EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

12 April 2017

Case Document No. 1

***Unione Nazionale Dirigenti dello Stato* (UNADIS) v. Italy**
Complaint No.147/2017

COMPLAINT

Registered at the Secretariat on 20 March 2017

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

FAO: Executive Secretary of the European Committee of Social Rights, acting on behalf of the Secretary General of the Council of Europe

Collective complaint

pursuant to Article 1(c) of the Additional Protocol to the European Social Charter, which provides for a system of collective complaints

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Information concerning the complainant trade union organisation UNADIS

1. UNADIS Unione Nazionale Dirigenti dello Stato

- is a confederal trade union:
- represents public sector directors from the state administrations, including self-governing bodies, the Office of the President of the Council of Ministers, constitutional bodies, agencies and authorities (areas I, VI & VIII) and municipal secretaries:
- is the trade union organisation that is most representative of directors, and as such is a contractual party on all levels of bargaining.
- is a trade union which, within the branch, has exclusively directors as members.

2. The UNADIS accordingly represents and assists hundreds of public sector directors (Doc. No. 1), with a level of representativeness certified by ARAN for the central areas branch of 6.9% (Doc. No. 2).

3. In this collective complaint the UNADIS is represented by its current President and legal representative, Ms Barbara Casagrande. Communications may for the purposes of this complaint should be made via the email addresses unadis2012@gmail.com and/or the telephone number +39 06.42.01.29.31 and/or

fax number + 39 06.42.01.29.31

4. For the purposes of this complaint, UNADIS has availed itself of the assistance of Counsel Sergio Galleano of the Milan bar (Italian tax ID GLLSRN52E18F205N), Counsel Vincenzo De Michele of the Foggia bar (Italian tax ID DMCVCN62Al 6D643W) and Counsel Ersilia De Nisco of the Rome bar (Italian tax ID DNSRSL79T68A783N), email roma@studiogalleano.it fax 06 37500315.

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Contracting party which has violated the European Social Charter: ITALY

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Statement concerning the situation of workers assisted by the UNADIS

5. In redesigning the organisation of the financial administrative structure of the Italian state, Legislative Decree No. 300 of 30 July 1999 on the structural organisation of central government pursuant to Article 11 of Law No. 59 of 15 March 1997 - established and regulates the tax agencies (Revenue Agency, Land Registry Agency, Customs Agency and State Property Agency) as regards the management of the functions carried out by the revenue, customs and land registry departments along with related functions carried out by other offices from the ministry, transferring to them the relevant legal rights, obligations, powers and competence, to be exercised in accordance with the rules governing the internal organisation of each agency.

6. The tax agencies have legal personality under public law; they have regulatory, administrative, asset management, organisational, accounting and financial autonomy. In particular, as far as is of interest here, it must be stressed that Article 71 of Legislative Decree No. 300 of 1999 provides that the administrative regulations of each tax agency shall stipulate, *inter alia*, the rules on eligibility for directorial positions.

7. In keeping with that provision, the Land Registry Agency and the Revenue Agency have regulated, each within their own Administrative Regulations

(respectively Article 26 and Article 24), the procedures according to which directorial positions are to be filled, providing essentially for the possibility to conclude individual fixed-term contracts of employment with their own officials in accordance with internal procedures for assessing suitability for appointment as a director. The Customs Agency has made similar provision (Doc. No. 3).

8. However, it must be pointed out that, pursuant to Article 60 of Legislative Decree No. 300 of 1999, as part of the heightened level of ministerial oversight to which the tax agencies are subject, the resolutions of the management committee concerning the regulations of the tax agencies are subject to approval, which has been regularly granted in these cases, by the Minister for the Economy and Finance.

9. The tax agencies constitute the operational arm of the Ministry for the Economy of the Government of the Republic of Italy and, pursuant to Legislative Decree No. 300 of 1999, have been responsible for the management of the tax revenue of the Italian State since 1 January 2001, in addition to dealing with a whole range of other significant activities for the state.

10. The tax agencies have developed considerably since they were established, and have been decisive in rebalancing tax policy and combating tax evasion. From the outset the agency suffered from a lack of directorial staff, which has been aggravated over the years by the bar on the employment of new staff imposed by Italian law.

11. As a result, a large number of officials who are notionally clerical staff - belonging to Category Three of the classification of staff under the sectoral NCLA (Doc. No. 4) - have been appointed to specific directorial positions, as will be specified in greater detail below, pursuant to Article 19 of Legislative Decree 165/2001 (Consolidated Act on Public Sector Employees, Doc. No. 5), the parts of which that are relevant for this complaint are reproduced below:

LEGISLATIVE DECREE No. 165 OF 30 MARCH 2001 PUBLIC SECTOR EMPLOYMENT

WORK

Article 19 *Appointments with directorial functions (Article 19 of Legislative Decree No. 29 of 1993, as replaced first by Article 11 of Legislative Decree No. 546 of 1993 and later by Article 13 of Legislative Decree No. 80 of 1998, and subsequently amended by Article 5 of Legislative Decree No. 387 of 1998)*

1. For the purposes of the conferral of each appointment with directorial functions, consideration shall be given, having regard to the nature and characteristics of the predetermined objectives and the complexity of the structure concerned, to the aptitude and professional ability of the individual director, the results previously obtained within the administration of origin and the relative assessment of the specific organisational skills possessed and of any directorial experience acquired abroad, whether in the private sector or with other public administrations, insofar as relevant for the appointment. Article 2103 of the Civil Code shall not apply to the conferral of appointments and the transfer to different appointments. *(58)*

(...)

2. All appointments to directorial positions within the state administrations, including self-governing bodies, shall be made in accordance with the provisions of this Article. The decision confirming the appointment, or a separate decision adopted by the President of the Council of Ministers or the minister with competence for the appointments falling under paragraph 3, shall indicate the purpose of the appointment and the objectives to be achieved, with reference to the priorities, plans and programmes defined by the senior management body in its own policy documents, as amended during the course of the relationship, as well as the duration of the appointment, which must be commensurate with the predetermined objectives and may not under any circumstances be shorter than three years or longer than five years. The duration of the appointment may be shorter than three years if it is due to expire at the retirement age of the interested party. Appointments may be renewed. The decision to make the appointment shall be followed by the conclusion of an individual contract, which shall determine the corresponding remuneration, in accordance with the principles laid down by Article 24. The relationship may be terminated at any time by mutual agreement. The duration of the first appointment of a Band II director to a general directorial role or to equivalent functions

shall be equal to three years. Without prejudice to the foregoing, for the purposes of the application of Article 43(1) of Presidential Decree No. 1092 of 29 December 1973, as amended, the final salary for employees of a state body who have been appointed to a directorial role in accordance with this Article shall be determined on the basis of the final remuneration received in relation to the appointment. Under the circumstances referred to in the third sentence of this paragraph, the final salary for the purposes of the calculation of the end-of-service payment, irrespective of its designation, and the application of Article 43(1) of Presidential Decree No. 1092 of 29 December 1973, as amended, shall be determined on the basis of the final remuneration received prior to the appointment, if shorter than three years. [(59)]

(...)

