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COUNCIL OF EUROPE
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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

16 March 2020

Case Document No. 1

Confederazione Generale Sindacale, Federazione GILDA-UNAMS and Sindacato Nazionale Insegnanti di Religione Cattolica v. Italy
Complaint No. 192/2020

COMPLAINT

Registered at the Secretariat on 6 March 2020

CONFEDERAZIONE GENERALE SINDACALE
FEDERAZIONE GILDA-UNAMS
AND SINDACATO NAZIONALE INSEGNANTI DI RELIGIONE CATTOLICA
Via Salaria 44 – 00198 Rome
Telephone: 06/8845005 – Fax 06/8845095
website: https://www.gilda-unams.it - Fax: 06/84082071
Certified email address: degrandis.tommasom@avvocatifoggia.legalmail.it
mail: tom60@inwind.it and dgt5555@gmail.com

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

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

COLLECTIVE COMPLAINT

pursuant to Article 1(c) of the Additional Protocol to the European Social Charter

Providing for a System of Collective Complaints

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Information concerning the complainant trade union organisation CONFEDERAZIONE GENERALE SINDACALE -FEDERAZIONE GILDA UNAMS AND SNADIR

1. The Confederazione Generale Sindacale and the associated body Gilda-Unams, with registered office at Via Salaria 44 in Rome, Italian tax ID 96143130589 (see the Statute **in Doc. 1, subsequently Docs 1 and 7**), are representative bodies that have signed the National Collective Labour Agreement for the Schools Branch of 19 April 2018 and 26 November 2007, along with subsequent agreements and national contracts for teaching staff and ATA [administrative, technical and auxiliary] staff in schools administered by the state of every type and level. (**Doc. 2)**
2. Accordingly, Federazione GILDA-UNAMS (hereafter FGU) is a larger representative trade union, as certified by the ARAN [Agency for Representation in Bargaining with the Public Administrations] in 2019, following the most recent check carried out in December 2018 **(Doc. 3).** The CGS/FGU assists and protects tens of thousands of workers in schools in Italy administered by the state, including both teaching and administrative, technical and auxiliary staff working for the Ministry of Education, Universities and Research (hereafter, MEUR) under both permanent and fixed-term employment contracts with a level of representativeness that is certified by the right to sign the 2018 National Collective Labour Agreement [NCLA], which is currently applicable, in

the manner provided for under Articles 40 et seq of Legislative Decree no. 165 of 30 March 2001 (Consolidated Act on Public Sector Employment). The body SNADIR (*Sindacato nazionale insegnanti di religione cattolica* [National Trade Union of Catholic Religion Teachers]) is a trade union federated with the FGU, to which it has transferred trade union proxies pursuant to Article 3-bis of the Charter **(Doc. 4).**

Therefore, in this complaint, CGS/FGU/SNADIR (hereafter, the Complainant) has standing to act in order to uphold the interests of Catholic religion teachers (hereafter CRTs) in being members of the SNADIR pursuant to Article 3-bis of the SNADIR Statute and Article 2 of the FGU Charter. Moreover, that standing to act has already been established in complaints 144 of 2017 and 161 of 2018 **(Docs 5 and 6)**.

3. The Confederazione Generale sindacale and the Federazione Gilda-Unams are represented by Prof. Gennaro Di Meglio, born in Torre del Greco on 12 November 1949 and resident at Via De Jenner 12, Trieste, Italian tax ID DMGGNR49S12L259Z, as Secretary General and current legal representative, and have already been found to have standing to address this Committee in complaints 144 of 2017 and 161 of 2018 **(Doc. 7).**

The SNADIR is represented by the National Secretary Prof. Orazio Ruscica, born in Modica on 19 January 1958, Italian tax ID RSCRZO58A19F258H, **(Doc. 8)**, and both of the above mentioned are represented, jointly and/or individually, by Counsel Tommaso de Grandis (Italian tax ID DGRTMS60E16D643P) and Counsel Vincenzo De Michele, (Italian tax ID DMCVCN62A16D643W).

4. The service address chosen for the purposes of this collective complaint is Via Salaria 44, Rome (Italy) and/or at the email address: degrandis.tommasom@avvocatifoggia.legalmail.it

Contracting party which violated the European Social Charter: ITALY

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Statement of facts

5. As mentioned above, the Complainant is a national trade union organisation that has signed the National Collective Labour Agreement for the Schools Branch of 19 April 2018 (hereafter the 2018 NCLA), which is currently applicable, along with the agreement signed on 16 November 2007.

Pursuant to Article 40(1), first sentence, of Legislative Decree no. 165 of 2001 (**Doc. 9)**, collective bargaining establishes the rights and obligations directly pertaining to the employment

relationship.

6. By Legislative Decree no. 368 of 6 September 2001 **(Doc. 10)**, Italy implemented Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, also as regards employment relationships with all public administrations, including schools. However, it has been held that such teachers, including in particular CRTs, absolutely lack any protection under the current framework, most recently by the ***Tribunale di Napoli*** **in the referral order to the CJEU in Case C-282/19,** ***Gilda-Unams v. Ministero dell'istruzione, dell'Università e della Ricerca and others*** as well as the observations submitted by the **European Commission on 21 October 2019 (Docs 11-12).**

Specifically, the internal legislative framework applicable to insecure public sector employment in schools is characterised by a complete lack of protection as the application in this specific sector of Directive 1999/70/EC has been precluded pursuant to Article 10(4-ter) of Legislative Decree no. 368 of 2001 and under Article 29(2)(c) of Legislative Decree n.81 of 2015, now in force, which provides that Legislative Decree 368 of 2001 does not apply to the schools sector. **(Doc 13)**

Accordingly, the new rules governing fixed-term contracts are contained in Articles 19 and 29 of Legislative Decree no. 81 of 2015, which is however expressly stipulated not to be applicable to staff in schools administered by the state [see Article 29(2)(c)], whilst all public administrations (including schools administered by the state) continue to be governed by Article 36 of Legislative Decree no. 165 of 2001.

In this submission the Complainant objects to the circumstances of CRTs in schools administered by the state who, lacking all legislative protection against the wrongful recourse to fixed-term contracts, have suffered detrimental effects (*inter alia*) as a result of the recently issued **Decree-Law no. 126 of 29 October 2019**, **converted into Law no. 159 of 20 December 2019**, **(Official Journal no. 11 of 15 January 20) (Doc 14),** which provides in **Article 1–bis** for the publication before the end of 2020 of an "*ordinary*" competition for the granting of tenured status; provision has been made for the mere possibility of reserving up to a maximum of 50% of the available positions for the granting of tenured status, insofar as such positions are available after granting permanent status to those registered on the old ranking lists for the competition called by the Ministerial Decree of 12 December 2004. The number of these positions has been calculated with reference to 70% of available positions in the workforce and not to 100% of confirmed available

positions.

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SPECIFIC LEGISLATION APPLICABLE TO CATHOLIC RELIGION TEACHERS

For CRTs, **Article 9(2) of the Agreement between the Holy See and the Italian Republic amending the Lateran Treaty, ratified by Law no. 121 of 1985**, introduced far-reaching changes to the epistemological status and the legislative basis for the teaching of Catholic religion in Italian schools administered by the state. There has been a shift (mediated through constitutional principles) from the notion of a subject that is isolated from others in that it has a self-standing "rationale" in the religious structure of an authoritarian state - which regarded religion as an ideological factor for securing national unity, and was hence useful for its own political ends ("*The teaching of Christian doctrine, in the form admitted by Catholic tradition is considered by Italy to be the basis and the apex of public education*": Article 36 of the Lateran Treaty) towards the enactment of legislation that reflects a concept of religious teaching imparted by schools administered by the state as a constituent element of their broader educational and didactic mission, which is freely offered to all pupils, and as such enjoys equal dignity in the context of the educational content offered by Italian schools.**(Doc. 15)**

The aspects that account for this change in the conception of the subject are all encapsulated in the first section of the second part of Article 9 of the 1984 Agreement, which identified the epistemological basis for that teaching as the "*value of religious culture*" and incorporated that teaching "into the goals of schools", holding that it was to be substantively equivalent to other school subjects and recognising its full contribution to achieving the educational objectives of schools administered by the state.

However, the entirely specific nature of this teaching is maintained in terms of its content, which is still faith-based, thereby reflecting the doctrine and teachings of the Catholic Church, in order to ensure – also provided for by the law – that it be delivered by "*teachers who have been recognised as suitable by the ecclesiastical authorities and appointed by the school authorities, in agreement with the former*" [**letter, a), paragraph 5 of the Additional Protocol to the Agreement**]. The main, and logical, consequence of that specific provision consists in the optional status for each individual pupil of such teaching, attendance at which must result from a free choice by the family or, above the age of fourteen, by the pupil himself/herself in order to protect his/her full freedom of conscience and religion (Law no. 281 of 18 June 1986).

