The protection of public precarious employment in Europe and in Italy, "waiting for Godot"[1]
by

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Summary: 1. Preamble: the issue of the precarious public employment in Europe to the attention of the EU Parliament. – 2. The responsibility of EU Commission in increasing insecurity of labour relations in Europe and Italy. - 3. The Italian regulatory model regarding anti-abuse measures of the Directive 1999/70/EC and the choice of EU Commission to remove the "objective reasons" from the law n.230/1962. – 4. The Court of Justice on the Member States discretion in the adoption of implementing measures of directive 1999/70/EC mediated by the application of the principles of equality and non-discrimination: Mangold judgement. – 5. The Court of Justice about the further limit to the discretion of Member States in implementing directive 1999/70/EC as regards the EU concept of objective reasons: Adeneler judgement. – 6. The Court of Justice with judgement Mascolo remedies to the negligence of the Commission and sanction Italy for the failure to implement directive 1999/70/EC as regards the anti-abuse measures in favour of the public precarious employees. – 7. The Court of Justice with order León Medialdea and judgements Porras, Andrés e López, Pérez López highlights the failure of Spain to implement directive 1999/70/EC, imposing on all Member States the sanction of the stabilisation of the public precarious employees. – 8. The EU Commission gives false information to the European Parliament on the Italian implementation of directive 1999/70/EC towards the precarious managers and substitute teachers and legitimises the Italian Jobs Act with the repeal of the national protection legislation. – 9. The EU Commission leads to the crisis of the national system of protection of Italian public employees and provokes the temporary "autodichia" of the *Cassazione*: a) Judgement n.5072/2016 of the *Cassazione* Joint Sessions on the public precarious employment; b) Judgement n.11374/2016 of the *Cassazione* Joint Sessions on the "acausal" contracts; c) Judgements of 7 November 2016 of the *Cassazione* – Labour Section on the school; d) "Delay" judgement n.21972/2017 of the Cassazione Joint Sessions on 'exchange assistants'; e) Judgement n.13721/2017 of the *Cassazione* Joint Sessions on honorary/voluntary judges; f) The Constitutional Court with the second incidental reference for a preliminary ruling avoids the direct "fight" between (part of) the *Cassazione* and the Court of Justice on Taricco II case, and the CJEU puts the Italian legislator (and the non-supervising EU Commission) in default. – 10. The new references for a preliminary ruling to the Court of Justice by Italian courts for the protection of the public precarious employees' rights: a) The double reference for a preliminary ruling of the Tribunals of Trapani and Foggia; b) The EU reference for a preliminary ruling made by Court of Appeal of Trento on the school precarious employment; c) The EU preliminary rulings on the concept of "voluntary" honorary judge. – 11. The EU Commission reacts to the criticism of having favoured the Jobs Act and restores motu proprio the objective reasons of legislative decree n.81/2015: the fake news related to the "acausal" fixed-term contracts in the preliminary case Sciotto on the public precarious employees of the opera house foundations. – 12. The re-opening of the dialogue of the Cassazione with the Court of Justice on the effective protection of public precarious employees. – 13. The conclusions of Advocate-General Szpunar in the case Santoro and judgement Andrés and López of the Court of Justice on the categories of fixed-term employees comparable for the purspose of public precarious employees' stabilisation. – 14. Conclusion: the mission [im]possible of European Parliament on the effective protection of public (and private) precarious employees

1. Preamble: the issue of precarious public employment in Europe to the attention of the EU Parliament.

On 22 November 2017, at the Petitions Committee of the European Parliament, a public hearing was held to discuss about the "*Protection of the rights of workers in temporary or lprecarious employment, based on petitions received"*, i.e. about how Member States and EU Institutions have implemented the directive 1999/70/EC on the fixed-term employment.

1 This contribution represents, with some additions related to the Italian issue of the public temporary employment, the report made by the same author, titled "*The principle of non-discrimination and measures to prevent and sanction the misuse or the abuse of fixed-term contracts in light of the EU Court of Justice case laws*", and presented on 22 November 2017 by the cited author, as expert of EU Parliament, at the public hearing of the Petitions Committee held to deal with the issue of the "Protection of the rights of workers in temporary or precarious employment, based on petitions received".

The “quality” and quantity of the n.48 petitions presented raises thoughts on the role of the European Commission, as guarantor of the Treaties, in ensuring the proper application of EU law.

It is noted, in particular, the petition n.178/2017 on the implementation of non-discriminatory working conditions and of career perspectives for contract agents, presented by n.108 precarious employees of the contract staff of EU Commission.

The number of petitions submitted by Italian citizens is particularly high (n. 28 out of n. 48) and all of them relate to the issue of precarious public employment. Among these are n.10 petitions concerning the healthcare, n.5 education, n.9 honorary judges, n.4 Sicilian local authorities. However, violations of the directive 1999/70/EC are reported as well, in particular in: Portugal (n.4), Spain (n.4), France (n.6), Belgium (n.1), United Kingdom (n.1), Germany (n.1), Greece (n.1), Poland (n.1). Almost all these violations are related to public employment.

The issue of the spread of precarious public employment had already been pointed out by the opinion of Advocate-General Jääskinen in case Jansen C-313/10 (EU:C:2011:593, paragraph 61). The case concerned a reference for a preliminary ruling in which it was challenged the compatibility of the German provision allowing the possibility of “limiting the duration of contracts” in the public employment for budgetary reasons with the concept of “temporary” objective reasons of Adeneler case.

Advocate-General Jääskinen has stressed as employers in the public sector, thanks to provisions similar to the one challenged in the cited case, can exercise powers so great to abuse fixed-term contracts. As a matter of fact, setting their budgetary priorities, these employers can potentially provide *ex ante* the objective reasons justifying the use of fixed-term contracts, evading the fulfilment of essential principles of labour law. Additionally, he stressed that this risk of abuse is even wider, considering that it has been estimated a marked increase in employment under fixed-term contract, and not in employment under contracts of indefinite duration or in permanent staff employment, to meet the needs of the public sector. Such a situation is not limited just to Germany, but it is shared by the majority of Member States[2] and even by the employment establishment of the EU Commission.

