Law, other provisions governing individual procedures and the principles of European Union law. The provisions of this Law shall also apply to companies that are fully or predominantly under public ownership, with regard solely to the conduct of administrative functions. Private entities charged with the conduct of administrative functions shall ensure compliance with the aforementioned criteria and principles.[(6].

80. [(4)] *Heading added by Article* 9(1) *of Regional Law no. 5 of 5 April 2011*.

81. [(5)] *See also the provision in relation to the right of the Region and the bodies falling under this Article to join proceedings as a civil claimant with regard to a case brought against any citizen charged with organised crime offences, Article 18 of Regional Law no. 1 of 6 February 2008. See also Article 12(1), (2), (6) and (7) of Regional Law no. 5 of 5 April 2011.*

82. [(6)] *Paragraph as replaced by Article 1 of Regional Law no. 5 of 5 April 2011. The original text was worded as follows: "1. The administrative activity of the Sicily Region, of the authorities, the institutions and the companies coming under the Region and/or otherwise subject to its control, protection and/or oversight, of the local and/or institutional authorities and of the authorities, institutions and companies coming under them or otherwise subject to their control, protection and/or oversight, shall pursue the aims laid down by law and shall be governed by the criteria of value for money, efficacy and publicity in accordance with the arrangements laid down in this Law and the other provisions governing individual procedures."*

83. Moreover, the consideration contained in judgment no. 534 of 2016 of the Palermo Court of Appeal is entirely mistaken in asserting that Article 5 of Regional Law no. 24 of 2010 does not apply to the legislation on the stabilisation of the situation of social utility workers, but only to so-called "normal" contracts which are concluded due to the requirements of the Sicilian administration.[25]

84. This theory is also clearly at odds with the consideration that Article 5 of Regional Law no. 24 of 2010 must primarily be interpreted in the light of the general principles of Sicilian primary legislation, which have already been examined (Article 17 of the Statute and Regional Law no. 10 of 1991), which require compliance (insofar as necessary) with national and, *in primis*, European law.

85. It must also be pointed out in strictly normative terms that Article 5 is the first Article of "*Chapter II – Stabilisation procedures and renewal of contracts*" of Law no. 24 of 2010, which means that it would be, at the very least, reckless to assert that it has nothing to do with the type of fixed-term contract at issue in the proceedings.

86. Finally, the reference to clause 2 of the Directive is also not relevant insofar as it provides that:

2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:

a) initial vocational training relationships and apprenticeship schemes;

b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme.

87. By intentionally misconstruing letter b) it has been asserted that contracts such as those at issue here are "publicly supported", and for this reason alone are supposedly exempt from the scope of the Directive.

88. It is in fact clear that the provision of public support is mentioned by the Directive in relation to a *specific … training, integration and vocational retraining programme*, which may be

[25] Such contracts were however entirely non-existent other than in strictly political areas and for individuals with particular professional expertise, as almost all fixed-term contracts in existence are of the type considered in this complaint.

public or "publicly supported".

89. In our case, there is no trace of such a programme either in the individual contracts of employment, or above all in the specific implementation of the relationships in question.

90. As has been repeatedly stressed and confirmed by the public documents submitted, the *de facto* implementation of the relationships is entirely extraneous to the scenario envisaged by the framework agreement, as it relates to the performance by the public body of its own tasks with the full incorporation [of the individuals concerned] into ordinary administrative activity in order to occupy vacant stable and permanent positions.

91. As can be seen, only case law that is blatantly and intentionally incompatible with the national and European legislative framework can seriously invoke a fanciful genetic (sic) rationale that may remove the contracts in question from the application of ordinary law.

92. In addition, as can be seen from the individual contracts submitted (doc. 69: several contracts are submitted as examples), the employment relationship of the claimants is expressly governed by the collective agreement applicable to local authorities[26] and by employment law and therefore, also in this respect the, albeit positive, intentions of the employer and of the Sicily Region[27] invoked in these cases through a reference to provisions seeking to stabilise precarious employment[28] are of little import, as they are certainly not able to alter the – ordinary – nature of the relationship in question.