Since **Law no. 121/1985** established that the teaching of the Catholic religion must be *"..imparted in accordance with the doctrine of the Church and having due respect for the freedom of conscience of pupils, by teachers who have been recognised as suitable by the ecclesiastical authorities and appointed, in agreement with the former, by the school authorities*".

The establishment of study programmes, the manner in which such teaching is organised, including as regards its incorporation into the general lesson timetable, and aspects concerning the professional qualification of teachers have been left to being resolved by "Agreement" between the competent school authorities and the Italian Episcopal Conference, which was first implemented **in Decree of the President of the Republic no. 751/1985**.

More specifically, **Article 9 of the Agreement referred to by Law no. 121/1985** acknowledged the value of religious culture, taking account of the fact that the principles of Catholicism are an integral part of the historical heritage of the Italian people. Accordingly, paragraph 5 of the Additional Protocol to the Law concerned provided that Catholic religious teaching was to be provided in nursery and primary schools by the "*class teacher*", provided that he/she has been recognised as suitable by the ecclesiastical authorities and is willing to provide that service.

Subsequently, **Agreement no. 751/1985, later amended by Decree of the President of the Republic no. 175 of 2012**, provided that two hours of teaching per week could be provided in primary schools, whilst it was to be organised in nursery schools in the context of specific, separate activities. **(Doc. 16)**

Point 4.1. of the Agreement provides that teaching of the Catholic religion was to be given in the "*context of the purposes*" of the specific school type and level: "*4.l. The teaching of the Catholic religion, as provided in the context of the purposes of the school, must have equal educational and cultural dignity with other subjects. Such teaching must be given in accordance with the doctrine of the Church by teachers who have been recognised as suitable by the ecclesiastical authorities and who hold a suitable professional qualification*". It goes on to clarify **in paragraph 4.3.1., letters b.2) and b.3)** that the teaching of religion may be legitimately assigned as a priority matter to teachers of the section or class, and thereafter to non-permanent teaching staff.

This right is also reiterated in **paragraph 2.6. of the Agreement** which provides that: "*In accordance with the provisions of paragraph 5, letter a), sentence two of the Additional Protocol,*

the teaching of the Catholic religion at all nursery and primacy schools may be assigned by the school authorities, following consultation with the diocese prelate, to section or class teachers who have been recognised as suitable and who are willing to do so, who may withdraw their availability prior to the start of the school year".

This supplements the provisions of **paragraph 4.4. letter b) of Agreement no. 751/1985**, according to which religion may be taught in primary schools: "*b) [by] any person who, as the holder of a qualification valid for teaching in nursery or primary schools, fulfils the prerequisites laid down by the first sentence of this paragraph (4.4); or by any person who, having presented a different secondary school qualification, has obtained at least a diploma issued by an institute of religious studies that is recognised by the Italian Episcopal Conference*".

Moreover, the Agreement does not consider the fact that the above-mentioned persons are members of the teaching staff for all intents and purposes, "*with the same rights and duties*", as Catholic religious teaching is performed in the first instance by tenured teachers, and alternatively as mentioned above by non-permanent religious teaching staff; **paragraph 2.7 of Agreement no. 175 of 2012** provides that: "*Non-permanent teachers of the Catholic religion shall be members of the teaching staff in schools with the same rights and duties as other teachers but shall participate in recurring and final assessments only for the pupils who have chosen to be taught the Catholic religion, without prejudice to the provisions of state legislation governing the provision and assessment of such teaching. Where state legislation requires a majority vote for the final performance assessment, the vote cast by the Catholic religion teacher shall, if decisive, constitute a reasoned decision to be placed on record*".

Subsequently, **Article 1(1) and (2) of Law no. 186 of 2003** formalised the legal position by making provision, for the first time, to establish "*tenured positions*" for teachers of religion who, as a result of that Law, acquired the legal status and entitlement to remuneration that Legislative Decree no. 297 of 1994 and collective bargaining have established for teachers in schools of every type and level: "1. *For the purposes of teaching the Catholic religion in schools administered by the state of every type and level, as provided for under the Agreement amending the Lateran Treaty and the related Additional Protocol, implemented by Law no. 121 of 25 March 1985, along with the Agreement between the Ministry for Public Education and the President of the Italian Episcopal Conference, implemented by Decree of the President of the Republic no. 751 of 16 December 1985, as amended, two distinct regional roles shall be*

established, which shall be structured according to territorial units corresponding to diocese, for teaching staff corresponding to the levels of schooling provided for by law. 2. Except as provided otherwise by this Law, Catholic religion teachers serving in the tenured positions provided for under paragraph 1 shall be subject to the provisions governing legal status and remuneration laid down by the Consolidated Act of legislative provisions applicable to education in relation to schools of every type and level laid down by Legislative Decree no. 297 of 16 April 1994, as amended, hereafter referred to as the 'Consolidated Act', and by collective bargaining".

That Law subsequently established two separate regional roles for teaching staff - structured according to territorial units corresponding to the relevant diocese - respectively for nursery and primary schools and for secondary schools and provided **in Article 2** that the related workforce, should be organised at regional level and comprised only of 70% of the overall requirement for the number of teaching positions, as established by Decree of the Ministry for Education, Universities and Research acting in concert with the Ministry for the Economy and Finance and the Ministry of Public Administration.

Article 3 went on to provide that, when determining eligibility for tenured positions, competitions (which should be held at three-yearly intervals) should cover "*all*" available positions in the workforce pursuant to Article 400(01) of Legislative Decree no. 297 of 1994, whilst paragraph 6 stipulated that the competition examinations should involve one written and one oral examination with the aim of establishing the educational and didactic background of the individual participants. **(Doc. 17)**

Subsequently, **Article 40(5) of the National Collective Labour Agreement for the Schools Branch concluded on 29 November 2007,** as supplemented **by the NCLA of 19 April 2018**, confirmed that "1. *Staff falling under this Article shall be subject to the provisions of Article 25(2), (3) and (4). [...] 5. Catholic religion teachers shall be hired in accordance with the provisions of Article 309 of Legislative Decree no. 297 of 1994 by contracts for an annual appointment, which shall be deemed to have been renewed in the event that the conditions and prerequisites laid down by applicable statutory provisions are still met*."

Article 25 of the collective agreement concerned reasserted the equivalence between teachers of religion and permanent teachers, as well as their being subject to the specific provisions of national and Community law": "*3. The individual permanent or fixed-term employment relations*

of teaching and educational staff in institutions and schools administered by the state of every type and level shall be established and regulated by individual contracts, in accordance with statutory provisions, Community legislation and the applicable national collective agreement."

In effect, **Article 309(3) of Legislative Decree no. 297 of 1994** had previously stipulated the equivalence between teachers of religion and teachers of all other subjects, providing that: "*Teachers of the Catholic religion shall be members of the teaching staff within schools with the same rights and duties as other teachers*", and consequently the "*legal status*" of the said religious teaching staff is the same as that of teachers of other subjects, who shall participate "*pleno iure*" in the life of the school community and in recurring assessments for pupils who have chosen to receive Catholic religious instruction, as well as supplementary non-teaching activities as provided for under Article 29 of the 2006/2009 NCLA. (**Doc. 18)**

As a result, owing to the provision made within the legislative and contractual sources cited, the type of teaching activity, the identical nature of the rights and obligations relating to service that flow from them, and the fact that the academic qualifications required in order to teach are identical, the legal "*status*" of the complainants must be identical to that of ordinary teachers since the "*employment conditions*" are "*comparable*" and secondly because there is no "*objective justification*" capable of justifying any discrimination whatsoever compared with the teachers of other subjects.

Moreover, this situation has been confirmed by the **Court of Cassation in judgment no. 201 of 2016**, which reiterated in paragraph 3.6 the "*parity of rights… enshrined by the Agreements as well as by Article 309…*" **(Doc. 18-A)**

Finally, Article 40(4) of the Contract concerned also made provision concerning the "Fixed-term employment relationship" of teaching staff: "*4. A fixed-term employment relationship may be transformed into a permanent employment relationship as a result of specific legislative provisions.*".