Moreover, Advocate-General Jääskinen has noted that the proposal that led to the adoption of directive 1999/70[3] states that the flexibility resulting from taking account the “needs of specic

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2 In the note 53 of his opinion, Advocate-General Jääskinen quotes, in particular, A. Fitte-Duval, «Contrat à durée indéterminée dans la fonction publique: les risques d’une transposition inadaptée», *Actualité Juridique Fonctions Publiques,* 2007, p. 4 *et seqq*.

3 Paragraphs 26-31 of the explanatory memorandum of the proposal for a Council Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, 28 April 1999 [COM(1999) 203 final, pp. 6

sectors" of clause 5 of the framework agreement needs to be linked to "the special attention" clearly accorded to small and medium-sized enterprises (SMEs) when the framework agreement was drawn up, in compliance with Article 137(2) EC (now Article 153(2) TFEU)[4].

In the cited proposal, the Commission stated that the various provisions in the framework agreement to which it refers, including clause 5, "*show that the social partners have intended to leave room for manoeuvre in the implementation of the rights and obligations under the agreement which should allow for the specific needs of both workers and enterprises in specific sectors and categories of workers and enterprises to be taken into account, not least SMEs*" (Jääskinen opinion, paragraph 62). On the other hand, the *travaux préparatoires* of directive 1999/70 make no mention of a special treatment intended for the benefits of public sector, in connection with the drafting of clause 5 of the framework agreement. It does not seem that the posts to be filled in that sector are traditionally or by nature temporary, contrary to what may occur in some cases (Jääskinen opinion, paragraph 63).

In light of these considerations, Advocate-General Jääskinen concluded that clause 5(1)(a) of the framework agreement is to be interpreted as precluding a national rule like paragraph 14(1) n.7 of the German Federal Law on part-time working and fixed-term contracts of 21 December 2000 (the «TzBfG»), which allows the conclusion of successive fixed-term contracts for budgetary reasons exclusively reserved to public sector.

Nevertheless, it appears that only Germany has followed the interpretative suggestions made by Advocate-General Jääskinen. In the case, indeed, Land Nordrhein-Westfalen abandoned the appeal made before the Landesarbeitsgericht Köln (i.e. the referring court for a preliminary ruling in the Jansen case C-313/10) against the judgment given by the Labour Court of Cologne, regarding the reclassification in a contract of indefinite duration of a fixed-term contract concluded between the judicial administration department of the Land Nordrhein-Westfalen, justified by temporarily available budgetary funds. Such a reason could not be considered an "objective reason" to justify the conclusion of a fixed-term term.

Therefore, after just twenty days from the submission of Advocate-General Jääskinen's opinion, the Landesarbeitsgericht Köln informed the Court of Justice that the dispute in the main proceedings had become devoid of purpose and that, consequently, it was withdrawing its reference

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and 7].

4 Article 153(2) TFEU states that directives adopted in the field of social policy shall «shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings». See also paragraph 11 of the general considerations of the framework agreement.

for a preliminary ruling, with the subsequent removal of case C-313/10 from the Register by an order of the President on 25 October 2011.

Therefore, there was not any judgement by the Court of Justice in the case Jansen C-313/10 and the EU Commission, as well as many other Member States, continued to abuse fixed-term contracts in the public sector just because of budgetary reasons, which are, as said, insufficient to constitute the "temporary" objective reasons required by the Court.

2. The responsibility of EU Commission in increasing insecurity of labour relations in Europe and Italy.

Precisely because of the incredibly fast and unusual end of the described Jansen case C-313/10, it is necessary to find out the main responsible for the increasing insecurity of flexible labour relations, particularly (but not exclusively) in the public sector. The main responsible is right the EU Commission, referred to in the cited petition of contract agents (petition n.178/2017) presented to the Petitions Committee of the European Parliament.

All started with the pivotal judgment of the Court of Justice (chaired by La Pergola) of the Vitari case[5], in which the Court at paragraphs 21-26[6], in contrast with the opinion of Advocate-

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5 Judgement of the Court of Justice, 9 November 2000, case C-129/99 Vitari vs European Training Foundation, EU:C:2000:371. Vitari judgement was cited for the first time by F. Buffa, in "*Problematiche interpretative dell'art. 32, commi 5-7, della legge n. 183/2010 alla luce della giurisprudenza comunitaria, CEDU, costituzionale e di legittimità*", *Massimario* Office of the *Cassazione*, thematic report n.2 of 12 January 2011. See, also, V. De Michele, *La relazione del Massimario della Cassazione rievoca i "fantasmi" della l. n.230/1962 sul contratto a termine*, su *Lav.giur.*, 2011, n.3, 237 et seqq.

6 The Court of Justice said at paragraphs 21-26: «*21. According to Article 3 of the Commission rules, the contracts of members of the local staff performing their duties in Italy must, in principle, be concluded for an indefinite period, and derogations from that principle are permitted only where the circumstances or nature of the work require the setting of a term. In this respect, it is not possible to discern any contradiction between that provision and the relevant provisions of national law, which also favour the conclusion of contracts for an indefinite period. 22. Admittedly, the national legislation to which the national court refers is more precise, in that it expressly sets out the situations in which fixed-term contracts may, by way of exception, be concluded. 23. It may not, however, be concluded from Article 79 of the Conditions("CEOS") that the national law of the State in which a member of the local staff performs his duties is to be applied, as it stands, to the employment relationship between a Community institution and a member of the local staff. That article clearly states that the conditions of employment of local staff are to 'be determined by each institution in accordance with current rules and practice in the Member State where the worker is to perform his duties, which merely means that the rules adopted by each institution may not conflict with the fundamental rules of the applicable national law. 24. As is clear from paragraph 21 above, Article 3 of the Commission rules is consistent with the basic policy underlying the Italian legislation. 25. In those circumstances, it falls to the national court, in accordance with Article 81(1) of the Conditions, to establish whether the circumstances or nature of the work entrusted to Mr Vitari were such as to justify the conclusion of a fixed-term contract. As Advocate General Ruiz-Jarabo Colomer points out in section 32 of his Opinion, the order for reference does not in any event contain anything that would enable the Court to provide any assessment in that regard. 26. If the national court should find that Article 3 of the Commission rules has been infringed in the case in the main proceedings, in that the circumstances or nature of the work did not require a term to be set to the contract, it will be for that court to reestablish legality by converting the contract in question, which was concluded for a fixed term, into an employment contract of indefinite duration*».