93. Moreover, the Sicilian courts have consistently refused to refer to the EU Court the preliminary questions raised in all other proceedings, which were worded as follows:

1) Must a) clauses 1, 2, 3 and 5(1) and (2) of the Framework Agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, clause 4(1) of the Framework Agreement and the principle of equality and non-discrimination under European law [guaranteed by Article 6(2) of the Treaty on European

[26] Fixed-term contract, regulated until 31 December 2001 by Article 7 of the NCLA of 14 September 2000. As regards the regulation of fixed-term contracts, Article 1 of the NCLA of 22 January 2004, which took effect on 1 January 2002, refers (in paragraph 4) to Legislative Decree no. 165/2001, Article 36 of which provides that Legislative Decree no. 368/2001 (legislation amending Law no. 230/1962) shall apply to flexible contracts.

[27] Reflecting nothing more than the institutional tasks of the State and the equivalent structures in the autonomous regions.

[28] Which are paradoxically invoked precisely in order to consolidate the precarious nature of the relationships concerned!

Union (as amended by Article 1(8) of the Lisbon Treaty and to which Article 46 of the Treaty on European Union refers)] and Articles 20, 30 and 31 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, as primary legislation of the Treaty on European Union, and b) the general principles of the applicable law of the European Union of legal certainty, the protection of legitimate expectations, equality of arms within the trial, effective judicial relief, the right to an independent court and, more generally, to a fair trial [guaranteed by Articles 46, 47 and 52(3) of the Nice Charter as primary legislation of the Treaty on European Union, and Article 6 of the European Convention on Human Rights, a provision laying down fundamental principles of the European Union], and/or c) Articles 102(1) and 106(1) and (2) of the Treaty on the Functioning of the European Union (formerly Articles 82(1) and 86(1) and (2) of the EC Treaty) be interpreted, including in the light of the Fenoli judgment of 26 March 2015 (in Case C-316/13) to the effect that these provisions preclude the adoption by a Member State, and by a Member State local authority such as Sicily Region, of regional and state legislation such as Article 23 of the national Law 67/1988, Sicilian Regional Laws no. 85/1955, Articles 11 and 12, no. 27/1991, no. 5/1992, no. 25/1993, no. 85/1995, Article 12, no. 21/2003, Article 23 which, in permitting the unlimited repetition of successive fixed-term contracts without interruption that are established or otherwise continued for years notwithstanding the absence of any provision for a specific apprenticeship, training or vocational retraining programme pursuant to clause 2 of the Directive and involving the incorporation into stable and permanent positions within the workforce of the body, without providing for any of the protective measures provided for under clause 5 of EU Directive 1999/70 and its conditions for "legitimacy" – limiting the powers of the national courts in not permitting them to verify whether conditions actually obtain that could justify the temporary requirements of a regional and/or municipal public body in imposing a term on the employment relationship with regard to contracts concluded with private and public employers, and in not permitting the application within litigation of equivalent preventive measures for objective justifications pursuant to Article 1(1) of Legislative Decree no. 368/2001 and Article 36 of Legislative Decree no. 165/2001, or the imposition of sanctions on successive fixed-term contracts pursuant to Article 5(4-bis) of Legislative Decree no. 368/2001 and Article 36 of Legislative Decree no. 165/2001, with the result that it is possible to disregard at will the maximum duration for fixed-term contracts, or any other preventive or retrospective measure to prevent abuse, thereby rendering precarious without limit in time the employment relations of persons working for Sicilian public bodies without any legitimation or objective justification in breach of the

European constitutional principle of equality and non-discrimination and within the scope of European Union legislation on fixed-term contracts of employment.

2) Must clause 5(2) of the Framework Agreement on fixed-term work be interpreted to the effect that it precludes any national and regional legislation of that State – within a principal dispute concerning "successive" fixed-term contracts concluded for more than 10 consecutive years with the sole "justification" of the general and abstract clause in favour of the stabilisation of precarious workers, but involving the undisputed stable and permanent incorporation into the workforces of the local authorities – that prevents the application, which is guaranteed to all other workers, [of legislation] such as that provided for under Article 5(4-bis) of Legislative Decree no. 368/2001, which stipulates a maximum time limit of 36 months for fixed-term contracts for work in the same tasks, after which the relationship will be considered to be permanent, or that providing for compensation pursuant to Article 36 of Legislative Decree no. 165/2001, as held in the Papalia order and the Fenoli judgment of the European Court.