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DISCRIMINATION AS REGARDS THE COMPETITION PROCEDURES

The issues disputed in this complaint are the following:

a) The fact that the Italian State has failed - exclusively in relation to CRTs - to arrange any "*extraordinary*" competitions for the purpose of the granting of tenured status;
b) The fact that any positions available for the granting of tenured status must be calculated

with reference only to 70% of available positions within the workforce, after accounting for positions that will be allocated both to those successful in the new competition and to persons included in the old ranking lists for the competition called by the Director General's Decree of 2 February 2004, which have been "*unexpectedly*" reinstated pursuant to Article 1-bis(3). **(Doc. 19)**

As regards the first question, consideration must be given to **Law no. 107 of 2015 on "Good Schooling"**, which ensured stability of employment for most school staff included in the ranking lists to be drawn upon until exhaustion and also called various extraordinary competitions in order to grant permanent status to teachers in schools of every type and level. **(Doc. 20)**

In effect, the subsequently issued **Legislative Decree no. 59 of 13 April 2017** established a system of access to tenured status either by national public competition or by completion of a one-year training programme and probationary period, which provided for the granting of tenured status to workers in insecure employment pursuant to Articles 2 and 13 of the decree, on the basis solely of the assessment of that training programme. **(Doc. 21)**

Article 20(1)(c), of **Legislative Decree no. 75 of 25 May 2017**, entitled *"Resolving insecure work in the public administrations*", provided, amongst other things, for the calling of extraordinary competitions for the engagement of permanent teaching staff who had accumulated at least 36 months of service over the previous eight years. **(Doc. 22)**

As a result, subsequent notices announced "*extraordinary*" competitions for teachers in insecure positions with a view to granting them permanent status according to non-selective procedures.

Article 3 of the notice of 9 November 2018, published on page 89 of the Official Gazette, entitled: "*Extraordinary competition based on qualifications and examinations for the recruitment of permanent teaching and supply staff for nursery and primary schools*", which was implemented by **Director General's Decree no. 1546 of 7 November 2019**, stipulated as a prerequisite for eligibility at least two years' service over the previous eight years, and required only that the oral examination be passed in order for tenured status to be granted. Pursuant to Article 10(2) of the Director General's Decree, this examination is not selective in nature as all participants will be included on the extraordinary regional merit-based ranking lists used for the purpose of granting tenured status pursuant to Article 4(1-quater)(b) of Decree-

Law 87 of 2018. **(Doc. 23)**

Article 1 of Decree-Law no. 126 of 29 October 2019 (published in the Official Journal - General Series - no. 11 of 15 January 2020), read in conjunction with the conversion law, **no. 159 of 20 December 2019**, laying down: "*Extraordinarily necessary and urgent measures concerning the recruitment of staff in schools and research centres and teacher accreditation*", called an "*ordinary competition*" according to an "*extraordinary procedure*", based on qualifications and examinations, for the purpose of granting tenured status to 24,000 teachers out of those who had worked for three years between school year 2008/09 and school year 2019/2020. Article 17-quater(c) of the Law restated the possibility that tenured status could be granted according to non-selective procedures under the competition notices to be issued.

Conversely, **Article 1-bis of the Law** provided in relation to CRTs for the calling only of a selective "*ordinary competition*", stipulating that 50% of the positions covered by the competition could be reserved for those who had worked for three years, without specifying the period of time within which those years of service were to be calculated.

The Article provided as follows: ***"Article 1-bis** Urgent provisions concerning the recruitment of Catholic religion teaching staff*

1. The Ministry for Education, Universities and Research is authorised, following consultation with the President of the Italian Episcopal Conference, to call a competition by the end of 2020 in order to fill the positions for the teaching of Catholic religion that it is anticipated will be vacant and available during the school years 2020/2021 to 2022/2023.

2. A quota not exceeding 50% of the positions in the competition falling under paragraph 1 may be reserved for Catholic language teaching staff who have been recognised as suitable by the diocese prelate and have worked for at least three years, which need not be consecutive, in schools forming part of the national education system.

3. Pending the completion of the competition provided for under this Article, the granting of tenured status shall continue by depleting the general merit-based ranking lists pursuant to Article 9(1) of the Director's Decree of the Ministry for Education, Universities and Research of 2 February 2004, as published in the Official Gazette, 4th Special Series, no. 10 of 6 February 2004 on the calling of a reserved competition based on examinations and qualifications for appointments as Catholic religion teachers falling in the geographical scope

of each diocese in nursery schools, primary schools and lower and upper secondary schools.
4. The administrations concerned shall take steps to implement this Article subject to the human, material and financial resources available under applicable law, and under all circumstances without any new or increased burden for the public finances".

By judgment no. 868 of 23 January 2020, the Council of State recently ruled on the issue of reserved competitions, holding that: "*It is also apparent from the recent judgment of the Constitutional Court - no. 106 of 2 May 2019 - concerning an extraordinary competition for headteachers that the legislation making provision for extraordinary competitions such as that at issue in this case is, as a matter of principle, constitutional, having been enacted in order to guarantee the proper functioning of the administration by filling gaps in the workforce and in order to establish legal certainty in relations, resolving situations of insecure employment*…".

(Doc. 24)

Accordingly, precisely by virtue of its basis in constitutional law, the "*extraordinary*" procedure is intended to guarantee the "*proper functioning of the administration*" with the aim of resolving the insecure employment situation that could be defined as "*chronic*" for that category of staff.

In fact, CRTs have also not been granted stable employment either by Law no. 107 of 2015, which conversely ensured stability of employment for all other teachers included in the eligibility rankings to be drawn upon until exhaustion (ERE) or by the "*extraordinary*" competition procedures.

Indeed, even though CRTs have been included on the lists kept by the diocese prelate pursuant to Article 805 of the Code of Canon Law, they have not been included on permanent ranking lists and have therefore been excluded from the above-mentioned extraordinary plan.

Consequently, as far as the present objection is concerned, CRTs in insecure employment are treated differently from other teachers in insecure situations both in terms of the competition procedure, which will only be "*ordinary*" and therefore selective, involving a written and oral examination, and without any opportunity to achieve stable employment pursuant to different competition procedures (which have nonetheless been provided for with the aim of granting tenured status to other teachers under Article 1(17-quater)(a), (b) and (c) of Decree-Law no. 126 of 2019) and also as regards the reservation of positions, which will only be contingent and will be calculated with reference to 70% of available positions in the workforce, as will be

discussed below.

This must (also) be deemed to entail a violation of Article 51 of the Constitution, which provides that access to public sector employment is to occur under conditions of equality.

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DISCRIMINATION AS REGARDS THE AVAILABILITY AND CALCULATION OF AVAILABLE POSITIONS IN THE WORKFORCE

The limit of 70% for the purposes of calculating the available positions for the granting of tenured status was laid down by **Article 2 of Law no. 186 of 2003**, which provides as follows: "*1. The Minister for Education, Universities and Research acting in concert with the Minister for the Economy and Finance and the Minister for the Public Administration shall stipulate by decree the level of the Catholic religion teaching workforce at regional level, with reference to 70% of the overall number of teaching positions. 2. The workforces for teaching the Catholic religion in secondary schools shall be determined by the director from the regional schooling office, within the limits of the overall staffing levels of each region, at a level equivalent to 70% of the requirement for positions within the reference territory for each diocese. 3. The workforces for teaching the Catholic religion in nursery and primary schools shall be determined by the director from the regional schooling office, within the limits of the overall staffing levels of each region, at a level equivalent to 70% of the requirement for positions in the reference territory for each diocese, taking account of the requirements set forth in Article 1(3). Upon the initial application of this Law, the aforementioned workforces shall be determined at a level equivalent to 70% of the requirement for positions during the school year before that during which the Law entered into force".*

Article 3 clarified that "*1. Eligibility for the tenured positions pursuant to Article 1 shall be conditional upon the successful completion of a competition based on qualifications and examinations; the qualifications in question shall be those provided for under point 4 of the Agreement referred to in Article 1(1), as amended, as regards the positions available each year in the workforces falling under Article 2(2) and (3). 2. Competitions based on qualifications and examinations shall be called at triennial intervals by the Ministry for Education, Universities and Research, and may be held at various local centres, having regard to the*

number of participants, pursuant to Article 400(01) of the Consolidated Act, as amended...".

Article 400(01), as amended by Article 1(113)(a) and (b) of Law no. 107 of 2015, subsequently provided that: "01. *Competitions based on qualifications and examinations shall be national and called on a regional basis, at triennial intervals, for all vacant and available positions, subject to the limit of available financial resources, along with any positions that may become vacant and available during the three-year period…."*.

Therefore, the changes made by Article 400(01) in 2015 clearly involved the addition of the phrase "*all vacant and available positions*", which means that the 70% limit is unlawful as it would inevitably leave the remaining 30% of CRTs "*in an insecure situation for life*".