4. Appointments to general level directorial positions shall be made by decree of the President of the Council of Ministers, acting on a proposal by the competent minister; appointees must be Band I directors in the positions falling under Article 23 or, in an amount not exceeding 70% of the relevant staffing body, other directors serving in the same positions or, under a fixed-term contract, other individuals who possess the specific professional qualities required under paragraph 6. [(61)]

(...)

5. Directorial appointments to director level offices shall be made by the director from the general directorial level office; appointees must be directors assigned to his or her office pursuant to Article 4(1)(c).

(...)

12-bis. The provisions of this Article may not be set aside under contract or by collective agreements.

[(58)] *Paragraph replaced by Article 3(1)(a) of Law No. 145 of 15 July 2002. This paragraph was subsequently replaced by Article 40(1)(a) of Legislative Decree No. 150 of 27 October 2009.*

[(59)] *Paragraph replaced by Article 3(1)(b) of Law No. 145 of 15 July 2002 and amended by Article 14-sexies(1) of Decree-Law No. 115 of 30 June 2005, converted with amendments into Law No. 168 of 17 August 2005; this provision does not apply to directorial appointments to general directorial offices that became vacant prior to the expiry of the contracts of the directors concerned as a result of Article 3(7) of Law No.*

145 of 15 July2002. Finally, this paragraph was amended into its current form by Article 40(1)(c) No. 1 and 2 of Legislative Decree No. 150 of 27 October 2009, and subsequently by Article 1(32) of Decree-Law No. 138 of 13 August 2011, converted with amendments into Law No. 148 of 14 September 2011: for the application of this last provision, see Article 1(32) of Decree-Law 138/2011.

(61) Paragraph replaced by Article 3(1)(d) of Law No. 145 of 15 July 2002, and subsequently amended by Article 3(147). Law No. 350 of 24 December 2003, with effect from 1 January 2004.

(...)

12. The legitimacy of these directorial appointments made on the basis of the provisions cited above was further reinforced from 2012 by specific additional legislative provisions approved by the Italian Parliament over the last few years (see most recently Article 8(24) of Decree-Law No. 16 of 2012; Article 1(14) of Decree-Law No. 150 of 2013; Article 1(8) of Decree-Law No. 192 of 2014).

13. It should be pointed out that, according to the prevailing case law of the Italian Court of Cassation, the transfer of an official from clerical to directorial functions amounts to a new appointment (see on this point the initial judgment of the Court of Cassation, No. 3948 of 26 February 2004[1] and the recent judgments

[1] **Court of Cassation, Joint Civil Divisions, judgment No. 3948 of 26 February 2004** *C. and others v. Ministry of Justic*e **COMPETENCE AND CIVIL JURISDICTION** Jurisdiction of the ordinary courts and of the administrative courts
In accordance with the principles set out by the Constitutional Court in judgment No. 2 of 2001 and by the case law of the Court of Cassation on the division of **jurisdiction** over disputes relating to competitive selection procedures for the appointment of public sector employees, **jurisdiction** must be vested in the ordinary courts or the administrative courts, depending upon whether any of the various scenarios from the following overall framework obtains: a) **jurisdiction** of the administrative courts over disputes relating to competitive selection procedures for external candidates only; b) also administrative **jurisdiction** over disputes relating to mixed competitive selection procedures, whereby it is irrelevant whether or not the position to be filled falls within the same functional **area** as that under which the internal position to which the selection procedure relates is classified since, in such a case, the fact that the situation does not involve a transfer or appointment within a different **area** is rendered moot by the possibility of an external successful candidate; c) once again administrative **jurisdiction** in cases involving competitive selection procedures for internal candidates only that entail a **transfer** from one functional **area** to another, in which case it will fall to the ordinary court to verify the legitimacy of the rules precluding the eligibility of external candidates (unless it is found that the violation of the constitutional principle on the opening up of competitive selection procedures to external candidates, amounting to an *ultra vires* act committed through an act of contractual autonomy, for this reason establishes the jurisdiction of the ordinary courts, once it has been found that the administrative courts do not have exclusive jurisdiction over the matter); d) residual **jurisdiction** of the ordinary courts in

No. 3032 of 8 February 2013[2] and No. 3032 of 31 March 2015[3]), with the result that in order to be employed as a director, the official must successfully complete a specific competitive selection procedure.

14. Since these competitive selection procedures were never held, the officials were appointed under fixed-term contracts on the basis of specific calls for candidates; these contracts were occasionally extended.

15. As is the case for "tenured" directors, each year a review is conducted of the activities carried out by appointees, which involves specific procedures to monitor the quality and quantity of the work performed as well as the fulfilment of the specific objectives set for each director at the start of each year. A positive outcome to such checks and controls is a prerequisite for the continuation or renewal of the appointment.

16. Appointments to directorial functions are therefore to be considered to all intents and purposes, as mentioned above, as fixed-term contracts, including

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disputes relating to competitive selection procedures for internal candidates only that entail a **transfer** from one role to another within the same functional **area**.

[2] **Court of Cassation, Joint Civil Divisions, judgment No. 3032 of 08 February 2013**
P.R. v. Municipality of Sinnai
COMPETENCE AND CIVIL JURISDICTION Regulation of **jurisdiction** in general
PUBLIC SECTOR EMPLOYMENT Internal competitive selection procedures
Within the area of public sector employment according to collective labour agreements, the administrative courts must be considered to have **jurisdiction** over disputes relating to internal competitive selection procedures aimed at allocating employees to more senior functional areas or categories, given that such an eventuality would result in an objective novation of the employment relationship and not the **transfer** from one classification to another within the same functional **area**.

[3] **Court of Cassation, Joint Civil Divisions, judgment No. 6467 of 31 March 2015**
C.G. and others v. Roma Capitale
COMPETENCE AND CIVIL JURISDICTION
Jurisdiction of the ordinary courts and of the administrative courts
PUBLIC SECTOR EMPLOYMENT Relationship of public sector employment in general
As regards the allocation of **jurisdiction** within disputes concerning competitive selection procedures to appoint public sector employees, the administrative courts have **jurisdiction** over disputes relating to competitive selection procedures for external candidates only, within competitive selection procedures for internal candidates only that entail a **transfer** from one band or functional **area** to another and over disputes relating to mixed competitive selection procedures, in which regard it is irrelevant whether or not the position to be filled falls within the same functional area as the internal position to which the competitive selection procedure relates since, in such an eventuality, the fact that it does not involve a **transfer** to a different **area** is rendered moot by the possibility of external successful candidates. On the other hand, the ordinary courts have residual **jurisdiction** over disputes relating to competitive selection procedures only for internal candidates that entail a **transfer** from one role to another within the same **area**.

pursuant to clause 2(1) of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP on 18 March 1999 and implemented by Directive 1999/70(EC (Doc. No. 6), which provides as follows: "1. This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State".

17. The mechanism used for appointing officials from within the administration to directorial positions, which was established in 2000 in order to deal on a provisional basis with the extraordinary requirements of directorial staffing pending the completion of the relevant competitive selection procedures, has gradually turned into the ordinary system for recruiting directors to the tax agencies, and over the years, until 2015, ended up as the standard instrument for creating the directorial class in order to cover structural staffing shortages.