General Colomer (EU:C:2000:371) and with its previous Tordeur judgement[7] (which concerned temporary work), deferred to the national court (Pretore del lavoro di Torino), on the basis of national rules and therefore, at the time, of l. n. 230/1962, the possibility to reclassify fixed-term contracts, even concluded by EU Institutions, in contracts of indefinite duration in all cases of abuse.

The EU Commission considered art.3 of the regulation regarding the Conditions of employment of other servants of the European Communities («CEOS») the provision, inspired by art.1(1) l. n.230/1962, according to which the employment contracts of the local staff operating in Member States shall be concluded for an indefinite duration and any derogation to this principle is allowed only if the circumstances or the type of work require to fix a term. Nevertheless, the same Commission did not provide and still does not provide any of the prevention measures set forth in clause 5(1) of the framework agreement on fixed-term work, causing a limitless increase of its "flexible" employees' job insecurity.

EU Commission contract agents are engaged, through a competitive selection procedure, for a maximum period of 6 years – according to the new version of the Conditions which came into force since 1 January 2014 (art.3a CEOS[8]) – in non-vacant posts, since occupied by a member of the permanent staff currently absent, or in any case they are engaged for jobs related to financial allocations different from the Institution ordinary budget, without the possibility of the conversion of their contracts in contracts of indefinite duration and without the possibility to participate in the competitions reserved for "temporary" agents, who are different from officials (*i.e.* permanent staff employed for an indefinite duration) because they are engaged as non-permanent staff for an indefinite duration in vacant posts, and their employment may cease in case of filling of the vacant post by a permanent official (who is actually usually the same temporary agent, chosen after having successfully passed the reserved competition).

3. The Italian regulatory model regarding anti-abuse measures of the Directive 1999/70/EC and the choice of EU Commission to remove the "objective reasons" from the law n.230/1962

7 Judgement of the Court of Justice 3 October 1985, case C-232/84, Commission vs Tordeur, EU:C:1985:392.

8 With the new Conditions of 1 January 2014, the previous 3-years maximum period has been extended to 6 years. In the report of EU Commission on the use of contract staff in 2014 of 9 August 2016, it is possible to read that «*many contract staff who had already completed 3 years of service and were continuing to work for the Commission as agency staff have been able to be rehired for a further contractual period, allowing the Commission to benefit from contract staff who are already trained and operational immediately, while reducing the number of agency staff*.» [COM(2016) 499 final, p. 5].

It is necessary to recall that clause 5(1) of the framework agreement on fixed-term work, dealing with the issue of anti-abuse prevention measures, transposed the two anti-abuse models of the Italian Law (art.1 l. n.230/1962), referring to the "temporary" objective reasons required for each fixed-term contract [letter a)], and of the German Law (art.166 *Beschäftigungsförderungsgesetz,* as modified by l. n. 25/9/1996), referring to the maximum duration of two years for fixed-term contracts [letter b)] and the maximum amount of three renewals for the same contracts [letter c)].

The German legislator, after the judgement of the Court of Justice in Vitari case, promptly implemented directive 1999/70/EC through the Federal Law on part-time working and fixed-term contracts «TzBfG» of 21 December 2000, entered into force on 1 January 2001, which, in art. 14, regulates fixed-term contracts, following the model established by art. 1(2) of the Italian law n.230/1962.

It was right through directive 1999/70 implementation (in particular with art. 14, n. 1 TzBfG) that the German legislator introduced in the German Law, for the first time, the prevention measure of clause 5(1)(a), which was not provided in the previous national regulation. This clearly shows as the German legislator considered such prevention measure the most effective among the other possible ones, even in light of the sixth General Consideration of the framework agreement. Therefore, the German Legislator added the cited measure to the other two preventive measures already prescribed by the national law (i.e. the maximum duration of two years and the limit of three renewals in the same two-years period), as well as another anti-abuse measure related to the practice of imposing a minimum period of "non-working" of four months in the case of contracts renewals to avoid the reclassification of the contracts in contracts of indefinite duration.

Instead, in Italy with the legislative decree n.368/2001, before the corrective and supplementary intervention of both courts of merits and the court of legitimacy[9], it has been eliminated the idea of exceptionality of fixed-term contracts, which provided for only formal inconsistencies in the event of omitted specification of the general alternative, technical, organisational or productive reasons for concluding a fixed-term contracts in case of labour relations lasting more than 12 days (art.1(2), legislative decree n.368/2001) and which did not set

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9 See *Cassazione*, S.L., judgement 21 May 2008, n. 12985, in *Lav. giur.*, 2008, n. 9, 903, with comment by V. De Michele, "*L'interpretazione sistematica della Cassazione sul contratto a termine e la reazione caotica del legislatore*". Among scholars, see A.M. Perrino, "*Il paradosso del contratto a termine: l'enfasi dei principi e la «Realpolitik» delle regole*", in *Il Foro it.*, 2008, n. 12, 3576; A. Olivieri, "*La Cassazione e il rasoio di Ockham applicato al contratto a termine: la spiegazione più semplice tende a essere quella esatta*", in *Riv. it. dir. lav.*, 2008, II, 891; critics are in A. Vallebona, "*Sforzi interpretativi per una distribuzione inefficiente dei posti di lavoro stabile*", in *Mass. giur. lav.*, 2008, n. 8-9, 643.

any of the prevention measures set forth in clause 5(1) of the framework agreement, as regards the succession of fixed-term contracts and the sanctions related to art. 5 legislative decree n.368/2001[10].