3) May a worker such as that to which these proceedings relate who – but for the operation of the preclusionary rules referred to in question 1 – would have accrued a right to the establishment of a permanent relationship with the public employer in accordance with the sanctions put in place to prevent abuses of fixed-term contracts pursuant to Legislative Decree no. 368/2001, or to the compensation of equivalent redress pursuant to Article 36 of Legislative Decree no. 165/2001, directly invoke these rights on the basis of Article 4(3) of the Treaty on European Union and the [principle of] loyal cooperation between the Member States and the Union institutions along with Articles 30 and 47 of the Charter of Fundamental Rights of the European Union in order to obtain the right to a stable employment relationship or to equivalent compensation where the national and regional legislation described does not provide that the worker should enjoy those rights following the introduction of the provisions cited, which preclude substantive and judicial relief that would otherwise be afforded by the proper implementation of the Framework Agreement on fixed-term work, and must the national courts set aside or disapply any provision of national law with contrary effect in order to guarantee the full efficacy of that right.

4) Must the general principles of applicable European Union law of legal certainty, legitimate expectations, equality of arms within the trial, effective judicial relief, the right to an independent court and, more generally, to a fair trial pursuant to Article 47 of the Charter of Fundamental Rights of the European Union, in the light of the case law of the Court of Justice of the European

Union on the liability of the Italian State for losses caused to individuals due to the violation of European Union law by the court of final instance in the judgments in Traghetti del Mediterraneo in Case C-373/03 and Commission v. Italian Republic in Case C-379/10 be interpreted to the effect that these provisions and the case law cited of the Court of Justice preclude the adoption by a Member State – with the aim of favouring itself and its public administrations in Sicily Region, such as in the present case – of legislation such as that introduced by Law no. 18/2015 with the apparent intention of implementing the decisions of the CJEU cited but in actual fact with the substantive objective of thwarting their effects and conditioning national case law which, according to the newly enacted version of Article 2(3) and (3-bis) of Law no. 117 of 13 April 1988 on the civil liability of judges, establishes a notion of liability for wilful wrongdoing or gross negligence "in the event of a manifest breach of the law and of European Union law", which confronts the national judge with the choice – which irrespective of how it is made will constitute grounds for civil and disciplinary liability towards the State within proceedings to which the public administration is a substantive party, as in the present case – over whether to violate national legislation by applying European Union law, as interpreted by the Court of Justice, or by contrast of violating European Union law by applying the national provisions that preclude the recognition of the relief already acknowledged.

94. This accordingly clearly violates the case law of the European Court of Human Rights (*Dabhi* judgment of 8 April 2014, Requête no. 17120/09).

95. It therefore follows that Sicilian precarious workers are devoid of any protection whatsoever and are thus forced to take action before the Committee against the Italian State, seeking a ruling establishing the violation of the provisions of the Social Charter referred to below and of European Union law, with the result that this case involves not only a failure to implement the Directive[29] but also a violation due to the failure to control the actions of subordinate local authorities, of the specific obligation which the legislator has made binding on the Government, in accordance with Community treaties, providing explicitly for its corrective intervention, whereas it has remained entirely inert.

[29] It is also possible to add to the above the failure to put in place the correct instruments by amending Legislative Decree no. 368/2001, which implemented Directive 1999/70/EC, in spite of the considerable time constraints and causal restrictions imposed on the Government when amending or supplementing a legislative decree implementing a European directive both under the framework Community law for 2005 (Law no. 11/2005) and under the equivalent law for 2012 (Article 31 of Law no. 234/2012), so much so as to provide that any amendments or supplements that do not formally comply with the requirements laid down by the two framework laws governing the applicability of amendments made will have no effect (arguing pursuant to Article 21 of Law no. 11 of 2005, and pursuant to Article 58 of Law n. 234 of 2012), above all in terms of the inapplicability of any sanctions.