18. As is apparent from the report presented by the Director of the Agency to the Senate Finance and Treasury Committee on 16 July 2015 (Doc. No. 7), in March 2015 the number of staff directors included 866 officials within the Revenue Agency who had been appointed to a directorial role.

19. The selection/assessment procedure used in order to identify the officials who were to be appointed as directors pursuant to Article 24 of the Administrative Regulations of the Revenue Agency was conducted, as a rule, in the following manner: the selection procedure was launched by a notice from the competent Central Directorate of the Agency activating the internal search, which was aimed primarily at Band II directors and subsequently, if no candidates possessed the profile required, at staff from the third functional area with a school-leaving qualification or degree and at least five years' service. Notice concerning the launch of the appointment procedure was given to all employees, including both those present and any absent from work for any reason.

20. The call for candidates indicated the position within the organisation and the principal functions of the positions to be filled. It also identified the professional expertise, in terms of both prerequisites and knowledge, as well as the managerial

capacity, personal aptitude and professional experience required; interested candidates were required to state their interest and to submit their CV.

21. Statements of interest were examined by a central committee appointed by the Director of the Agency and comprising the competent central and regional directors, which could also directly interview interested parties and/or acquire information in any other way. Upon completion of this assessment, for each position for which a call for candidates had been issued, the committee drew up a short-list of suitable candidates for the Director of the Agency, who identified the official most suitable to hold the provisional directorial appointment, and subsequently made the appointment and concluded the relevant individual employment contract.

22. The Revenue Agency used the "Guidelines on the preparation of proposals and the conclusion of fixed-term contracts with Band II directors" (document adopted by the Director of the Agency on 9 March 2006, ref. 39504) and the "Criteria for making Band II directorial appointments" (document adopted by the Director of the Agency on 20 July 2011, ref. 110388) in order to assess applications and to identify the individuals to be appointed. Similar procedures applied to other tax agencies.

23. These documents provided for an analysis of the CV, the results of the assessment system, the interview (if held) and any other means useful for considering in greater depth the reasons of the interested parties that could enable the knowledge and expertise required for the position to be better assessed. Upon completion of this assessment, the relevant Regional Director proposed the official selected to the Director of the Agency who then, if the proposal was approved, made the appointment and concluded the individual employment contract. In some cases, ad hoc committees were convened in order to assess the selection of candidate officials, in some cases also involving structured examinations.

24. In a few cases, above all for appointments made since the first few years following the activation of the tax agencies, officials were appointed to directorial

positions on the basis of a direct assessment of the qualifications and professional experience of the officials, as authorised under the administrative regulations of the agencies.

25. More than 800 such fixed-term directorial appointments have been made over the years since the tax agencies were created until the most recent times to the positions indicated above, as described in fixed-term contracts occasionally renewed, also following subsequent calls for candidates. Upon evaluation of the results obtained at the end of each year all individuals were assessed positively, which was a necessary prerequisite for the continuation of the employment relationship and the confirmation of the appointments or the making of any other additional directorial appointments.

26. The individuals concerned therefore carried out functions of a directorial nature, performing identical tasks to permanent directors with tenured status, whilst bearing in full the same responsibilities for both the acts carried out and the management of the offices allocated to them (staff management, allocation of workload, delegation of operational powers, adoption of disciplinary measures, action required on workplace health and safety grounds, trade union relations, etc...).

27. In addition, in the same way as full directors, the appointed officials for example:

a. ensured that they were present in the office for periods in keeping with the role performed (in any case far beyond the standard 36 hours per week);

b. complied with the rules governing rotation between services, established in order to avoid the risks associated with excessively long periods in the same service;

c. selected participants in expert professional courses and masters courses, enabling the latter to acquire qualifications that would remain valid throughout their career;

d. selected, appointment and assessed – in accordance with formal procedures -

the staff allocated to organisational positions under Article 17 of the Supplementary National Collective Agreement (Heads of the Legal Area, Heads of the Assessment Area, non-directorial Managers of Local Offices) and those tasked with responsibilities remunerated under Article 18 of the Supplementary National Collective Agreement (team leaders, experts and co-ordinators of the Staff Area).

e. ensured the anti-corruption safeguards provided for under Law 190/2012 and the associated three-year anti-corruption plan adopted by the Revenue Agency;

f. complied with the obligation to file an annual declaration of assets pursuant to Article 17(22) of Law No. 127 of 15 May 1997 concerning real estate, moveable property included in public registers, shares and other corporate equity interests, the performance of the functions of director or statutory auditor of a company and other information of financial interest held or available to the individual under an obligation and his/her family members (spouse, including if separated, and children);

g. identified the employees worthy of merit for the purposes of payments out of the residual amount of the local fund of the FPS (Human Resources Development Policy Fund).

28. However, whilst receiving the same salary as tenured directors, they were subject to the following forms of unequal treatment compared with the latter:

a. end-of-service payment - appointees were not considered equivalent to directors in terms of the remuneration that was to be used as a basis for calculating the end-of-service payment which, in this case, was based not on the director's salary but rather that paid in relation to the functional area (Third Area) and salary band of origin, which resulted in a lower end-of-service payment;

b. pension entitlement - pay in excess of that laid down for the status of official was disregarded for pension purposes; in fact, despite the years spent as acting directors, the claimants' retirement benefits for pension purposes

continue to be based on the salary/contribution level of officials, resulting in a clear and evident difference in treatment notwithstanding the performance of identical tasks;

c. absences due to illness - appointee officials were subject to a salary reduction in accordance with Article 71 of Decree-Law No. 112/2008 for the public sector employment branch. This provision redefined the remuneration due in the event of absence due to illness, providing that: “during the first ten days of absence, basic remuneration shall be paid with the exception of any allowance or emolument, irrespective of its designation, with a fixed and ongoing status as well as any ancillary remuneration”. Consequently, the basis used for calculating the reduction in salary also included the amounts paid to appointees as an ancillary allowance in place of the salary paid to directors.

The intervention of the Italian Constitutional Court

29. The issue of officials appointed on a provisional basis to directorial positions within the tax agencies was significantly affected, in terms of the subsequent consequences, by proceedings brought before the Regional Administrative Court for TAR Lazio by the trade union organisation Dirpubblica, which essentially sought to challenge the resolution adopted by the Management Committee of the Revenue Agency to amend Article 24 of the Administrative Regulations, which authorised the appointment of officials as directors until 31 December 2010. Although it did not issue a definitive ruling, the Regional Administrative Court for Lazio recognised in judgment No. 260/2011 that Dirpubblica had standing to sue as the holder of collective interests.

30. The Revenue Agency appealed against this judgment by appeal R.G. 2979/2011. Within that context, by Order No. 9 of 26 November 2013, the Council of State raised a question concerning the constitutionality of Article 8(24) of Decree-Law No. 16 of 2 March 2012 which, without prejudice to contacts that had already been concluded, extended the possibility for the tax authorities to conclude new fixed-term contracts appointing its officials as directors. These

contracts were concluded with a fixed term until the planned competitive selection procedures had been completed and the successful candidates who were to be appointed to the directorial positions had been identified.