Regarding this matter, the **Constitutional Court** noted in section 4.1 of the "*Conclusions on points of law*" in **judgment no. 146 of 2013**, that 30% of CRTs "*still lack stability*".**(Doc. 25)**

The issue of competence over CRT workforce levels falls within the exclusive purview of the Italian State as it falls outside the powers of the ecclesiastical authorities. Regarding this specific issue **in section 9 of judgment no. 343 of 10 January 2018 the Court of Cassation** reiterated the provisions of Article 2 of Law no. 186 of 2003: ".. *The indications provided by the diocese prelate shall be decisive as regards the assessment of the suitability of the teacher appointed to teach Catholic religion by the director of the regional schooling office, whilst they shall be of no effect for the purposes of identifying workforces, a task which falls outside the competence of the ecclesiastical authorities having been transferred exclusively to the director of the regional schooling office, who is required pursuant to Article 2(2) and (3) of Law no. 198 of 2003 to conclude permanent contracts of employment in order to cover 70% of the requirement for positions in the reference territory for each diocese".* It should be noted that the Law is no. 186 of 18 July 2003, although is incorrectly cited in section 9 as Law no. 198 of 2003. (**Doc. 25-A)**

Regarding that specific aspect, the Constitutional Court has already ruled *"…that Article 4(1) and (11) of Law no. 124 of 3 May 1999 (Urgent provisions on school staff) is unconstitutional insofar as it authorises the potentially unlimited renewal of fixed-term employment contracts to fill vacant and available posts for teachers and administrative, technical, and auxiliary staff, without placing effective limits on the maximum total duration of successive contracts of employment and without any justification by objective reasons"* **(Constitutional Court judgment no. 187 of 2016, Doc. 41)**

Accordingly, Article 4 of Law no. 124 of 1999, which made provision concerning supply teaching within the schools branch, was ruled unconstitutional by the Constitutional Court precisely due to the fact that it was possible to conclude successive fixed-term contracts "*sine die*" with staff in insecure employment in schools without providing for granting them permanent status, and therefore objecting precisely to the matter that has been brought to the attention of this Committee.

On the other hand, in the wake of the *Mascolo* judgment issued by the Court of Justice on 26 November 2014, by Article 1(98) et seq of Law no. 107 of 13 July 2015, the Italian State launched an extraordinary plan for the hiring of more than 100,000 teachers on permanent contracts, starting from school year 2015/2016, which was aimed exclusively at staff working in schools administered by the state included on the ERE and did not stipulate any minimum duration of service, and above all did not require access via public competition.

As mentioned above, that extraordinary granting of permanent status excluded only CRTs who, despite having been included on lists kept by the diocese prelate pursuant to Article 805 of the Code of Canon Law, were not included on the permanent ranking lists and were thereby excluded from the above-mentioned extraordinary plan.

Article 2 of Law no. 186 of 2003 therefore discriminated heavily against such staff as it did not provide that the calculation for the purpose of the granting of tenured status should be made on the basis of "*all vacant and available positions*", but rather on 70% of that figure, thereby preventing the number of available positions within the workforce for the granting of tenured status from being calculated properly.

It should be added that, whilst Article 1-bis of Decree-Law no. 126 of 2019 stipulated that a quota not higher than 50% of positions be reserved for those with at least three years' service, it is also the case that this reservation is only contingent, having been "*saturated*" by those granted tenured status from the ranking lists of the old competition called by the Director General's Decree of 2 February 2004.

Specifically, Article 1-bis(3) provided that, pending the organisation of the new competition the ranking lists for the first and only competition called by Law no. 186 of 2003 are to be depleted.

That stipulation of priority will not only not enable workers in insecure employment who have accumulated 36 months of service to be granted permanent status, but in some cases will not

even allow any positions to be made available for the new competition to be held.

For example, if we consider the persons available to cover 70% of the positions for the school year 2019/2020, we see that the depletion of the old ranking lists will cover all available positions in the workforce in the regions of Basilicata, Campania and Calabria.

The situation is the same if one considers secondary schools in Abruzzo, Molise and Sicily, whilst 12 positions are available in secondary schools in Marche; 29 positions in Piedmont; 33 positions in Sardinia; 13 positions in Umbria and so on. **(Doc. 26)**

Moreover, that residual availability could be split evenly between those who are successful in the new competition and, potentially, those who have accumulated 36 months' service.

Accordingly, that unfair split would end up allocating to those qualifying as eligible under the old competition, and in some reasons to those qualifying as eligible under the new competition, (almost) all available positions in the workforce, thereby depriving of any protection some of the CRTs who have accumulated 36 months' service, who are accordingly destined to remain in an insecure situation for life.

Regarding this matter it is asserted, first of all, that the route for acquiring permanent status is open to only 70% of the workforce and not 100%; moreover, as a result, the reservation of 50% of positions established for workers in insecure situations with 36 months' service will inevitably be undermined, if not rendered academic, by the depletion of the old ranking lists of the competition called by the Ministerial Decree of 2 February 2004.

In actual fact, even acknowledging that this subject is freely chosen by students in schools of every type and level, it is beyond dispute that 30% is an excessively high percentage to condemn to life-long insecure status, as is proven by the fact that the CRTs in insecure employment have been working under fixed-term contracts for a number of years, and many for more than ten years.

This complaint therefore objects to the violations of the European Social Charter, Community Directives and the principles laid down in the "*European Pillar of Social Rights*", as listed in the final part of this complaint.

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Protection against contractual abuses for Italian fixed-term public sector workers in the case law of the Court of Justice

Fifteen years after the first reference for a preliminary ruling by the *Tribunale di Genova* on 21 January 2004 concerning the interpretation of Directive 1999/70/EC, these unlawful acts are continuing the breaches of the law to the detriment of workers in insecure employment, even though the problem was previously raised some time ago in the Marrosu-Sardino judgment,[1] in which the Court stated in its interlocutory ruling that the national legislation on the sanction of damages provided for under Article 36(2) (now paragraph 5) of Legislative Decree no. 165 of 2001 was "*prima facie*" compatible [with EU law]. **(Doc. 27)**

Recently the Regional Administrative Court for Lazio also made several references for a preliminary ruling by the order of 3 April 2019 in Case C-329/19 against the Ministry for Education, Universities and Research (MEUR) concerning university researchers in insecure employment in which the administrative court challenged – in the light of the Sciotto judgment[2] of the Court of Justice – the absolute prohibition on the conversion of fixed-term contracts into permanent contracts asserted by the Constitutional Court in judgment no. 89 of 2003 concerning school support staff, stressing that the prohibition on conversion laid down by Article 36(5) of Legislative Decree no. 165 of 2001 was not applicable when a public competition had been successfully completed. **(Docs 28, 29 and 37)**

In fact, by judgment no. 89 of 2003, the Constitutional Court had upheld the absolute prohibition on the conversion of fixed-term contracts into permanent contracts in public sector employment and appears to have encroached also on the interpretative authority of the Court of Justice, calling into question delicate institutional and constitutional equilibria in view of the previous amendment to Article 117 of the Constitution by Constitutional Law no. 3 of 2001.

The *Tribunale di Napoli* was accordingly forced to refer to the CJEU the specific question concerning the insecure status of CRTs by the referral order of 13 February 2019 in Case C-282/19, raising almost at the same time the same "*constitutional conflict*" with judgment no. 248 of 2018 of the Constitutional Court concerning this matter. **(Doc. 11)**

[1] EC Court of Justice, judgment of 7 September 2006 in Case C-53/04, *Marrosu-Sardino v. Azienda Ospedaliera S.Martino di Genova*, EU:C:2006:517.

[2] EU Court of Justice, judgment of 25 October 2018 in Case C-331/17, *Sciotto v. Fondazione Teatro dell'Opera di Roma*, EU:C:2018:859.