Furthermore, as regards the European labour relations, in particular the issue of contract agents, the EU Commission rapidly obtained a revision of Vitari judgement with the judgement *Betriebsrat der Vertretung der Europäischen Kommission in Österreich*[11], in which the Court, with a manipulation of the precedent (judgment Vitari, paragraph 23), decided for the non-application of the national law of the State where the Commission local agent worked, thus forming a basis even for the non-application of directive 1999/70/EC towards all the precarious staff of the European Institutions.

Advocate-General Mengozzi with his opinions in the case Oberto (EU:C:2014:2169), regarding a reference for a preliminary ruling submitted by the German Federal Labour Court, tried to take the Court back to the previous stronger judicial protection, entrusted to national judges, of the teachers employed under fixed-term contracts in European Schools, financed by the EU. Yet, the Court of Justice in its judgement of 11 March 2015[12] recognised to the European Institutions the exercise of their "internal" judicial power (without referring to external courts, so called "*autodichia"*), so hindering the application of directive 1999/70 even towards the contract agents of the EU supranational entities.

4. The Court of Justice on the Member States discretion in the adoption of implementing measures of directive 1999/70/EC mediated by the application of the principles of equality and non-discrimination: Mangold judgement

After the reference for a preliminary ruling in January 2004 by the *Tribunale di Genova* in the Marrou-Sardino case, referring to the interpretation of the framework agreement on fixed-term work as regards the absolute prohibition of reclassification in contracts of indefinite duration in the public sector prescribed by the Constitutional Court with its judgement n.89/2003, in community settings, with the tolerance of the Commission, took also steps to weaken the effects of directives 1999/70 towards Italian public precarious employees.

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10 On the issue, see V. De Michele, "*Il contratto a tempo determinato"*, in "*Il nuovo mercato del lavoro dalla riforma Fornero alla legge di stabilità 2013"*, AA.VV., by CINELLI, FERRARO, MAZZOTTA (edited by), Torino, 2013, 19 ss.; also, "*Il d.lgs. 81/2015 e l'(in)compatibilità con il diritto dell'Unione europea"*, in "*Contratti di lavoro, mansioni e conciliazione vita-lavoro nel Jobs act II"*, AA.VV., by E. Ghera e D. Garofalo, Bari, 2015, 25 ss

11 Court of Justice, judgement 10 July 2003, case C-165/01, Betriebsrat der Vertretung der Europäischen Kommission in Österreich vs Commission of the European Communities, EU:C:2003:401.

12 Court of Justice, judgement 11 March 2015, joint cases C-464/13 e C-465/13 Oberto *et al*, EU:C:2015:163.

It was created in Germany, in contrast with the ontologically temporary nature of the objective reasons justifying fixed-term contracts, the leading case of Mr. Mangold, a 56-years-old worker employed as a secretary by the German lawyer Mr. Helm, through a unique part-time contract for few months, without the specification of any objective reason, on the basis of a provision of the German Law which, to make it easier to conclude fixed-term contracts with older workers, allowed the conclusion of fixed-term contracts without any reason. This was parallel, however, to the aforementioned two prevention measures of the two-years duration and the three maximum renewals.

In Mangold judgement[13] the Grand Chamber of the Court of Justice – arousing the protests of different advocates general[14] for having recklessly combined the effects of two directives, i.e. the directive 1999/70 on fixed-term contract (which the Court denied to be applicable on the first and unique fixed-term contract of the case) and the directive against employment discriminations 2000/78/CE – stated the incompatibility of the national provision, which made it easier the working reintegration of older workers through fixed-term contracts, with directive 2000/78, allowing the national judge to disapply the national rule and to reclassify in a contract of indefinite duration the fixed-term contract of the fictitious employee Mr. Mangold, falsely employed by Mr. Helm right to create the *casus belli*.

Therefore, the Court of Justice through a judicial case made up, starting from the German Law which had chosen the temporary objective reasons as the main anti-abuse measure, originally denied that the first and unique fixed-term contract concluded without objective reasons fell within the scope of clause 5 of the framework agreement, allowing Member States to make the fixed-term work more flexible, without any interference of the EU Court.

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13 Court of Justice, Grand Chamber, judgement 22 November 2005, case C-144/04 Mangold, EU:C:2005:709, in *Lav. giur.*, 2006, 5, 459, with comment by P.Nodari; in *Foro it*., 2006, IV, 341, with comment by V.Piccone and S.Sciarra, "*Principi fondamentali dell'ordinamento comunitario, obbligo di interpretazione conforme, politiche occupazionali"*; in *Riv. it. dir. lav.*, 2006, 251, with comment by O.Bonardi, "*Le clausole di non regresso e il divieto di discriminazioni per motivi di età secondo la Corte di giustizia*"; in *Riv. giur. lav.*, 2007, 205, with comment by L.Calafà, in *Riv. crit. dir. lav*., 2006, 387, with comment by A.Guariso; in *Dir. lav.*, 2006, (1-2), 3, with comment by A.Vallebona. On Mangold judgement see also G.Franza, "*La disciplina europea del lavoro a termine interpretata dal giudice comunitario"*, in Mass.giur.lav., 2006, p.230-234; L.Ciaroni, "*Autonomia privata e principio di non discriminazione"*, in *Giur.it.*, 2006, p.1816-1822; L.Imberti, "*Il criterio dell'età tra divieto di discriminazione e politiche del la*voro, su *Riv.it.dir.lav.*, 2008, 2, p.301-317; L. Cappuccio, *Il caso Mangold e l'evoluzione della giurisprudenza comunitaria sul principio di non discriminazione"*, in *Dieci Casi sui Diritti in Europa: uno strumento didattico*, Bologna, 2011, 111-124; A. D'Aloia, "*Il principio di non discriminazione e l'integrazione europea "attraverso" la Corte di giustizia: riflessi del caso Mangold"*, 125-139; V. De Michele, "*Contratto a termine e precariato"*, Milan, 2009, 48-70; R. Cosio, "*I diritti fondamentali nella giurisprudenza della Corte di Giustizia"*, in *Riv.it.dir.lav.,* 2012, I, 311 ss.

14 See in particular, Advocate-General J. Mazák opinions, submitted on 23 September 2008 for the case C-388/07 and Advocate-General E. Sharpston opinions submitted on 22 May 2008 for the case C-427/06.