31. By judgment No. 37/2015 (Doc. No. 8), the Italian Constitutional Court ruled the contested provision unconstitutional, extending the ruling also to Article 1(14) of Decree-Law No. 150 of 30 December 2013 and Article 1(8) of Decree-Law No. 192 of 31 December 2014. Following this ruling, by the memorandum of 25 March 2015 (ref. 42431) signed by the Director of the Agency (Doc. No. 9), the Revenue Agency gave notice of the termination of all fixed-term contracts concluded under the authority of the legislative authorisation that had been declared unconstitutional, terminating with immediate effect the performance by the claimants of their directorial functions, even though the contracts concluded between the parties provided for a later expiry, as noted in the previous paragraph.

32. The same memorandum stated that the relationships had been terminated as a result of the mere application of the judgment of the Constitutional Court and not as a result of inadequate performance or negative assessments, and indeed asserted that "this shall not detract from the dedication and competence that have been demonstrated, which will be suitably turned to account in ways currently being examined by the institutions".

33. As a result of the termination of the contracts concerning fixed-term appointments as directors and in relation to the performance of the directorial tasks described, the appointees suffered significant prejudice, including both pecuniary and non-pecuniary losses, and in fact:

- those formerly appointed to directorial functions had dedicated a number of years of their working lives, and in particular had a legitimate expectation of remuneration during the period of the fixed-term directorship appointment (as opposed to the period worked as an official), which had been suddenly and drastically reduced. That reduction ranged between a minimum of 40% and a maximum of 70% of the overall remuneration previously earned during the directorship appointment, depending upon the salary level of the directorship

appointment held and the salary band under which they were classified, which led to understandable consequences on a psychological, relational, family and social level;

- the officials were also targeted by a ferocious media campaign conducted at various levels with no shortage of name calling and disparaging remarks, which seriously undermined their professionalism and respectability;
- the significant commitment required by the performance of the appointment which, as mentioned above, went far beyond the standard 36 hours per week, led to a significant loss of opportunities compared with other officials, who in the meantime were able to acquire qualifications of direct benefit (academic qualifications, publications, training courses, teaching appointments etc.);
- during the period in which they carried out directorial functions, they were unable to participate in the competitive selections for courses organised by the National Public Administration School, which entailed a leave of absence for a period of time that was not compatible with the directorship appointment accepted;
- following the revocation of these appointments the claimants ended up being demoted back to the position of official held before taking up the appointments at issue in the proceedings, which was associated with all of the negative consequences that can be imagined in terms of their careers, which had now been compromised, paradoxically in spite of the wealth of expertise recognised and the significant professional contribution provided to the agency of origin. Following the revocation of the appointments, in some cases the claimants ended up becoming subordinates to officials whom they themselves had attributed/proposed for positions of responsibility (team leaders, heads of department, etc.)

34. It should be added that the judgment of the Council of State given in the case at issue here, following the referral of the proceedings by the Constitutional Court, held that, in the event that a competitive selection procedure was called in order to appoint directors, the former appointees could not rely on their previous period of

work in a directorial role, ruling as follows: *having clarified the above, the Court considers that the second ground of appeal set out above (letter b3) is unfounded as - with reference to the reasons for and the scope of the annulment ordered by the contested judgment - the logical and legal reasoning followed is clear, in seeking to avoid a scenario in which directorship appointments unlawfully made (due to the derived unconstitutionality of the regulatory provision on which it was based) could be taken into account in competitive selection procedures* (Council of State, 4th Division, judgment 4641/2015, page 27) (Doc. no.10). The consequence of this was that appointees were not only unable to continue working under the existing contracts, but were also deprived of any opportunity to be able to compete effectively in the competitive selection procedure for directors that was being prepared by the Agency (a competitive selection procedure which in any case has still not yet been held).

35. In point of fact, the functions previously performed by each of the appointees to directorial functions continued to be performed by the interested parties through the “delegation” of powers and the granting of “authorisations” by a director in accordance with a mechanism which has left the situation essentially unchanged in the terms described above, and hence the claimants expressly reserve the right to take action to seek payment for the relative salary differences.

36. This trade union’s attempts to regularise their situation were also unsuccessful, and hence the workers concerned have been obliged to apply to the competent judicial authority to seek redress in kind for the damage caused by the Italian State (and by the public sector employer, the Revenue Agency) due to the failure to implement and the failure to apply clauses 4 and 5 of the framework agreement on fixed-term work implemented by Directive 1999/70/EC at EU level and, at national level, by Legislative Decree No. 368/2001, which has now been repealed with effect from 25 June 2015 (i.e. after the unlawful termination of the directorship appointments at issue in this case) by Article 55(1)(b) of Legislative Decree No. 81/2015, which it replaces with regard to the provisions governing fixed-term contracts.

The conduct of the Italian State with reference to fixed-term contracts within public sector employment

37. As mentioned above, the appointments to which this complaint relates were made by concluding fixed-term contracts, as provided for under national law.

38. It is therefore appropriate to examine in summary terms the national legislation in this area.

39. By Legislative Decree No. 368 of 6 September 2001 (Doc. No. 11), Italy implemented Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP also for employment relations with all public administrations, as stipulated in paragraphs 7-14 of the judgment in the *Marrosu-Sardino* case of the Court of Justice of the European Union (Doc. No. 12), as "contractualised" public sector work did not fall under the grounds for exclusion from the scope of Legislative Decree No. 368/2001 laid down by Article 10 of that Decree.

40. Legislative Decree No. 368/2001 was repealed with effect from 25 June 2015 by Legislative Decree No. 81/2015 (Doc. No. 13), which lays down in Articles 19-29 the new rules governing fixed-term contracts.

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

42. Article 36(5) of Legislative Decree No. 165/2001 has been interpreted within the prevailing case law of the ordinary courts and of the Court of Cassation as being capable of preventing under all circumstances the establishment of a permanent employment relationship on the basis of fixed-term employment contracts even in situations in which they are abused by public administrations as punished under Article 1(2) and Article 5(2)-(4) of Legislative Decree No. 368/2001, notwithstanding that Article 11 of Legislative Decree No. 368/2001 provides for the repeal of previous legislation that is incompatible with the new rules introduced to implement Directive 1999/70/EC, and notwithstanding that

almost all permanent staff in the public administrations (in particular in the Schools Branch) have been and are hired upon completion of legitimate recruitment procedures by public selection.

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

44. By Law No. 247 of 24 December 2007, with effect from 1 January 2008, the legislature introduced paragraph 4-bis into Article 5 of Legislative Decree No. 368/2001, which provided for a maximum limit of 36 months for successive fixed-term contracts, even if not continuous, with equivalent duties for the same employer, following which the fixed-term contract would be deemed to be a permanent contract. The provision, which was applicable both to private sector and public sector workers, was the only effective anti-abuse sanction for the latter recognised anywhere under national law. Following the prohibition on conversion into permanent contracts in public sector employment laid down by Article 36(5) of Legislative Decree No. 165/2001, by the *Affatato* order in Case C-3/10 (Doc. No. 14), the *Tribunale di Rossano Calabro* referred questions for a preliminary ruling concerning the failure to apply Directive 1999/70/EC throughout all public sector employment, including schools administered by the state.