96. Consideration should be given here to the requirements laid down by Article 41 of Law no. 234 of 2012 (Community framework law:[30] doc. 70):

1. In order to prevent the initiation of infringement proceedings under Articles 258 et seq of the Treaty on the Functioning of the European Union and to put an end to the same, the regions, the autonomous provinces, the local authorities, other public authorities and equivalent bodies shall take all necessary steps to rectify promptly any violations attributable to them of the obligations of the Member States resulting from European Union law. They shall under all circumstances be obliged to implement promptly the obligations resulting from the judgments given by the Court of Justice of the European Union pursuant to Article 260(1) of the Treaty on the Functioning of the European Union.

2. The State shall exercise the necessary reserve powers in respect of any bodies falling under paragraph 1 that incur responsibility for the violation of the obligations resulting from European Union law or that do not promptly implement the judgments of the Court of Justice of the European Union in accordance with the principles and procedures laid down in Article 8 of Law no. 131 of 5 June 2003 and Article 41 of this Law.

THE VIOLATIONS OF THE EUROPEAN SOCIAL CHARTER REGARDING WHICH THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS IS REQUESTED TO MAKE A FINDING

97. The right to work and to fair and dignified working conditions has been expressly enshrined in Italian law at a constitutional level and this right is widely recognised and protected by the European Social Charter.

98. The USB is entitled as a trade union association to take action to protect the employment interests of its members, including before the national courts, as it has already done (see ECtHR, *Unison v. United Kingdom*, judgment of 10 January 2002, application no. 53574/99).

99. The USB has, through its lawyers, sponsored various cases before the Sicilian courts without obtaining any relief for the precarious employees who are members of the trade union, which has had inevitable repercussions on its credibility.

[30] However, see also previously Article 10(3) of Law no. 11 of 2005 (Buttiglione Law) and Article 11(2) of Law no. 86 of 1989 (La Pergola Law).

100. The case law of the Sicilian courts, including above all that of the Palermo Court of Appeal, to which most Sicilian courts are adhering – which in recent judgments has also awarded considerable procedural costs (Annex 64) against precarious part-time workers – has made this situation entirely unsustainable.

101. The judgments of the Sicilian courts thus constitute an extremely serious **violation of the** following provisions **of the European Social Charter:**

- **Article 1**, obligations l and 2, as the Italian State has failed to honour both the obligation to recognise among its principal aims and responsibilities stability of employment for tens of thousands of public workers involved in the institutional activity of the Sicilian local authorities, on account of the existence and performance by them for years of tasks for which there is a vacant position, the realisation and maintenance of the highest and most stable possible level of employment with a view to the attainment of full employment, as well as the obligation to protect effectively the right of such workers to earn a living through work freely undertaken, by contrast rendering their work precarious in its threefold status as legislator, judge and employer, and to control the application of EU law in Italy;

- **Article 4**, obligations 1 and 4, as the Italian State has failed to honour as an employer both the obligation to recognise for tens of thousands of precarious Sicilian workers the right to sufficient remuneration such as to guarantee them and their families a decent standard of living, by rendering their remuneration dependent upon regional contributions that are renewed from year to year and often after considerable delays, and paying under all circumstances the minimum contractual amounts without recognising any career progression for services already rendered, along with the obligation to recognise the right of workers to a reasonable period of notice for termination of employment;

- **Article 5**, because the Italian State has not guaranteed the freedom of Sicilian workers to form national trade union organisations such as the USB for the protection of their economic and social interests and to join those organisations, as the national legislation has undermined this freedom and the Sicilian courts have applied it in such a manner as to impair this freedom, even frustrating statutory rules and the provisions of collective labour agreements which recognise the rights of workers;

- **Article 6**, obligation no. 4, because the Italian State has failed, through both legislation and the courts, to recognise de facto the right of precarious Sicilian workers to collective action

through the complainant USB in cases of conflicts of interest, because the collective action (provided for by law) brought before the Court of Justice of the European Union (and recognised by the *Affatato*, *Papalia* and *Mascolo* judgments) has been deprived of its effect of protecting rights by the Sicilian courts;

- **Article 24**, because the Italian State, as an employer and through legislation and the courts, has in respect of tens of thousands of Sicilian workers, who were unlawfully hired under fixed-term contracts to fill vacant positions within the workforce, failed to recognise the right of all workers not to have their employment terminated without valid reasons 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.