Yet, Member States' discretion in implementing the prevention measures of clause 5 of the framework agreement has been mediated in Mangold judgement by the application (rightfully contested by Germany[15] for its possible abuses in the case-law) of the EU principle of equality and non-discrimination which, in the subsequent Court of Justice's case-law, has been correctly specified to refer to the comparison (and equality) of the «employment conditions» reserved to permanent employees, according to clause 4(1) of the framework agreement. In particular, the cited expression is referred to the rights and duties which define an employment relationship, i.e. the conditions under which a person is employed[16].

The Court of Justice has stated that all the follow-up elements fall in the concept of «employment conditions»: compensation due by an employer in case of a fixed-term contract termination[17], the notice period for termination of a fixed-term contract[18], compensation due by an employer for the unlawful insertion of a fixed-term clause in a contract[19], bonus or seniority increases[20], conditions of salary and retirement remuneration related to the employment relationship, except for the retirement associated with a scheme of social security[21], half reduction of the working time and the subsequent reduction of remuneration[22] and the right to participate to the evaluation plan of teaching and the subsequent economic benefit[23].

The Court of Justice has frequently specified that clause 4 of the framework agreement aims to give application to the principle of non-discrimination for fixed-term employees, in order to avoid that a fixed-term contract is used to deprive employees of the rights recognised to the permanent staff, and that clause 4 entails a «*principle of Community social law* [that] *cannot be*

15 The Court of Karlsruhe in its judgement "Lissabon-Urteil" of 30 giugno 2009 has strongly criticised the strong constitutional interference of the Court of Justice with its judgement in Mangold case, regarding the disapplication of national provisions on the basis of the general principle of non-discrimination based on age. In the period between July and August 2010, with the order "Mangold-Urteil", however, this strong position of BVG radically changed, thanks to the appropriate interpretative afterthoughts of the Court of Justice on the application of principle of equality and non-discrimination in the specific field of directive 1999/70/EC and, in particular, of clause 4(1) of the framework agreement and thanks to the choice made by Germany to help the EU integration process even in the new EU system, after the Greek crisis.

16 See Advocate-General Sharpton opinions in the C-158/16 Vega Gonzales, paragraph 22, EU:C:2017:647.

17 Court of Justice, judgement 14 September 2016, de Diego Porras, C-596/14, EU:C:2016:683.

18 Court of Justice, judgement 13 March 2014, Nierodzik, C-38/13, EU:C:2014:152.

19 Court of Justice, judgement 12 December 2013, Carratù, C-361/12, EU:C:2013:830.

20 Court of Justice, judgements 13 September 2007, Del Cerro Alonso, C-307/05, EU:C:2007:509; 22 December 2010, Gavieiro Gavieiro and Iglesias Torres, C-444/09 and C-456/09, EU:C:2010:819, 9 July 2015, Regojo Dans, C-177/14, EU:C:2015:450.

21 Court of Justice, judgement 15 April 2008, Impact, C-268/06, EU:C:2008:223.

22 Court of Justice, order 9 February 2017, Rodrigo Sanz, C-443/16, EU:C:2017:109.

23 Court of Justice, order 21 September 2016, Álvarez Santirso, C-631/15, EU:C:2016:725.

interpreted restrictively»[24] and is unconditional and sufficiently precise to be invoked against the State by the public fixed-term employees before national courts, allowing therefore the disapplication of the contrasting national provision in cases in which there are not objective reasons justifying the different treatment between fixed-term employees and permanent employees[25].

Two important references for preliminary rulings are currently being discussed before the Grand Chamber of the Court of Justice, related to Spanish cases[26], dealing with the issue of the direct applicability of clause 4(1) of the framework agreement in relation to the comparison of the conditions for the termination of an employment relationship on grounds of «objective circumstances» between contracts of indefinite duration and fixed-term contracts, both in the private (C-574/16 Grupo Norte Facility) and public sector (C-677/16 Montero Mateos).

In the case C-574/16 Grupo Norte Facility, a Spanish worker was employed under a fixed-term ‘relief contract’ in order to make up the balance of the reduced working hours of a colleague who had taken partial retirement. His relief contract was for a fixed term until the colleague retired. Thereafter the worker was no longer employed. The main proceedings now concern the statutory compensation to which Spanish workers are entitled from their employers under certain circumstances if their employment relationship ends. The bone of contention is that the amount of compensation varies depending on how the employment relationship ends. If the employer dismisses its employee on objective grounds, that compensation is higher under Spanish law than if — as in this case — the employer simply allows a fixed-term employment relationship to expire when its agreed end date is reached. In some cases the worker is even not entitled to any compensation at all on the expiry of his fixed-term employment contract.

In the case C-677/16 Montero Mateos, the issue of discrimination arises in the case of a Spanish worker who for several years was employed by a public corporation under a fixed-term employment contract in a temporarily vacant post pending the final outcome of a selection procedure to fill the post permanently. Under Spanish law, the worker is not entitled to any financial

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24 Court of Justice, judgements 13 September 2007, Del Cerro Alonso, C-307/05, EU:C:2007:509, paragraph 38; 15 April 2008, Impact, C-268/06, EU:C:2008:223, paragraph 114; 14 September 2016, de Diego Porras, C-596/14, EU:C:2016:683, paragraph 27, and orders 21 September 2016, Álvarez Santirso, C-631/15, EU:C:2016:725, paragraph 33, and 9 February 2017, Rodrigo Sanz, C-443/16, EU:C:2017:109, paragraph 30.

25 Court of Justice, judgement 22 December 2010, Gavieiro Gavieiro and Iglesias Torres, C-444/09 and C-456/09, EU:C:2010:819, paragraph 4) of conclusions. As regards the professional and economic progress of the public schools precarious or *ex* precarious staff, see Cassazione, S.L., judgement 7 November 2016, n.22558.