45. In its written observations in the *Affatato* Case C-3/10 (Doc. No. 15), the Italian Government asserted that none of Legislative Decree No. 368/2001, including in particular Article 5(4-bis), was applicable to the public administrations.

46. This assertion was received by the European Commission on 10 May 2010 (Doc. No. 16) 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.

47. Consequently, by an order issued in the *Affatato* case on 1 October 2010

(Doc. No. 17), the Court of Justice of the European Union held in paragraph 48 that the sanction of transformation into a permanent contract pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001 was to be applied as an effective sanction.

48. Consequently, the *Tribunale di Trento* raised questions concerning the constitutionality of the legislation on the recruitment of supply teachers in schools by two referral orders of 27 September 2001, No. 283 and 284 (Doc. No. 18), on the grounds that it lacked appropriate measures to sanction abuse of fixed-term contracts.

49. As a result, in order to avoid the proliferation of the dispute concerning compensation for the abuse of fixed-term contracts within public sector employment and to obstruct the effects of the *Affatato* judgment of the Court of Justice, by judgment No. 392/2012 of 13 January 2012 (Doc. No. 19), the Employment Division of the Court of Cassation laid down the principle of law that it fell exclusively to the worker to prove the loss suffered in the event of the abuse of fixed-term contracts within public sector employment and that Legislative Decree No. 368/2001, including in particular Article 5 on successive contracts, did not apply to public sector workers in insecure employment, and did not convert their contracts into permanent contracts, as had been purportedly confirmed by the *Affatato* order of the Court of Justice, which by contrast asserts the exact opposite.

50. These principles were subsequently reiterated in judgment 10127/2012 (Doc. No. 20) of the Court of Cassation concerning the schools sector.

51. In judgment No. 10127/2012, the Court of Cassation also instructed the national courts to refrain from referring questions to the Court of Justice of the EU in order to request clarification as, according to paragraphs 65-66 of judgment No. 10127/2012, the judgment of the European Court of Human Rights in *Ullens de Schooten and Rezabek v. Belgium* of 20 September 2011 accepted the legitimate and justified refusal to make a reference for a preliminary ruling and the unrestrained use of the EU preliminary reference procedure had led to delays in

the resolution of disputes and high socio-economic costs.

52. Judgments No. 392/2012 and No. 10127/2012 of the Court of Cassation were criticised on the grounds that they violated the ECHR, EU law and national law (see Doc. 21). Following the criticisms, report No. 190 of 24 October 2012 of the Case Law Analysis Office of the Court of Cassation (Doc. No. 22) concerning "Insecure employment within schools and the protection of rights under Community and national case law: the tension between the need for special provision and the principle of equality" immediately refuted the conclusions reached in judgment No. 10127/2012 of the very same Court, which had commissioned the Research Service of the Court of Cassation to examine precisely the interpretative "consistency" of the judgments made against those in insecure employment in schools administered by the state:

53. Essentially, report No. 190 of 24 October 2012 by the Case Law Analysis Office of the Court of Cassation asserted that Legislative Decree No. 368/2001 was applicable also to public sector workers along with the right to employment stability and length of service benefits under the same conditions as private sector workers, including in schools administered by the state, subject to any provisions precluding this outcome (Article 4(14-bis) of Law No. 124/1999 and Article 10(4-bis) of Legislative Decree No. 368/2001), which were to be disapplied by the courts as a result of the vertical effect of Directive 1999/70/EC against the Italian state as the employer, or which were to be subject to constitutional review in order to remove them definitively from the legal order.

54. At the same time, by the judgment in *Valenza and others* of 18 October 2012 (Doc. No. 23), the Court of Justice of the EU ruled for the first time, referring to Article 97(3) (now paragraph 4) of the Constitution on access to the public administrations (*Valenza* judgment, paragraph 13) as well as the principle of equality pursuant to Article 3 of the Constitution (*Valenza* judgment, paragraph 12), refuting the interpretation proposed by the Council of State in the references for a preliminary ruling and confirmed by the Court of Cassation itself in judgment No. 392/2012 and No. 10127/2012 on the supposed prohibition on

conversion within public sector employment as a principle at “Community” level, which was purportedly confirmed by the Affatato order of the Court of Justice.

55. The case examined by the Court of Justice in the *Valenza* judgment concerned legislation providing for favourable treatment – Article 75 of Decree-Law No. 112/2008, not converted into law – which had made it possible for former workers of independent authorities in insecure employment, who received salaries that were much higher than those of other public sector employees with equivalent duties as a result of the financial and regulatory autonomy of the public body, to be stabilised urgently on the basis of an “expansive” application of Article 1(519) of Law No. 296/2006 without either a public competition establishing access or a selective procedure for the purpose of stabilisation, subject to a waiver of the length of service accrued for the period of fixed-term employment, whilst however maintaining the personal salary supplement and the right to retain it in the event of a pay rise.

56. Accordingly, following the report by the Case Law Analysis Office of the Court of Cassation, by the order of 3 January 2013 in Case C-50/13 *Papalia*, the *Tribunale di Aosta* (Doc. No. 24), which awarded compensation equal to 20 months’ salary for the abuse of fixed-term contracts within public sector employment, sent a new reference for a preliminary ruling concerning Italian public sector employment against the Court of Cassation judgment No. 392/2012, which had required public sector workers in insecure employment to furnish proof of the loss suffered, which is impossible to provide if associated with a prohibition on conversion. The case involved Mr Rocco Papalia, leader of the Municipality of Aosta brass band, who had worked as an employee in an insecure situation without interruption for almost 30 years.

57. By four orders made in January 2013 in Joined Cases C-22/13 *Mascolo* (Doc. No. 25), C-61/13 *Forni*, C-62/13 *Racca* and C-63/13 *Russo*, the *Tribunale di Napoli* sent references for a preliminary interpretation concerning the compatibility with Directive 1999/70/EC of national legislation on fixed-term contracts in public sector employment, both inside and outside of schools.

58. By the preliminary reference No. 207/2013 in Case C-418/13 *Napolitano and others* (Doc. No. 26), the Constitutional Court also voiced doubts concerning the compatibility with Directive 1999/70/EC of the legislation on recruitment in schools, proposing that an interpretative request be sent to the EU Court of Justice pursuant to Article 267 TFEU for the first time within interlocutory constitutionality proceedings. At the same time, by order No. 206/2013 (see Doc. 27) it clarified the applicability of Legislative Decree No. 368/2001 to supply staff in schools, subject to the applicability of preclusionary rules introduced in 2009 (Article 4(14-bis) of Law No. 124/99) and in 2011 (Article 10(4-bis) of Legislative Decree No. 368/01), which could be removed from national law only by the Constitutional Court (as suggested by report No. 190/2012 by the Case Law Analysis Office of the Court of Cassation) through specific constitutional review, which the referring court (the *Tribunale di Trento*) had not sought, with the result that the six referral orders concerning questions of constitutionality were inadmissible.

59. As a result of this complex legislative framework, by the *Papalia* order of 12 December 2013 in Case C-50/13 (Doc. No. 28), the CJEU ruled that Article 36(5) of Legislative Decree No. 165/2001 was incompatible with Directive 1999/70/EC in laying down a prohibition on conversions into permanent contracts of employment within the public sector due to a violation of mandatory statutory provisions because it did not ensure adequate and equivalent preventive protection and protection through penalties, thereby objecting to judgment No. 392/2012 of the Court of Cassation which precluded any type of protection through penalties.