102. Each of the violations of the European Social Charter mentioned above was committed in parallel with the violation of **Article E of the European Social Charter** and the obligation for the Italian State **not to discriminate** against Sicilian fixed-term workers, [in terms of their right] to be granted tenured status with the public administration which employs them, as compared to private sector workers whose situations are stabilised pursuant to Article 5(4-bis) of Legislative Decree no. 368/2001.

*

The following documentation, referred to above, is annexed to the complaint:

1- Statutes of the USB;
2- documentation concerning the representativeness of USB
3- National Collective Labour Agreement for Local Authorities of 29 November 2007;
4- Legislative Decree no. 165/2001 (Consolidated Act on Public Sector Employment);
5- Legislative Decree no. 368/2001, national legislation implementing Directive 1999/70/EC on fixed-term work, repealed with effect from 25 June 2015;
6- Directive 1999/70/EC implementing the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP;
7- Court of Justice judgment in Marrosu-Sardino of 7 September 2006 in Case C-53/04;
8- Articles 19-29 and 55 of Legislative Decree no. 81/2015, repealing Legislative Decree no. 368/2001;

9- MIUR [Ministry of Education, Universities and Research] circular of 25 September 2008 acknowledging the applicability of Legislative Decree no. 368/2001 to workers in schools;

10- circular note 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-23/2010, of the EU Commission to a parliamentary question on the application by Italy of Article 5(4-bis) of Legislative Decree no. 368/2001 to public sector employment;

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

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

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

19- extract from page 18 of the 2011 report on the administration of justice of 26 January 2012;

20- decree of 1 March 2012 of the President of the Milan Court of Appeal on the reorganisation of roles

21- judgment no. 709 of 11-15 May 2012 of the Employment Division of the Milan Court of Appeal;

22- judgment no. 764 of 11-25 May 2012 of the Employment Division of the Milan Court of Appeal;

23- judgment no. 10127/2012 of 20 June 2012 of the Court of Cassation;

24- article by V. De Michele and S. Galleano, *Le spese di giustizia nel giusto processo del lavoro tra legge e prassi amministrativa* [Employment law and the costs of a fair trial: the law and administrative practice], published in “Il lavoro nella giurisprudenza, 2016, no. 8-9;

25- article by V. De Michele, “Il Tribunale aquilano demolisce la sentenza antispread della Cassazione sul precariato scolastico” [“The L’Aquila court demolishes the anti-spread judgment of the Court of Cassation on precarious workers in schools”], published in “Il Lavoro nella giurisprudenza”, 2012, no. 8-9;

26- *report no. 190 of 24 October 2012 of the Case Law Analysis Office of the Court of Cassation concerning "Il precariato scolastico e la tutela dei diritti nella disciplina e giurisprudenza comunitaria e nazionale, tra esigenze di specialità e principio di eguaglianza" ["Precarious work in schools and the protection of rights under Community and national law: between the need for special provision and the principle of equality"];";*

27- reference for a preliminary ruling to the CJEU from the Tribunale di Aosta of 12 December 2013 in Case C-50/13 Papalia;

28- reference for a preliminary ruling to the CJEU from the Tribunale di Napoli of January 2013 in Case C-22/13 between the claimant Raffaella Mascolo and the MIUR;

29- written observations of 06 June 2013 by the teacher Raffaella Mascolo filed with the Court of Justice in Case C-22/13 against the MUIR;

30- written observations of 14 May 2013 from the Italian Government filed with the Court of Justice in Joined Cases C-22/13, C-61/13, C-62/13 and C-63/13;

31- written observations filed with the Court of Justice on 25 April 2013 by the EU Commission regarding the reference for a preliminary ruling in *Papalia* C-50/13;

32- order no. 207/2013 of the Constitutional Court of 18 July 2013;