Accordingly, in the space of fifteen years, between the two references for preliminary rulings by the *Tribunale di Genova* and the *Tribunale di Napoli*, the only absolute position, which is immune to any change, has been that of the unshakable national legislature, which has not at any time amended the provision – currently Article 36(5) of Legislative Decree no. 165 of 2001 – that has passed constitutional muster first in judgment no. 89 of 2003 and subsequently in judgment no. 248 of 2018 of the Constitutional Court. **(Doc. 30)**

Indeed, the absolute lack of effective measures to combat abuses and the complete breach of Directive 1999/70/EC committed by all public administrations, leaving aside the absence in Article 36(5) of the Consolidated Act on Public Sector Employment [TUPI] of any legal criterion for determining harm, has been required by law since 2013 (Article 4 of Decree-Law no. 101 of 2013, converted with amendments into Law no. 128 of 2013), by Article 36(5-quater) of Legislative Decree no. 165 of 2001, which provides for the absolute nullity of flexible contracts where there is no lawful reason for the inclusion of a fixed-term, i.e. that lack any objective justification for the time limit. **(Doc. 31)**

However, it must be pointed out that this provision was introduced by the Italian Government in a complex normative context (Decree-Law no. 101 of 2013; Decree-Law no. 104 of 2013) – resulting from the combined effect of the order no. 207 of 2013 of the Constitutional Court making a reference for a preliminary ruling concerning supply teachers in schools and the order of the *Tribunale di Napoli* making a reference for a preliminary ruling concerning local authority workers in insecure employment situations in Case C-63/13 *Russo* – which also involved a significant plan for granting permanent status to public sector workers in insecure employment, including in schools and the Advanced Training and Artistic and Musical Specialisation [AFAM] branch (Decree-Law no. 104 of 2013), aimed at so-called "*long-term*" insecure workers who had accumulated 36 months of service, even if not continuous, for the public administration, having already established eligibility for public sector work in accordance with selective public procedures.

The stabilisation plan provided for under the 2013 Decree-Law reiterated the provisions previously set forth in the Italian Government's stabilisation plan laid down in Article 1(519) and (558) of the Finance Law, no. 296 of 2006, which was necessary in order to "*comply*" with the Marrosu-Sardino judgment of the Court of Justice. Moreover, the same solution was adopted by Article 20 of Legislative Decree no. 75 of 2017 (known as the "Madia reform")

following the failure to implement the 2013 stabilisation plan and the findings on the inadequacy of compensation comprising solely damages resulting from judgment no. 5072 of 2016 of the Joint Divisions of the Court of Cassation in all cases involving the abuse of successive fixed-term contracts in public sector employment; this criticism was raised initially by the *Tribunale di Trapani* in the reference for a preliminary ruling from September 2016 in **Case C-494/16 *Santoro*** concerning insecure employment in Sicilian local authorities, and immediately after by the *Tribunale di Foggia* in the referral to the Constitutional Court made on 25 October 2016 (Register of Referral Orders no. 32 of 2017) concerning insecure employment in the health service. **(Doc. 36)**

On the other hand, over the 13 years since the judgment in *Marrosu-Sardino*, much appears to have changed in the case law of the Court of Justice concerning insecure public sector employment in Italy.

By the *Affatato* order of 1 October 2010[3] concerning insecure employment in the health service, the Court of Justice answered the questions put by the *Tribunale di Rossano*, which had referred 16 questions for a preliminary ruling with the aim of making evident, in the first place, the complete absence of measures to prevent abuse throughout the entire public sector (schools, health service, local authorities, socially useful workers and bodies governed by public law such as the postal service), and secondly the inadequacy of the interpretation of the *Marrosu-Sardino* judgment, which had given rise to much confusion within the national legal system concerning the amount of compensation payable in relation to the abuse of fixed-term contracts in public sector employment. The ECJ answered that the granting of permanent status should constitute an appropriate remedy, which was considered in paragraph 48 of the order to entail the application in full of the sanction of the reclassification as permanent contracts of successive contracts with a total duration in excess (even by one day) of 36 months, even if not continuous, in the employment of the public administration pursuant to Article 5(4-bis) of Legislative Decree no. 368 of 2001. **(Doc 32)**

In the *Valenza* judgment[4] the Court of Justice rejected the interpretation proposed by the Council of State in the four references for a preliminary ruling, according to which the national law at issue in the main proceedings (Article 75(2) of Decree-Law no. 112 of 2008, a provision

[3] EU Court of Justice, order of 1 October 2010 in Case C-3/10, *Affatato v.ASL Cosenza*, EU:C:2010:574.

[4] EU Court of Justice, judgment of 18 October 2012, Joined Cases C-302/11 to C-305/11, *Valenza and others*, EU:C:2012:646.

not subsequently converted into law), which had enabled workers in insecure employment to be hired directly as an exception to the rule stipulating a public competition as a prerequisite for eligibility for public sector employment (employees of independent authorities who had accumulated 36 months' service), was compatible with clause 4 of the framework agreement on fixed-term work, thereby allowing for such workers to be granted tenured status at the lowest level of the salary scale, without retaining the length of service accumulated during the fixed-term relationship (paragraph 23 of the judgment). **(Doc. 33)**

The ECJ pointed out that Article 97(4) of the Constitution allows for the granting of tenured status in public sector employment not only on the basis of competitive procedures, but also pursuant to the law, as had occurred in this case (albeit by the enactment of a "*privileged*" urgent decree-law, which was not converted into law).

In the *Papalia* order,[5] which involved a reference for a preliminary ruling from the *Tribunale di Aosta* concerning a shocking example of the abuse of successive fixed-term contracts with the head of the Municipality of Aosta musical band, who had accumulated almost 30 years of service without interruption, the Court of Justice held that Article 36(5) of Legislative Decree no. 165 of 2001 as interpreted "*conditionally*" in the light of the *Marrosu-Sardino* judgment, was incompatible with Directive 1999/70/EC, and restated the need for an "*effective and efficacious*" sanction so as to limit such abuses. **(Doc. 34)**

In the *Mascolo* judgment[6] the Court of Justice held that the system governing the recruitment of teaching and ATA staff in schools administered by the State was incompatible with Directive 1999/70/EC, and accepted in this respect the questions for a preliminary ruling referred by the *Tribunale di Napoli* and the Constitutional Court by order no. 207 of 2013. It declared moot all of the other questions for a preliminary ruling referred by the *Tribunale di Napoli*, including in particular those concerning the application of clause 4(1) of the framework agreement on fixed-term work and Article 47 of the EU Charter of Fundamental Rights as regards the national legislation that precluded the transformation of fixed-term contracts into permanent contracts with retroactive effect in cases in which 36 months' service, even if not continuous, had already been accumulated. In response to the questions referred in *Russo* C-63/13 concerning nursery

[5] EU Court of Justice, order of 12 December 2013 in Case C-50/13, *Papalia v. Comune di Aosta*, EU:C:2013:873.
[6] EU Court of Justice, judgment of 26 November 2014 in Joined Cases C-22/13, C-61/13, C-62/13 and C-418/13, *Mascolo, Forni, Racca, Napolitano and others v. MEUR*, and Case C-63/13 *Russo v. Comune di Napoli*, with written observations submitted by CGIL, FLC-CGIL and GILDA-UNAMS in *Racca* Case C-62/13, EU:C:2014:2124.

supply teachers from the Municipality of Naples, the Court of Justice stressed once again that Article 5(4-bis) of Legislative Decree no. 368 of 2001 constituted an adequate and effective measure to sanction the abuse of fixed-term contracts, inviting the *Tribunale di Napoli*, in paragraph 55, to continue to apply it as a judicial act in keeping with the principle of fair co-operation with the EU institutions. **(Doc. 35)**

By the *Santoro* judgment[7] the Court of Justice considered preliminary questions raised by the *Tribunale di Trapani* concerning long-term insecure employment at Sicilian local authorities as regards (solely) the amount of damages payable in respect of employment relationships established with the public administrations without having followed any competition procedures (which were therefore void owing to a violation of overriding provisions governing engagement in public sector employment), and mitigated the effects of judgment no. 5072 of 2016 of the Joint Divisions of the Court of Cassation, stipulating that it must be the public administration that bears the (negative) burden of proof concerning the loss of opportunities when setting the compensation comprising full redress due to a worker in an insecure situation in respect of the loss of a stable employment opportunity. **(Doc. 36)**

By the *Sciotto* judgment,[8] responding to the reference for a preliminary ruling made by the Rome Court of Appeal concerning the availability to insecure workers at operatic and orchestral foundations of the protection provided for under Article 5(4-bis) of Legislative Decree no. 368 of 2001, having taken note of the public status of the employer according to the position set out by the Italian Government in its written observations (moreover, in judgment no. 153 of 2011 the Constitutional Court held that operatic bodies had the status of national bodies governed by public law, i.e. non-economic public bodies; see Court of Cassation judgment no. 12108 of 2018), the Court of Justice concluded as follows: "*Clause 5 of the framework agreement on fixed-term work….must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the ordinary law rules governing employment relationships and intended to penalise the misuse of successive fixed-term contracts by the automatic transformation of the fixed-term contract into a contract of indefinite duration if the employment relationship goes beyond a specific date are not applicable to the sector of activity*

[7] EU Court of Justice, judgment of 7 March 2018 in Case C-494/16, *Santoro v. Comune di Valderice and the Italian Government*, EU:C:2018:166.