60. As could have been foreseen, in the *Mascolo* judgment of 26 November 2014 (Doc. No. 29) in Joined Cases C-22/13 (*Mascolo v. Ministry of Education, Universities and Research (MEUR))*, C61/13 (*Forni v. MEUR*), C-62/13 (*Racca v. MEUR*), C-63/13 (*Russo v. Comune di Napoli*) and C-418/13 (*Napolitano and others v. MEUR*), the Court of Justice finally ruled that the system used for recruiting supply staff in schools administered by the state was incompatible with Directive 1999/70/EC, indirectly asserting that Article 5(4-bis) of Legislative Decree No. 368/2001 should be applied as an adequate sanction to public sector

employment outside of schools (paragraph 55),[4] as its correct application by the *Tribunale di Napoli* in the *Racca* case amounted to an act of sincere co-operation with the EU institutions (paragraphs 59-61),[5] thereby objecting to the position taken by the Court of Cassation in judgment No. 10127/2012.

61. First the Employment Division of the Court of Cassation, by judgment No. 27363/2014 of 23 December 2014 (Doc. No. 30), 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.[6]

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[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****.*"

[6] 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*

However immediately afterwards, by judgment No. 27481/2014 of 30 December 2014[7] (Doc. No. 31), the Court of Cassation itself held that the *Mascolo* judgment had no value and, in a case involving a public sector worker in insecure employment with more than 36 months' service, denied the right to employment stability and awarded only compensation of between 2.5 and 6 months' salary, pursuant to a provision that was not applicable to the case in question – Article 8 of Law No. 604/1966 – inventing the concept of so-called "Community damage".

62. Following the *Mascolo* judgment of the Court of Justice, by judgment No. 529/15 of 21 January 2015 (see Doc. 32) in case No. 5288/12 R.G. concerning the applicant Raffaella Mascolo, the *Tribunale di Napoli* accepted the worker's request for a declaration of permanent employment, applying Article 5(4-bis) of Legislative Decree No. 368/2001 and disapplying Article 4(14-bis) of Law No. 124/1999.

63. By judgment No. 260/2015 (see Doc. 33) the Constitutional Court also applied the *Mascolo* judgment and converted an unlawful fixed-term employment relationship with the public administrations (operatic foundations) into permanent employment due to a lack of temporary objective justifications for each individual fixed-term contract.

64. Following the change in government in February 2014, the Italian State decided not to implement the previous plan for stabilising non-school public sector workers in insecure employment with 36 months' service set out in Decree-Law No. 101/2013, and in any case refused to apply Article 5(4-bis) of Legislative Decree No. 368/2001, as suggested by the Court of Justice in paragraph 55 of the *Mascolo* judgment, even going so far, by Article 55(1)(b) of Legislative Decree

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to prove that he was forced to forego better work opportunities, although the effect of that obligation is to render impossible in practice or excessively difficult the exercise by that worker of rights conferred by European Union law. ***It is for the referring court to assess to what extent the provisions of domestic law aimed at penalising the misuse by the public administration of successive fixed-term employment contracts or relationships comply with those principles', giving effect to the conversion of fixed-term contracts into permanent contracts for all successive fixed-term employment relationships with the same public sector employer after 36 months of precarious service, even if not continuous, pursuant to Article 5(4-bis) of Legislative Decree No. 368 of 2001****."*

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

No. 81 of 15 June 2015, to repeal Legislative Decree No. 368/2001 in its entirety without replacing it with any other legislation to implement Directive 1999/70/EC for fixed-term workers in public sector employment.

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

66. In fact, by four identical judgments (Nos. 4911, 4912, 4913 and 4914/2016 of 14 March 2016 the Joint Divisions of the Court of Cassation (Doc. No. 34) accepted four identical appeals filed by the Municipality of Massa against four identical judgments of the Genoa Court of Appeal, which had awarded compensation of 20 months' salary to public sector workers in insecure employment as damages for the abuse of fixed-term contracts, annulling the decisions insofar as the grounds of appeal were accepted and referring the proceedings to the Genoa Court of Appeal, composed of different judges. The Court asserted the principle of law that the workers were entitled only to compensation of between 2.5 and 12 months' salary, in accordance with an application by analogy of Article 32(5) of Law No. 183/2010, a provision which was moreover repealed with effect from 25 June 2015 by Article 55 of Legislative Decree No. 81/2015 and ruled incompatible with Directive 1999/70/EC by the Court of Justice in the *Carratù* judgment where it is applied retroactively in favour of the state and the public administrations (Doc. No. 35).

67. Judgments Nos. 4911, 4912, 4913 and 4914 of 2016 of the Joint Divisions do not contain any reasons in support of the argumentation set forth in the decision, regarding which reference is made to a decision – No. 5072/2016 (Doc. No. 36) – filed on the following day – 15 March 2016 – concerning the *Marrosu-Sardino* case to which the judgment of the Court of Justice was applied. Judgments Nos.

4911, 4912, 4913 and 4914 of 2016 did not contain any reasons in support also of the refusal to make a preliminary reference pursuant to Article 267(3) TFEU in response to the preliminary request made by the workers in their written statements filed pursuant to Article 378 of the Code of Civil Procedure.

68. The "parent" judgment No. 5072/2016 of the Joint Divisions of the Court of Cassation of 15 March 2016 asserted - in contrast to the *Mascolo* judgment of the Court of Justice and judgment No. 260/2015 of the Constitutional Court - that public sector workers who have been employed under fixed-term contracts in a manner that constitutes an abuse cannot be given permanent status in accordance with the various provisions laid down in Legislative Decree No. 368/2001, which is applicable in any case to all public administrations, including schools,[8] because a public competition is necessary in order to access public sector employment and, given the lack of any provisions laying down sanctions for public sector employment and since the equivalent sanctions regime to which private persons are subject cannot be applied, the damages awarded do not compensate the loss of the job but rather the so-called "Community" damage of between 2.5 and 12 months' salary.

69. The following principle of law was asserted by the Joint Divisions of the Court of Cassation by judgment No. 5072/2016: "*Under the regime applicable to public sector employment, in the event of the abuse of fixed-term contracts by a public administration, an employee whose employment status has been unlawfully rendered insecure is entitled, notwithstanding the prohibition on the transformation of the employment contract from fixed-term into permanent as laid down by Article 36(5) of Legislative Decree No. 165 of 30 March 2001, to*

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

compensation of damages as provided for under that provision and is exempt from the requirement to furnish proof within the limits laid down by Article 32(5) of Law No. 183 of 4 November 2010, and accordingly in an amount equal to an all-inclusive indemnity of between a minimum of 2.5 and a maximum of 12 monthly payments of the last global de facto remuneration, having regard to the criteria indicated in Article 8 of Law No. 604 of 15 July 1966.".