26 At the hearing of 8 November 2017 the cases C-574/16 Grupo Norte Facility S.A. vs Angel Manuel Moreira Gómez and C-677/16 Montero Mateos vs Agencia Madrileña de Atención Social de la Consejería de Políticas Sociales y Familia de la Comunidad Autónoma de Madrid have been discussed before the Grand Chamber.

compensation upon the mere expiry of such a 'temporary replacement contract', whereas a worker who has been dismissed by his employer on objective grounds is entitled to compensation.

In the case C-574/16 Grupo Norte Facility and in the case C-677/16 Montero Mateos the Spanish Government has challenged the judgment in *de Diego Porras* (EU:C:2016:683), which it identified that the absence of any compensation for the expiry of a fixed-term employment contract constituted discrimination prohibited by EU law.

Advocate-General Kokott lodged the written conclusions in Case C-574/16 Grupo Norte Facility (EU:C:2017:1022) and in Montero Mateos (EU:C:2017:1021) on 20 December 2017, inviting the Court of Justice to review its position with respect to the judgment of Diego Porras, with very similar and unconvincing arguments on the legal level of the "in fact" non-comparability of the working conditions between fixed-term and comparable permanent workers.

In fact, at the same time on 20 December 2017 the Court of Justice with the judgment Vega González[27] preferred to accept the conclusions of Advocate General Sharpston, who had highlighted the discriminatory nature and contrary to clause 4 of the framework agreement on fixed-term work of the legislation national which provides for the granting of an expectation for special appointments in the event of election to public office only for permanent officials, excluding interim officials. The Court of Justice with the ruling Vega González seems to respond, thus, in advance to the Spanish Government in cases C-574/16 and C-677/16, rejecting the "political" conclusions of Advocate General Kokott and confirming the sentence of Diego Porras , called up thirteen times.

5. The Court of Justice about the further limit to the discretion of Member States in implementing directive 1999/70/EC as regards the EU concept of objective reasons: Adeneler judgement

The Italian Government, therefore, had removed with the legislative decree n.368/2001 the only preventive measure of the objective reasons contained in the repealed law n.230/1962 applied in the Vitari judgement of the Court of Justice, then put back by courts, and, after being inspired by Mangold judgement, the Italian legislator adopted with art.1(518) of the finance law n.266/2005 the "acausal" contract of Poste Italiane of art.2(1*bis*) of the legislative decree n.368/2001, the only provision which will survive until 31 December 2016 after the Jobs act of the legislative decree

27 Court of Justice, judgements 20 december 2017, case C-158/16 Margarita Isabel Vega González vs. Consejería de Hacienda y Sector Público del gobierno del Principado de Asturias, EU:C:2017:1014.

n.81/2015, which integrally repealed the legislative decree n.368/2001 and even simultaneously deleted every reference to directive 1999/70.

Yet, the Adeneler judgement[28] had been the answer of the Grand Chamber of the Court of Justice to itself, with the development of the European concept of temporary objective reasons (since the first and possibly unique fixed-term contract) and of the concept of successive contracts of clause 5(1)(a) of the framework agreement, in a way to highlight the contractual "fraud" and the circumvention of the rule that sees the contract of indefinite duration as the prototype for the employment relationships, in the event that the time between a contract and the successive one was normatively less than two/three months.

Notwithstanding Adeneler judgement, the Commission has tried to weaken the field of application of the anti-abuse prevention measures of clause 5(1) of the framework agreement, as in the preliminary ruling Huet[29], in which the Court of Justice denied the counterargument of the Commission (judgement Huet, paragraph 37), stating that the conversion of a fixed-term contract in a contract of indefinite duration cannot be deemed outside the scope of application of the framework agreement and that the "sanction" falls perfectly within the preventive measures of clause 5 (1)(b) of the framework agreement.

Huet judgement highlights the consequences of the EU Commission's "negligence" in monitoring Member States as regards the correct implementation of directive 1999/70, in the moment in which the French national provision recognised in the incidental proceedings has been adopted with art.13(1) of the law n. 2005-843, 26 July 2005, providing for several implementing measures of the European Law for the public sector, which sets for, *in peius* compared to the previous applicable regime, the same high limit of "continuative" six years for the contract agents, adopted after several years by the Commission with the modification of Art 3b CEOS with effect from 1 January 2014, conversely to the previous limit of three years. The same 3-year limit had been introduced even in Italy, taking it from the regulation of the contract agents of the

28 Court of Justice, Grand Chamber, judgement 4 July 2006, case C-212/04 *Konstantinos Adeneler* et al. vs *Ellinikos Organismos Galaktos (ELOG)*, EU:C:2006:443. On the judgement see R. Conti and R. Foglia, "*Successione di contratti di lavoro a termine nel settore pubblico*", in *Corr. giur*., 2006, 1456-1459; L. Zappalà, "*Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ's Jurisprudence*", *Giorn. rel. ind*., 2006, 439-444; G. Franza, "*Lavoro a termine: è ormai completa l'interpretazione della direttiva*", in *Mass. giur. lav.*, 2006, 752-755; A.M. Perrino, "*Perplessità in tema di contratto di lavoro a termine del pubblico dipendente*", in *Il Foro it.*, 2007, IV, Col. 75-81; L. De Angelis, "*Il contratto di lavoro a termine nelle pubbliche amministrazioni alla luce della giurisprudenza comunitaria: spunti di riflessione*", in *Foro it.*, 2007, IV, Col. 344-348; V. De Michele, "*Contratto a termine e precariato*", *op. cit.,* 48-70.

29 Court of Justice, judgement 8 March 2012, case C-251/11 Huet vs Université de Bretagne occidentale, EU:C:2012:133.

Commission, by art.5(4-bis) of the legislative decree n.368/2001 with effect from 1 January 2008, in addition to the temporary objective reasons of art.1(1) of the same legislative decree.

Nevertheless, both the French provision regarding the public employment of art.13(1) of the law n.2005-843 and the Italian provision applicable (even) to the public employment of art.5(4-bis) of the legislative decree n.368/2001 expressly provide (the latter only provided) for the sanction of the conversion in contracts of indefinite duration of the successive fixed-term contracts which have exceeded the clause of maximum duration, whereas for the contract agents of the EU Commission no sanction is provided, just for the reason that it is not possible to stipulate new fixed-term contracts, without resorting to the temporary employment.