[8] EU Court of Justice, judgment of 25 October 2018 in Case C-331/17, Sciotto v. Fondazione Teatro dell'Opera di Roma.

of operatic and orchestral foundations, where there is no other effective measure in the domestic legal system penalising abuses identified in that sector." **(Doc. 37)**

In order to reinforce the interpretation whereby any national legislation that precludes the preventive protection available under Directive 1999/70/EC for fixed-term workers of operatic and orchestral foundations is incompatible [with the Directive], in the *Sciotto* judgment the ECJ appears to have substantially required the direct and vertical application of the framework agreement on fixed-term work on the Italian State, which is failing to comply with it, and on all public administrations in accordance with the principle of non-discrimination regarding the terms of employment set forth in Clause 4 of the agreement, clarifying in paragraph 71 that: "*In any event, as has been argued by the Commission, since the national law at issue in the main proceedings does not in any case allow, in the sector of activity of operatic and orchestral foundations, for the conversion of fixed-term employment contracts into a contract of indefinite duration, it is likely to lead to discrimination between fixed-term workers in that sector and fixed-term workers in other sectors, as the latter may become, after the transformation of their employment contract in the case of infringement of the rules on the conclusion of fixed-term contracts, comparable permanent workers within the meaning of Clause 4(1) of the Framework Agreement.*".

When confronted with this framework of case law from the Court of Justice on the abuse of fixed-term contracts in Italian public sector employment, one would have expected some response from the Court of Cassation, and above all from the Constitutional Court, that went beyond the critical aspects of the "*Community damage*" solution embraced by the **Joint Divisions of the Court of Cassation in judgment no. 5072 of 2016** and was more favourably minded towards reclassification as a permanent contract, at least in cases in which the successive fixed-term contracts had exceeded 36 months' service, even if not continuous, where the workers had been engaged after the completion of lawful public competition procedures.

Indeed it does not appear to have been by chance that, **by order no. 25728 of 15 October 2018**, confirmed by **order no. 4952 of 2019**, the Supreme Court emphasised the fact that employment in the public administration could be lawfully obtained according to public selective procedures as a basis for rejecting the prohibition on the conversion of fixed-term contracts into permanent contracts. **(Doc. 38)**

However, by judgment no. 248 of 2018, the Constitutional Court had ruled unfounded (as stated in the operative part, although the reasons also mention inadmissibility) a question of constitutionality raised by the *Tribunale di Foggia*, sitting as an employment court, concerning Article 36(5), (5-ter) and (5-quater) of Legislative Decree no. 165 of 2001 and Article 10(comma 4-ter) of Legislative Decree no. 368 of 2001.

In the context of national legislation on insecure public sector employment that entirely lacks any protection, including in the form of compensation (Article 36(comma 5-quater) of Legislative Decree no. 165 of 2001), and that, as is the case for the schools sector, precludes the very applicability of Directive 1999/70/EC (Article 10(comma 4-ter) of Legislative Decree no. 368 of 2001; now Article 29(2)(c) of Legislative Decree no. 81 of 2015), in a decision that does not appear to be properly supported by reasons, the Constitutional Court limited itself to upholding the constitutionality of certain provisions that prevented reclassification as permanent employees and the payment of compensation; the Court held specifically that the principles asserted by the Joint Divisions of the Court of Cassation in judgment no. 5072 of 2016 – which according to the Constitutional Court had supposedly been upheld as compatible with Directive 1999/70/EC by the *Santoro* judgment of the Court of Justice – were applicable also to the case before it.

The judgment in question of the Constitutional Court – no. 248 of 2018 – concluded in the worst possible manner, not only in disregarding the *Sciotto* judgment of the Court of Justice, which had been referred to by counsel for the workers both in the concluding written statement and at the oral hearing held on 23 October 2018, but also by having (in the view of the undersigned) distorted the interpretation of the ECJ in this area: "*In fact, whilst on the one hand it must be acknowledged that it is impossible for the entire public sector to convert fixed-term contracts into permanent contracts − according to settled European and national case law − on the other hand there is an appropriate sanction consisting in the compensation of damages as specified by the Court of Cassation*.".

In view of the above, the reasons provided in the **order concerning a reference for a preliminary ruling made on 13 February 2019 by the *Tribunale di Napoli*** concerning CRTs in insecure employment (as well as in the order concerning a reference for a preliminary ruling made on 3 April 2019 by the Regional Administrative Court for Lazio concerning university researchers in insecure situations in Case C-329/19) are rooted precisely in this interpretative

conflict between the *Sciotto* judgment of the Court of Justice and judgment no. 248 of 2018 of the Constitutional Court, as specified by the court making the reference in paragraph 15*: "There is therefore a difference between the positions of the highest courts as regards the powers of the national courts, which should always pass through the Constitutional Court, and could never establish permanent employment relationships in the various sectors of the public administration, even if there is an absolute lack of any measures to prevent abuse pursuant to Clause 5. As a result, it is necessary to refer the matter once again to the CJEU*".

The *Tribunale di Napoli* has asked the CJEU to acknowledge the power not to apply, thereby recognising the right to the granting of tenured status (second preliminary question) or to disapply (fourth preliminary question) any national provisions that preclude the availability of equivalent and adequate protection consisting in the reclassification as permanent contracts of successive fixed term contracts for a period in excess of 36 months' service.

The factual circumstances of supply CRTs are typical of those prevailing in school recruitment, and are aggravated by the fact that tenured status can be granted only in accordance with a competition as no provision has been made for that category of teacher for ranking lists to be drawn upon until exhaustion with the aim of securing stability for so-called "long-term" insecure workers, as explained on page 18 of this complaint.

For CRTs the situation of insecure employment is further aggravated today by the absence of any competition procedures for the granting of tenured status (the last competition for the appointment of permanent staff was that held in 2003) as well as the fact that 30% will remain in insecure employment for life since, as mentioned above, Article 2 of Law no. 186 of 2003 provides that the workforce is to be calculated with reference only to 70% of available positions.

Ultimately, the *Tribunale di Napoli*, with regard to the first and third questions referred to the CJEU, argues that there is a prohibition on discrimination on the grounds of religion pursuant to Article 21 of the EU Charter of Fundamental Rights and **Directive 2000/78/EC**, adding in relation to the third question the principles of equality and non-discrimination laid down in clause 4 of the framework agreement on fixed-term work implemented by **Directive 1999/70/EC** and, implicitly, Article 20 of the Nice Charter.

In particular, the court making the preliminary reference drew a distinction between direct discrimination (first question) pursuant to Article 1 and point (a) of Article 2(2) of Directive

2000/78/EC and indirect discrimination (third question) pursuant to Article 1 and point (b) of Article 2(2) of the same directive to combat discrimination in employment. **(Doc. 39)**

Finally, it is noted that on 21 October 2019, the European Commission joined the proceedings in Case C-282 of 2019, arguing in favour of the CRTs and concluding as follows: "*1) The framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC 28 of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, including in particular clause 5, precludes any internal legislation, such as that at issue in the main proceedings, that does not provide for any measure required under that clause in order to prevent the abuse of fixed-term contracts of employment for workers such as the claimants in the main proceedings.*

2) It is for the judicial authorities of the Member State concerned to guarantee respect for the prohibition on discrimination laid down by clause 4(1) of the framework agreement, including by disapplying those national provisions that prevent the operation of provisions of national law that are aimed at properly sanctioning breaches of that clause and eliminating their effects". **(Doc. 12)**

These conclusions are based on the factual and legal premises reiterated by Directives 2000/78/EC and 1999/70/EC, and it is asserted in paragraphs 53 et seq that, since there are no "*objective reasons*" capable of justifying unlawful recourse to fixed-term contracts for CRTs, clauses 4 and 5 of Directive 1999/70/EC have been violated. Accordingly, referring to the *Sciotto* judgment, it is stated in paragraph 69 that: "*In this case, as stated in paragraph 23 of these written observations, a teacher with a fixed-term contract in a school administered by the state in a subject other than Catholic religion can have his or her employment relationship transformed into a permanent relationship. In addition, once that transformation has occurred, those teachers constitute without any doubt a comparable category of worker pursuant to clause 4(1) of the framework agreement. There is therefore a difference in treatment between the claimants in the main proceedings and their colleagues, who are also teachers in schools administered by the state, but now work under permanent employment contracts, and thus constitute comparable workers pursuant to clause 4(1) of the framework agreement*".