70. On the other hand, entirely disregarding judgment No. 5072/2016 of the Joint Divisions of the Court of Cassation, by judgment No. 187 of 20 July 2016 (Doc. No. 37) 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 permanent stabilisation is the only sanction capable of resolving the consequences of the contractual abuse. At the same time, the Constitutional Court expressly held that the *Mascolo* judgment constituted a *ius superveniens* within national law (see orders Nos. 194 and 195 of 2016, Doc. 38).

71. Following judgment No. 187/2016 of the Constitutional Court, which held that the only adequate sanction for punishing the abusive use of fixed-term contracts was stabilisation of public sector workers in insecure employment and not the payment of mere damages, on 5 September 2016 in Case C-494/16 (Doc. No. 39), acting contrary to the solution of Community damage laid down by the Joint Divisions of the Court of Cassation in judgment No. 5072/2016, the *Tribunale di Trapani* sent two new references for a preliminary ruling to the CJEU concerning the principle of equivalence and the efficacy of the sanction laid down Article 32(5) of Law No. 183/2010 which provides only for the payment of compensation: "*1) Is the granting of compensation in the amount of between 2,5 and 12 monthly payments of the last overall salary payment (Article 32(5) of Law No 183/2010) to a public employee, who is a victim of the unlawful successive renewal of fixed-term contracts, who may obtain full compensation only by proving the loss of other work opportunities or by proving that, if he had participated in an open competition, he would have been successful, an equivalent and effective measure within the meaning of the judgments of the Court of Justice*

in Mascolo [and Others (C-22/13, C-61/13 to C-63/13 and C-418/13)] and Marrosu [and Sardino] (C-53/04)? 2) Must the principle of equivalence referred to by the Court of Justice (inter alia) in those judgments, be interpreted as meaning that, when the Member State decides not to apply the conversion of the employment relationship (as awarded in the private sector) to the public sector, it must nevertheless provide the worker with the same benefit, if necessary through compensation which must relate to the value of the employment contract of indefinite duration?".

72. By the judgment in *Martínez Andrés and Castrejana López* (Doc. No. 40) of 14 September 2016, issued with reference to judgment No. 187/2016 and orders Nos. 194 and 195 of 2016 of 20 July 2016 of the Constitutional Court, the Court of Justice made a finding of full equivalence in terms of sanctions between the public and private sectors, concluding as follows: "*1) Clause 5(1) of the framework agreement on fixed-term work, concluded on 18 March 1999, which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, from being applied by the national courts of the Member State concerned in such a manner that, in the event of abuse resulting from the use of successive fixed-term employment contracts, a right to maintain the employment relationship is granted to persons employed by the authorities under an employment contract governed by the rules of employment law, but that right is not conferred, in general, on staff employed by those authorities under administrative law, unless there is another effective measure in the national law to penalise such abuses with regard to the latter staff, which it is for the national court to determine. 2) The provisions of the framework agreement on fixed-term work which is set out in the annex to Directive 1999/70, read in conjunction with the principle of effectiveness, must be interpreted as precluding national procedural rules which require a fixed-term worker to bring a new action in order to determine the appropriate penalty where abuse resulting from the use of successive fixed-term employment contracts has been established by a judicial*

authority, to the extent that it results in procedural disadvantages for that worker, in terms, inter alia, of cost, duration and the rules of representation, liable to render excessively difficult the exercise of the rights conferred on him by EU law.".

73. Conversely, by six identical judgments of 7 November 2016 on workers in insecure employment in schools - Nos. 22552, 22553, 22554, 22555, 22556 and 22557 (Doc. No. 41) - the Court of Cassation set aside the *Mascolo* judgment and, in addition to reclassifying the relationship, refused to award compensation to workers in insecure employment who had not been included in the so-called "*de facto* workforce", as determined by unilateral decision by the Minister for Public Education.

74. At the same time as the judgments adopted by the Court of Cassation in breach of the position stated by the Constitutional Court and the Court of Justice, in a communication of 7 November 2016 (ref. No. 0022549 (Doc. No. 42)) concerning "disputes involving workers in insecure employment in schools" addressed to all court of appeal presidents, the First President of the Court of Cassation instructed all employment judges in all courts and courts of appeal throughout the country to give effect "as a matter of priority" to the judgments of the Court of Cassation on insecure employment in schools: "*Please find the enclosed copy of the press release announcing that the Employment Division of this Court has published several judgments concerning the dispute regarding fixed-term contracts of workers in insecure employment in schools (teachers and ATA staff). I am therefore informing you of the position adopted regarding this matter by the Court of Cassation in order that you may bring it to the attention of the courts dealing with the merits as a matter of priority.*" All courts at first and second instance have been complying with the judgments of the Court of Cassation, copying them in their entirety and rejecting workers' claims.

75. Moreover, repudiating the assertion made by the Constitutional Court in judgments No. 153/2011 (Doc. No. 43) and No. 260/2015 concerning the public status of operatic foundations, by order No. 27465 of 29 December 2016 adopted

in chambers (Doc. No. 44), the Joint Divisions of the Court of Cassation held that a foundation for the production of music recognised as a national theatre, and hence as a national body governed by public law, had private law status, without however providing any explanation.

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

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

77. The UNADIS is entitled as a trade union association to take action to protect the employment interests of its members, including within national proceedings, as it has done (see European Court of Human Rights, *Unison v. United Kingdom*, judgment of 10 January 2002, application No. 53574/99).

78. As noted above, directorial functions were allocated to the staff to which this complaint relates by fixed-term contracts in accordance with the applicable national legislation (pursuant to Clause 2 of the framework agreement of 18 March 1999 implemented by Directive 1999/70/EC) as, since acquisition of the status of director is subject to a competitive selection procedure, it entails the establishment of a new employment relationship which in fact, in this case, necessarily entailed the conclusion of individual fixed-term contracts with each appointee.

79. In situations involving successive fixed-term contracts Legislative Decree No. 368/2001, which implemented Directive 1999/70/EC on fixed-term work, provides for the transformation of fixed-term contracts into permanent contracts at the very least after 36 months' service, even if not continuous, pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001 (now Article 19 of Legislative Decree 81/2015).

80. The application of Article 5(4-bis) of Legislative Decree No. 368/2001 also to public administrations pursuant to Article 36(2) and (5-ter) of Legislative Decree No. 165/2001, was asserted by the Italian State before the EU institutions (Court

of Justice and Commission) during the course of the proceedings that led to the *Affatato* order. The question was not therefore disputed and concerned now recognised rights to stable employment.