Such a restrictive interpretation of clause 5 of the framework agreement on the fixed-term work made by the Commission – that has limited, for “internal” reasons, the implementation of directive 1999/70 to the mere identification of only one of the three preventive measures, *i.e.* the most inappropriate (compared to the objective reasons), i.e. the clause of maximum overall duration, set so high (6 years, but even 3 years in some cases) to allow the application mainly in cases of structural staff shortage – leads to the annulment of the EU law and its disapplication, as far as the provision provided by the directive (i.e. clause of employment relationships maximum duration) is so flexible because of the excessively long term and the absence of sanction to demolish the general rule of directive 1999/70, according to which the contract of indefinite duration represents the general form of employment.

Instead, except for only the order Vino[30] on the unique “acausal” fixed-term contract of Poste Italiane pursuant to art.2(1 bis) of the legislative decree n.368/2001 and for the order Rivas Montes[31] on the (non)application of clause 4(1) of the framework agreement regarding the different employment conditions between the Spanish public permanent staff and the contract agents, in which the Court of Justice declared its absence of jurisdiction following (for the last time) the interpretation of Mangold judgement, the Luxembourg Court has constantly stated that, on the basis of paragraphs 6 and 8 of the general considerations of the framework agreement on fixed-term work, the benefit of employment stability is considered as a pivotal element for the protection of workers.

According to the Court of Justice only in some cases the fixed-term contracts are likely to meet both the employers’ and the employees’ needs (judgements Adeneler *et al.*, paragraph 62, as

30 Court of Justice, order 11 November 2010, case C-20/10, Vino vs Poste Italiane, EU:C:2010:677; as well as order 22 June 2011, causa C-161/11, Vino vs Poste Italiane, EU:C:2011:420.

31 Court of Justice, order 7 March 2013, case C-178/12, Rivas Montes vs Instituto Municipal de Deportes de Córdoba (IMDECO), EU:C:2011:250.

well as Fiamingo *et al.* [32], paragraph 55; judgement Márquez Samohano[33], paragraph 39), therefore it in the implementation of the mentioned framework agreement that Member States are free, as far as there is an objective reason, to take into account the particular needs related to the areas of activity and/or to the specific categories of workers considered (judgement Fiamingo *et al.*, paragraph 39), making thus the preventive measure of the objective reasons of clause 5(1)(a) of the framework agreement as entailing the ontological distinction between the rule of the contract of indefinite duration and the exception of the fixed-term contract, even starting from the first and possibly only contract which falls under the scope of application of the aforementioned clause 5(1) (see also judgements Angelidaki[34], Sorge[35] and Carratù[36] in an analogous sense).

The crisis of the right judicial application of the two most important clauses of the framework agreement on the fixed-term work, i.e. clause 4 on the discrimination and clause 5 on the anti-abuse prevention measures, was proposed by Advocate-General Mengozzi in the written conclusions of the case *Regojo Dans* (EU:C:2015:326), in which in the extremely long note 73, he

32 Court of Justice, judgement 3 July 2014, joint cases C-362/13, C-363/13 and C-407/13 Fiamingo et al vs Rete ferroviaria italiana, EU:C:2013:2044; in *Riv.it.dir.lav.*, 2015, II, 291 ss., with a comment by E.Ales, "*La nuova disciplina del contratto a termine è conforme al diritto comunitario? Una risposta (nel complesso) positiva"*. Among scholars see L. Menghini, "*Diritto speciale nautico, diritto comune e diritto eurounitario: le loro interferenze nelle pronunce della Cassazione e della Corte di giustizia Ue sul contratto di arruolamento a tempo determinato"*, in www.europeanrights.eu, 2015; A.Vimercati, "*Lavoro marittimo, se tra due part time non passano 60 giorni il rapporto diventa a tempo indeterminato"*, su *Guida dir.*, 1 September 2014; V. De Michele, "*L'interpretazione "autentica" della sentenza Mascolo-Fiamingo della Corte di giustizia UE sulla tutela "energica" del lavoro flessibile alle dipendenze di datori di lavoro pubblici e privati"*, in www.europeanrights.eu, 2015; A. Charbonneau, "*L'actualité de la jurisprudence européenne et internationale. Application de la directive CDD aux marins"*, in *Revue de jurisprudence sociale*, 2014, 555-556; A. Von Medem, "*Sozialpolitik: Befristete Arbeitsverträge"*, in *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 2015, 243-247.

33 Court of Justice, judgement 13 March 2014, Márquez Samohano, C-190/13, EU:C:2014:146.

34 Court of Justice, judgement 23 April 2009, joint cases C-378/07 and C-380/07 Angelidaki et al. vs Organismos Nomarchiakis Autodioikisis Rethymnis, EU:C:2009:250; see V. De Michele, "*Contratto a termine e precariato"*, cit., p.75-81; M. Miscione, *La Corte di giustizia sul contratto a termine e la clausola di non regresso*, in *Lav. giur.*, 2009, p. 437; L.Driguez, "*Retour sur les clauses de non régression"*, in Europe 2009, Juin, Comm. nº 235, p.25-26; C.Kerwer, "*Verschlechterungsverbote in Richtlinien"*, in Europäische Zeitschrift für Arbeitsrecht, 2010, p.253-265.