33- order no. 206/2013 of the Constitutional Court of 18 July 2013;

34- Article 4 of Decree-Law no. 101 of 31 August 2013;

35- Article 15 of Decree-Law no. 104 of 12 September 2013;

36- written opinion of 17 July 2014 delivered by Advocate General Szpunar in Joined Cases C-22/13, C-61/13, C-62/13, C-63/13 and C-418/13;

37- order of 12 December 2013 issued by the CJEU in Case C50/13 Papalia;

38- Mascolo judgment of the CJEU of 26 November 2014 in Joined Cases C-22/13, C-61/13, C-62/13, C-63/13 and C-418/13;

39- judgment no. 27363/2014 of 23 December 2014 of the Employment Division of the Court of Cassation;

40- judgment no. 27481/2014 of 30 December 2014 of the Employment Division of the Court of Cassation;

41- judgment no. 529/15 of 21 January 2015 of the *Tribunale di Napoli* in case no. 5288/12 R.G. between the claimant Raffaella Mascolo and the MIUR;

42- judgment no. 260/2015 of the Constitutional Court of 11 December 2015;

43- Law no. 107 of 13 July 2015;

44- judgments no. 4911, 4912, 4913 and 4914 of 14 March 2016 of the Joint Divisions of the

Court of Cassation;

45- judgment of the CJEU in Case C-361/12 Carratù;

46- judgment no. 5072 of 15 March 2016 of the Joint Divisions of the Court of Cassation;

47- article by F. Putaturo Donati, *PA e contratti illegittimi: note critiche sul riconoscimento del danno (extra)comunitario,* ["The public administrations and unlawful contracts: critical nots on the award of (extra) Community damages"] published in "Massimario della giurisprudenza del lavoro, 8-9, 2016, p.603-614;

48- judgment no. 187/2016 of the Constitutional Court of 20 July 2016;

49- order no. 194/2016 of the Constitutional Court of 20 July 2016;

50- order no. 195/2016 of the Constitutional Court of 20 July 2016;

51- bill no. 742 tabled on 18 April 14 before the Sicilian Regional Assembly

52- technical assessment by the Draft Legislation Department 14 July 2014

53- decision of the Regalbuto Municipal Council of 22 September 2014

54- decision of the Regalbuto Municipal Council of 31 October 2012

55- decision of the Barcellona Pozzo di Gotto Municipal Council of 26 January 2012

56- decision of the P.d.G. Municipal Council of 22 December 2011

57- decision of the Agrigento Municipal Council of 7 May 2013

58- decision of the Agrigento Municipal Council of 28 February 2014

59- attestation by the Agrigento municipal police sector of 12 February 2014

60- order concerning a reference to the CJEU of the *Tribunale di Trapani* of 5 September 2013

61- observations of the European Commission in Case C-494/16

62- judgment 534/2016 of the Palermo Court of Appeal

63- judgment 415/2017 of the Palermo Court of Appeal

64- order of the *Tribunale di Termini Imerese* of 7 June 2017

65- Statute of Sicily Region

66- Sicily Regional Law no. 17 of 27 December 2004

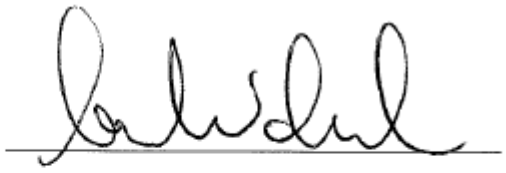
67- Sicily Regional Law no. 24 of 27 December 2010

68- Sicily Regional Law no. 10 of 30 April 1991

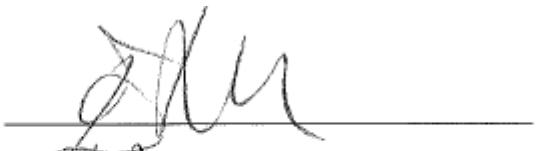
69- individual employment contracts of precarious Sicilian workers

70- Italian Law on the implementation of EC law, no. 234 of 2012

Rome, 10 July 2017

Daniela Mencarelli 

Sergio Galleano 

Ersilia De Nisco 

Vincenzo De Michele