81. Conversely, after October 2010, when involved before the Italian courts in litigation in which fixed-term workers sought conversion of their contracts into permanent contracts, having worked for longer than 36 months, the Italian State refused to establish permanent employment relations; this resulted in the judgments by the highest courts denying the right to stabilisation to fixed-term workers over the last few years, including in particular the six "pilot" (and "tombstone") judgments of the Employment Division of the Court of Cassation of 7 November 2016, which have been followed by dozens of judgments of the Supreme Court and hundreds of judgments by the ordinary courts at first and second instance (all of which were identical and copied from the "standard form" judgments), along with the rules precluding the recognition of the right to stable employment upon fulfilment of the prerequisite of 36 months' service pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001, in addition to the prohibition laid down by the Council of State in judgment No. 4641/2015, which prohibits the ability to rely on prior directorial experience of fixed-term workers in future competitive selection procedures for vacant directorial positions, in clear breach of Clause 4 of Directive 1999/70/EC, which accordingly constitutes an extremely serious **violation of the** following provisions **of the European Social Charter**:

- **Article 1**, commitments 1, 2 and 4 as the Italian State, in its triple capacity as legislator, judge and employer, has failed to honour both the commitment towards hundreds of officials from the tax agencies who have been performing directorial functions under fixed-term contracts for more than 10 years to achieve and maintain as high and stable a level of employment as possible, along with the commitment to protect effectively the right of such workers to earn their living in an occupation freely entered upon by rendering employment insecure and without ensuring adequate guidance and professional training and the participation under conditions of equality with other workers in future competitive selection procedures in order to acquire

the status of director by explicitly denying the professional value and directorial experience accumulated over more than a decade;

- **Article 4**, commitments 1 and 4 as the Italian state has failed as an employer to honour the commitment to recognise and maintain for hundreds of officials, who have been appointed under fixed-term contracts to perform directorial functions for more than ten years with the tax agencies, sufficient remuneration in order to guarantee to them and to their families a dignified standard of living, reducing abruptly and without prior notice the remuneration of some of them to the lowest levels and without recognising career advancement by virtue of service as a director for a number of years;
- **Article 5** as the Italian State has not guaranteed the freedom of officials, who have been appointed under fixed term contracts to perform directorial functions for the tax agencies, to associate and act within national organisations such as the UNADIS in order to protect their economic and social interests, on the grounds that national legislation has prejudiced this freedom and acted, as interpreted by the Constitutional Court and the Council of State, in such a manner as to undermine it, going so far as to flout the statutory rules recognising workers rights in accordance with Directive 1999/70/EC;
- **Article 6**, commitment 4 as, through its legislation and the judiciary, the Italian State has not recognised the right of officials who have been appointed under fixed term contracts to perform directorial functions in cases involving conflicts of interest because any collective action has been fundamentally undermined by the authoritative interventions in breach of the provisions of EU law by the Italian Constitutional Court and Council of State;
- **Article 24**, because the Italian State, as an employer and through legislation and the judiciary, has not recognised for hundreds of officials who were unlawfully hired under fixed-term contracts to vacant positions within the workforce the right not to be dismissed from the directorial appointment under the fixed-term contract without valid reasons for such termination

connected with their capacity or conduct or based on the operational requirements of the public offices or service or the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief, in addition preventing also the right to appeal to an impartial body.

82. Each of the violations of the European Social Charter highlighted above was committed in parallel with the violation of **Article E of the [Revised] European Social Charter** and the commitment by the Italian State **not to discriminate** against officials hired with the status of directors even for periods in excess of ten years, and in any case longer than 36 months, [in terms of their right] to be granted tenured status with the public administration of the tax agencies, compared with workers from the private sector who are stabilised pursuant to Article 5(4-bis) of Legislative Decree No. 368/2001 (now Article 19 of Legislative Decree 81/2015).

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

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

1 - Statute of UNADIS;

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

3 - Regulations of the following tax agencies: Revenue Agency, Land Registry Agency and Customs Agency;

7 - NCLA for the tax agencies sector;

5- Legislative Decree No. 165/2001 (Consolidated Act on Public Sector

Employment);

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

7 - Report presented by the Director of the Agency to the Senate Finance and Treasury Committee on 16 July 2015

8 - Judgment No. 37/2015 of the Constitutional Court;

9 - Memorandum of 25 March 2015 (ref. 42431) signed by the Director of the Revenue Agency;

10 - Judgment No. 4641/2015 of the Council of State;

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

12- Court of Justice judgment in *Marrosu-Sardino* of 7 September 2006 in Case C-54/04;

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

14- 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*;

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

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

17- Court of Justice order in *Affatato* of 1 October 2006 in Case C3/10;

18- Referral orders to the Constitutional Court No. 283 and 284 of 27 September 2001 from the *Tribunale di Trento* concerning Article 4(1) of Law No. 124/1999;

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

20- Judgment No. 10127/2012 of 20 June 2012 of the Court of Cassation;

21- Extract from page 18 of the 2011 report on the administration of justice of 26 January 2012;

22- Report No. 190 of 24 October 2012 of the Case Law Analysis Office of the

Court of Cassation concerning *"Il precariato scolastico e la tutela dei diritti nella disciplina e giurisprudenza comunitaria e nazionale, tra esigenze di specialità e principio di eguaglianza"* ["Insecure employment in schools and the protection of rights under Community and national case law: between the need for special provision and the principle of equality"];

23 - Judgment in the case of *Valenza and others* of 18 October 2012

24- Reference for a preliminary ruling to the CJEU from the *Tribunale di Aosta* of 3 January 2013 in Case C-50/13 *Papalia*;

25- Reference for a preliminary ruling to the CJEU from the *Tribunale di Napoli* of January 2013 in Case C-22/13 concerning the claimant Raffaella Mascolo, assisted by ANIEF lawyers;

26- Order No. 207/2013 of the Constitutional Court of 18 July 2013;

27- Order No. 206/2013 of the Constitutional Court of 18 July 2013;

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

29- 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;

30- Judgment No. 27363/2014 of 23 December 2014 of the Employment Division of the Court of Cassation;

31- Judgment No. 27481/2014 of 30 December 2014 of the Employment Division of the Court of Cassation;

32- Judgment No. 529/15 of 21 January 2015 of the *Tribunale di Napoli* in case No. 5288/12 R.G. between the claimant Raffaella Mascolo and the MEUR;

33- Judgment No. 260/2015 of the Constitutional Court of 11 December 2015;

34- Judgments No. 4911, 4912, 4913 and 4914 of 14 March 2016 of the Joint Divisions of the Court of Cassation;

35- Judgment of the CJEU in Case C-361/12 Carratù;

36- Judgment No. 5072 of 15 March 2016 of the Joint Divisions of the Court of Cassation;

37- Judgment No. 187/2016 of the Constitutional Court of 20 July 2016;

38- Orders Nos. 194 and 195/2016 of the Constitutional Court of 20 July 2016;

39- Reference for a preliminary ruling to the CJEU from the *Tribunale di Trapani*

of 5 September 2016 in Case C-494/16 *Santoro*;

40- Judgment of the CJEU of 14,September 2016 in Joined Cases C-184/15 and 195/15 *Martínez Andrés and Castrejana López*;

41- Judgments Nos. 22552, 22553, 22554, 22555, 22556 and 22557 of 7 November 2016 of the Employment Division of the Court of Cassation;

42- Communication of 7 November 2016 from the First President of the Court of Cassation to the presidents of the court of appeal instructing the immediate application of the judgments of the Court of Cassation on insecure employment within schools, with appended press release;

43- Judgment No. 153/2011 of the Constitutional Court on the public status of operatic foundations;

44- Order No. 27465 of 29 December 2016 of the Joint Divisions of the Court of Cassation;

Rome, 23 February 2016

Barbara Casagrande, legal representative of UNADIS	[signature]
Sergio Galleano as counsel for UNADIS	[signature]
Vincenzo De Michele as counsel for UNADIS	[signature]
Ersilia De Nisco as counsel for UNADIS	[signature]