As is known, following the two orders concerning references for a preliminary ruling by the *Tribunale di Napoli* and the Regional Administrative Court for Lazio in Case C-329/19 relating

to effective protection against the abuse of fixed-term contracts in Italian public sector employment, the *Rossato* judgment[9] was adopted by the Court of Justice. **(Doc. 40)**

It is clear to the undersigned that, when adopting the *Rossato* judgment, the Court of Justice sought to mediate between two countervailing requirements.

On the one hand, the ECJ had to recognise the granting of permanent status as effective protection against insecure public sector employment in accordance with clause 5 of the framework agreement on fixed-term work asserting, in keeping with the *Sciotto* judgment, that successive fixed-term contracts must be transformed into permanent contracts once 36 months' service are reached, even if not consecutive.

On the other hand, the Court of Justice sought to respect the "*stare decisis"* imposed by the Court of Cassation (cf. concerning this matter order no. 8671 of 28 March 2019), according to which "*the incorporation of previous successive fixed-term contracts into a stabilisation procedure governed by regional legislation (Article 3(38) of Regional Law no. 40 of 2007; Article 30 of Regional Law no. 10 of 2007) would have the effect of rendering the action devoid of purpose and in any case, having obtained broader protection, would preclude any further possibility of considering rights to compensation, as is evident in view of the similar precedents of this Court (Court of Cassation, judgment no. 16336 of 3 July 2017 concerning the granting of tenured status at the Ministry of Justice; Court of Cassation, judgment no. 22552 of 7 November 2016 concerning the grant of tenured status in the schools sector).*".

On the other hand, the **Constitutional Court itself held in section 18 of judgment no. 187 of 2016** - applying the *Mascolo* judgment of the ECJ, which it regarded as a "*ius superveniens*" - that stabilisation was the only measure capable of definitively rectifying the breach of Community law, and declared Article 4(1) of Law no. 124/1999 unconstitutional, only subsequently to reverse its position completely in judgment no. 248 of 2018. **(Doc. 41)**

In judgment no. 248 of 27 December 2018 the Constitutional Court, drawing on "*established European case law*", but without citing it (because it does not exist), upheld the absolute prohibition on the conversion of fixed-term contracts into permanent contracts in public sector employment, thereby intentionally disregarding also the *Sciotto* judgment of the Court of

[9] EU Court of Justice, judgment of 8 May 2019 in Case C-494/17, *Rossato v. Ministero dell'Istruzione and Conservatorio di musica C.A. Bonporti*, EU:C:2019:387.

Justice of 25 October 2018, which was filed two days after the hearing at which its publication and foreseeable outcome had been announced.

In the *Rossato* judgment, the Court of Justice referred in paragraphs 27-28 and 36-40 – in the view of the undersigned extremely clearly – to the transformation of fixed-term contracts into permanent contracts as the "*only*" sanction capable of guaranteeing the efficacy of clause 5 of the framework agreement on fixed-term work.

In fact, according to the ECJ, where, as in the case involving Professor Rossato, EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent on the national authorities to adopt measures that are not only proportionate but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective (*Rossato* judgment, paragraph 27), citing paragraph 29 of the *Santoro* judgment.

It follows from the above that, where there has been misuse of successive fixed-term contracts or relationships, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order to duly penalise that misuse and nullify the consequences of the breach of EU law (*Rossato* judgment, paragraph 28), citing paragraph 64 of the *Fiamingo* judgment[10] and paragraph 79 of the *Mascolo* judgment.

Since transformation into permanent contracts under the extraordinary plan for the recruitment of permanent staff pursuant to Article 1(95) et seq of Law no. 107 of 2015 was mandatory and not unforeseeable or arbitrary, the sanction was sufficiently rigorous and dissuasive in nature (*Rossato* judgment, paragraph 37).

In the *Rossato* judgment, the Court of Justice essentially limited the rectification of the breach of Community law solely to cases in which fixed-term contracts were transformed into permanent contracts as a mandatory effect of the depletion of ranking lists until exhaustion pursuant to Article 1(95) of Law no. 107 of 2015, thereby excluding the discretionary situations falling under Article 1(109) of the Law referred to by the Constitutional Court in judgment no. 187 of 2016.

As a consequence of the *Rossato* judgment of the Court of Justice, on 25 July 2019 the European Commission launched **infringement procedure no. 2014/4231 (Doc. 42),** intimating formal

[10] EU Court of Justice, judgment of 3 July 2014 in Joined Cases C-362/13, C-363/13 and C-407/13 *Fiamingo and others v. Rete ferroviaria italiana*.

notice to Italy concerning the absence of protection against the abuse of successive fixed-term contracts in the area of public sector of employment concerning:

- the contracts of staff employed by Italian operative and symphonic foundations;
- fixed-term contracts concluded with teaching staff and ATA in relation to supply appointments;
- fixed-term contracts concluded with healthcare staff, including specialist doctors, within the National Health Service;
- fixed-term contracts concluded with workers at advanced artistic, musical and dance training institutions ("AFAM") that are subject to oversight by the Ministry for Education, Universities and Research ("MEUR");
- fixed-term contracts concluded pursuant to Law no. 240 of 30 December 2010, laying down provisions governing the organisation of universities, academic staff and recruitment;
- recalls to service of the voluntary staff of the National Fire Service

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

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

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

The fixed-term recruitment of teaching and ATA staff in schools administered by the state was governed by Article 4 of Law no. 124 of 1999, a provision introduced prior to the entry into force of Legislative Decree no. 368 of 2001, the legislative decree that implemented Directive 1999/70/EC on fixed-term work. Articles 40 and 60 of the 2007 NCLA for the Schools Branch, as amended by the NCLA of 19 April 2018, expressly provided that specific statutory provisions, such as those contained in Article 5 of Legislative Decree no. 368 of 2001, enable

supply appointments of school staff to be transformed into permanent contracts in the event that successive contracts are used, at any rate after 36 months' service even if not continuous, pursuant to Article 5(4-bis) of Legislative Decree no. 368 of 2001.

The application of Article 5(4-bis) of Legislative Decree no. 368 of 2001 also to the public administrations responsible for schools has not only been established by the collective labour agreements for the Branch and Articles 36(2) and (5-ter) and 70(8), no. 1 of Legislative Decree no. 165 of 2001 but has also been asserted by the Italian State before the EU institutions (Court of Justice and Commission). It was therefore an undisputed issue concerning now established rights to stability of employment, at least until the Italian State introduced two provisions, the first with effect from 25 November 2009 according to Article 4(14-bis) of Legislative Decree no. 124/1999 and the latter with effect from 6 July 2011 according to Article 10(4-bis) of Legislative Decree no. 368/2001, without any express retroactive effect, which prohibit the transformation of supply appointments into permanent contracts, an anti-abuse sanction provided for under Article 5(4-bis) of Legislative Decree no. 368/2001.

The six "pilot" judgments of the Court of Cassation of 7 November 2016, which have been followed by dozens of judgments of the Supreme Court and hundreds of judgments of the merits courts at first and second instance, all identical and copied from the "standard form" judgments, and all rules – Article 4(14-bis) of Law no. 124 of 1999, with effect from 25 September 2009 until the present time; Article 10(4-bis) of Legislative Decree no. 368 of 2001 from 6 July 2011 until 24 June 2015; Article 36(5-ter) of Legislative Decree no. 165 of 2001 with effect from 1 September 2013 until the present time; Article 29(2)(c) of Legislative Decree no. 81 of 2015 from 25 June 2015 until the present time – that preclude recognition of the right to employment stability upon fulfilment of the prerequisite of 36 months' service pursuant to Article 5(4-bis) of Legislative Decree no. 368 of 2001 along with the 70% limit on the calculation of workforce positions for the purposes of granting tenured status and the failure to make provision within Article 1-bis of Decree-Law no. 126 of 2019 for an "*extraordinary*" competition therefore constitute a very serious violation of the following provisions of the **European Social Charter**:

• **Article 1**, commitments 1 and 2 as the Italian State has failed to honour both the commitment towards tens of thousands of teachers of religion working in schools administered by the state to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full

employment, along with the commitment to protect effectively the right of the worker to earn his or her living in an occupation freely entered into by rendering employment insecure owing to the failure to call "*extraordinary*" competitions to grant tenured status to CRTs with more than 36 months' service along with the failure to consider 30% of positions, notwithstanding that they were vacant and available, for the purposes of establishing stable employment;

• **Article 4**, **commitments no. 1 and 4** as the Italian State has failed to honour as an employer both the commitment towards tens of thousands of Catholic religion teachers in schools administered by the state to recognise sufficient remuneration such as will guarantee them and their families a dignified standard of living, rendering their terms of employment insecure for the reasons set out in Article 1, thereby adversely affecting their income from employment and their access to the financial benefits available for permanent teachers, such as for example the teachers' bonus provided for under Article 1(126) of Law no. 107 of 2015, and the commitment to recognise the right of supply teachers to reasonable advance notice in the event that their employment is terminated pursuant to Article 23 of the NCLA of 7 November 2007;

• **Article 5,** because the Italian State has not guaranteed the freedom of workers in schools, including in particular CRTs, to secure protection through national trade unions such as FEDERAZIONE GILDA-UNAMS/SNADIR, in order to protect their economic and social interests, on the grounds that national legislation and the case law of the Court of Cassation and the recent case law of the Constitutional Court have prejudiced and indeed frustrated legal provisions and the terms of collective agreements, which have been signed (*inter alia*) by the Complainant union, and which conversely recognised the rights invoked by CRTs;

• **Article 6**, **commitment no. 4**, because the Italian State has failed, through both legislation and the judiciary, to recognise as a matter of fact the right of CRTs in schools administered by the state to collective action through the complainant FEDERAZIONE GILDA-UNAMS/SNADIR in cases of conflicts of interest because the collective action (provided for by law) brought before the Court of Justice of the European Union was subsequently deprived by the Court of Cassation and the Constitutional Court of its effect of protecting rights;

• **Article 24,** because the Italian State, as an employer and through legislation and the judiciary, has not recognised for tens of thousands of teachers of religion who were unlawfully hired under fixed-term contracts to vacant and available positions in the workforce (certainly at a level of 30%) the right of all workers not to have their employment terminated without valid

reasons for such termination connected with their aptitude 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.

Each of the violations of the European Social Charter highlighted above was committed in parallel with the violation of **Article E of the European Social Charter** and **the commitment by the Italian State not to discriminate** against Catholic religion teachers who have worked for the MEUR for a period in excess of 36 months by virtue of the fact that, as things currently stand, no "*ordinary*" or indeed "*extraordinary*" competition has been called, which is the case solely for this category of staff, and that not "*all vacant and available positions*" are and will be taken into account for the purposes of establishing available positions in the workforce, but rather only 70% of the positions identified, which is also the case solely for this category of staff.

This detriment constitutes discrimination against the said workers both compared with those working in the private sector, who are granted tenured status pursuant to Article 5(4-*bis*) of Legislative Decree no. 368 of 2001, and also compared even with supply teaching staff included in the ERE, who have been hired under permanent contracts with legal effect from 1 September 2015 in accordance with the extraordinary plan for the grant of tenured status laid down by Article 1(98) et seq of Law no. 107 of 2015, despite not having worked for even one single day in a school administered by the state or having worked for fewer than 36 months.

It is also requested that **Article E** be considered with reference to **discrimination on the ground of religion pursuant to Article 21 of the EU Charter of Fundamental Rights and Directive 2000/78/EC**, with regard to the fact that the special status of such staff, who as mentioned above are deemed to be equivalent according to law to all other teachers, might in some way constitute a violation of the principle of equal treatment and non-discrimination compared to other comparable teachers.

In relation to this issue, the case law of this Committee has been clear in asserting that the principle of equality involves ensuring equal treatment to persons in an identical situation, whilst at the same time preventing both direct and indirect discrimination in situations involving inappropriate treatment or unequal access to a collective benefit compared to other persons whose circumstances are identical *[cf. Association internazionale Autisme-Europe (AIEA v.*

France complaint no. 13 of 2000, decision cited above §§51-52.]

From a different perspective, a distinction is discriminatory pursuant to **Article E** of the Charter where it lacks objective justification that is reasonably proportionate with the means used and the intended purpose. *[cf. European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §40]*

Last but not least, it is also necessary to mention the decision concerning Italian justices of the peace, who have life-long insecure status and lack protection, and in relation to whom this Committee has held, *inter alia*, that: "*72. A distinction is discriminatory with regard to Article E of the Charter where it lacks objective and reasonable justifications, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §40)… The Committee considers that these arguments concern mere modalities of work organisation and do not constitute an objective and reasonable justification of the differential treatment of persons whose functional equivalence has been recognised. 83. Consequently, the Committee holds there is a violation of Article E read in conjunction with Article 12§1 of the Charter in respect of persons who perform the duties of Justice of the Peace and who have no alternative social security coverage*" **(Associazione Giudici di Pace v. Italy, complaint no. 102 of 2013, decision on admissibility of 2 December 2014, § 19).**

By this collective complaint, the European Committee of Social Rights is therefore requested to intervene in order that, acting within the ambit of its competence, it make a finding concerning the violations of the European Social Charter alleged against the Italian State and recommend that they be rectified, along with an award of costs and legal fees to the lawyers, who hereby declare that they have not charged any fees to their clients.

Finally, considering the seriousness of the violation of the European Social Charter and the resulting encroachment on the fundamental rights of tens of thousands of members of the FGU/SNADIR, the Committee is asked to adopt as an immediate measure the urgent procedure for establishing the admissibility of this complaint pursuant to Article 36 of the Rules of the European Committee of Social Rights.

The complainant party requests that it be able to use the Italian language in any submission

relating to these proceedings.

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

1- Statute and Memorandum of Association of Federazione GILDA-UNAMS;

2- National Collective Labour Agreement for the Schools Branch of 29 November 2007 and of 19 April 2018, signed by GILDA-UNAMS, excerpt;

3- Representativeness of FGU;

4- Statute of SNADIR;

5- Complaint no. 144 of 2017;

6- Complaint no. 161 of 2018;

7- Identity document of Prof. Rino Di Meglio, National Secretary of the FGU and appointment of Prof. Di Meglio as the legal representative of the CGS/FGU;

8- Identity document of Prof. Orazio Ruscica, National Secretary of the SNADIR and appointment as legal representative;

9- Legislative Decree no. 165 of 2001, excerpt;

10- Legislative Decree no. 368/2001, national legislation implementing Directive 1999/70/EC on fixed-term work, excerpt;

11- Case C-282 of 2019, *Gilda-Unams v. Italian Government*;

12- European Commission, written observations in Case C-282/19;

13- Legislative Decree no. 81 of 2015, excerpt;

14- Decree-Law no. 126 of 2019, converted into Law no. 159 of 2019;

15- Law no. 121 of 1985, excerpt;

16- Law no. 751 of 1985 and Decree of the President of the Republic no. 175 of 2012, excerpt;

17- Law no. 186 of 2003;

18- Legislative Decree no. 297/1994, Articles 309-400

18A- Court of Cassation, judgment no. 201 of 2016

19- Director General's Decree of 2 February 2004, excerpt;

20- Law no. 107 of 2015, excerpt;

21- Legislative Decree no. 59 of 2017, excerpt;

22- Legislative Decree no. 75 of 2017, excerpt;

23- Competition notice of 9 November 2018 and Director General's Decree no. 1546 of 2019;

24- Council of State, judgment no. 868 of 23 January 20

25- Constitutional Court, judgment no. 146 of 2013;

25-A Court of Cassation, judgment no. 343 of 10 January 2018

26- Schedule of available positions in the workforce;

27- CJEU judgment of 7 September 2006 in Case C-53/04, excerpt;

28- Regional Administrative Court for Lazio, referral of Case C-329/19, excerpt;

29- Constitutional Court, judgment no. 89 of 2003;

30- Constitutional Court, judgment no. 248 of 18;

31- Decree-Laws no. 101/13 and no. 104/13, excerpts;

32- CJEU judgment of 1 October 2010 in Case C-3/10, *Affatato*, excerpt;

33- CJEU judgment of 18 October 12 in Case C-302/11, *Valenza and others*, excerpt;

34- CJEU judgment of 12 December 2013 in Case C-50/13, *Papalia*;

35- CJEU judgment of 26 November 2014 in Case C-22/13, *Mascolo and others*, excerpt;

36- CJEU judgment of 7 March 2018 in Case C-494/16, *Santoro*, excerpt;

37- CJEU judgment of 25 October 2018, Case C-331/17, *Sciotto*;

38- Court of Cassation, Joint Divisions, judgment no. 5072 of 2016; Court of Cassation, judgment no. 25728 of 15 October 2018; order no. 4952/19;

39- Directives 1999/70/EC and 2000/78/EC;

40- CJEU judgment of 8 May 2019 in Case C-494/17, *Rossato*.

41- Constitutional Court, judgment no. 187 of 2016, excerpt;

42- Infringement procedure 2014/4231.

Rome, date of transmission

Prof. Gennaro Di Meglio_____ Prof. Orazio Ruscica_____

Counsel Tommaso de Grandis_____ Counsel Vincenzo De Michele_____