35 Court of Justice, judgement 24 June 2010, case C-98/09, *Sorge* vs *Poste Italiane*, EU:C:2010:369.

36 Court of Justice, III Sect., judgement 12 December 2013, case C-361/12 *Carratù* vs *Poste italiane* EU:C:2013:830. On judgement *Carratù* see V. De Michele, "*La sentenza "integrata" Carratù-Papalia della Corte di giustizia sulla tutela effettiva dei lavoratori pubblici precari"*, *Lav. giur.*, 3, 2014, 241-260; L. Menghini, "*Dialogo e contrasti tra le Corti europee e nazionali: le vicende del personale ATA non sono ancora terminate"*, in *Lav. giur.*, 2014, 5, 463-465; P. COPPOLA, "*I recenti interventi legislativi sul contratto a termine. A forte rischio la tenuta eurounitaria del sistema interno"*, Working Paper CSDLE "Massimo D'Antona".IT, 2014, n. 198; R. Nunin, "*Impiego pubblico, violazione delle regole sul contratto a termine e adeguatezza delle sanzioni: spunti recenti dalla Corte di giustizia"*, waiting to be published in *Riv.giur.lav.*, 2014; M. Lughezzani, "*Il principio di parità di trattamento nella dir. 99/70/CE e le sue ricadute sugli ordinamenti interni"*, in *Riv.it.dir.lav.*, 2014, n. 2, II, 487 et seqq; S. Guadagno, "*Evoluzione dei regimi risarcitori per il lavoro a termine, parità di trattamento e non regresso"*, in *Arg.dir.lav.*, 3, 2014, 682-695; G. Gentile, "*Corte di giustizia e contratto a termine: la legittimità dell'indennità forfettizzata e la natura di ente pubblico delle società partecipate dallo Stato"*, in *Riv. it. dir. lav.*, 2014, 2, II, 479 et seqq.

criticises the position held by the Court of Justice in the orders Vino on the Italian public precarious employment[37] and Rivas Montes on the Spanish one.

Advocate-General Mengozzi underlined that the decision (of absence of jurisdiction) taken by the Court in the order Rivas Montes was wrong, in so far as, since the applicant was a fixed-term employee, and some employees for indefinite duration (the permanent staff) had the advantage that was denied to her, it would have been preferable to find an unequal treatment, prohibited under clause 4 of the framework agreement on fixed-term work.

According to Advocate-General Mengozzi, denying to Mrs Rivas Montes, as the Court did, the protection of clause 4 of the framework agreement meant to demand that all the comparable employees employed for an indefinite duration (permanent staff and agents employed with a contract of indefinite duration), and not just some comparable employees for an indefinite duration (permanent staff), benefit of the advantage denied to the fixed-term employee who considers itself discriminated, with a restrictive interpretation of clause 4, whereas the purposes of the framework agreement and its *effet utile* demanded an extensive interpretation of the clause.

Eventually, Advocate Mengozzi underlined that in the order Vino, on which the judgement of absence of jurisdiction of the Court of Justice in the order Rivas Montes is based, no worker employed for an indefinite duration can benefit of the advantage claimed by the appellant, because this advantage consisted in the compulsory indication in the fixed-term contract of the objective reason justifying its conclusion (assuming that the omission of a similar indication entailed the requalification of the contract in a contract of indefinite duration).

There was, thus, an unequal treatment between some fixed-term workers (those of Poste Italiane, for whom it was provided that the contract shall not mention the reasons explaining why it was concluded as a fixed-term contract) and others (those enjoying the provisions of the *ius commune*, which provides of the obligatory indication of the cited reasons).

In case *Regojo Dans* the dispute, once again, was on the well-known issue of the recognition of the right to three-yearly seniority increments towards a Spanish employee, "occasionally" recruited (i.e. on the basis of a fiduciary nature contract and connected to the length of the employment qualified as occasional but actually based on the fact that the activity was understaffed) to the Council of State, where she worked from 1 March 1996 until 25 January 2012 as head of the Secretariat of the President of the II Sect. having in any case made temporary works for public administrations (even for the Constitutional Court) for 31 and a half years.

37 In the conclusions of the cited judgement Carratù, the Court of Justice declared that Poste Italiane is a public law organisation which represents the Italian State.

The Court of Justice in judgement *Regojo Dans*[38] integrally confirmed the conclusions of Advocate-General Mengozzi e specified that the concept of «fixed-term employee», pursuant to clause 3(1) of the framework agreement on fixed-term work, shall be interpreted as applicable even to an "occasional" employee as appellant in the main proceeding and it declared that clause 4(1) of the framework agreement on fixed-term work shall be interpreted as against a national law which excludes, irrespective of any objective reason, that the staff occasionally recruited can receive a bonus equivalent to the three-yearly seniority increase agreed to the, in particular, permanent staff, when, as regards the possibility of receiving of this bonus, these two workers categories are in comparable situations.

6. The Court of Justice with judgement Mascolo remedies to the negligence of the Commission and sanction Italy for the failure to implement directive 1999/70/EC as regards the anti-abuse measures in favour of the public precarious employees

The unique infringement procedure for the failure to implement directive 1999/70/EC was lodged by the Commission on the 13 May 2014 for the case C-238/14, after almost thirteen years of negligence since the expiration of the deadline for the implementation of the framework agreement on fixed-term work, to ask to the Court of Justice to observe that, *keeping a series of derogations to the measures to prevent an abusive use of a succession of* fixed-term contracts concluded with the casual workers of the show business, Luxembourg failed to comply with its duties under clause 5 of the framework agreement on the fixed-term work.

It is true that the EU Commission had started the infringement procedure n.2010-2124 for the omitted implementation of clauses 4 and 5 of the framework agreement on fixed-term work towards the substitute teachers of public school and it had written on 28 November 2013 its reasoned opinion, after the complaint of On.le Rita Borsellino, in the parliamentary question E-2354/10, on the problem of the administrative technical auxiliaries (ATA staff) employed in public schools with fixed-term contracts for several years, however the complaint was quickly closed by the Commission once it obtained information that Italy had introduced with effect from 1 January 2008 the mentioned provision –art.5(4 bis) of the legislative decree n.368/2001 – which allowed after 36 months of even non-continuous fixed-term service the conversion in a contract of indefinite duration both in the private and public sector.

38 Court of Justice, judgement 9 luglio 2015, causa C-177/14, *Regojo Dans* contro *Consejo de Estato*, EU:C:2015:450.

Even, with the communication of 26 August 2013 the EU Commission answered on the complaint of 2 May 2012 prot.n. CHAP(2012)1564, communicating to have expanded the infringement procedure n.2010-2124 to the whole public precarious employment.

Nevertheless, as said in communication of 3 August 2016 of the Petitions Committee of the EU Parliament on the status of petitions related to the school precarious employment, after judgement Mascolo[39] of the Court of Justice and the adoption by the national authorities of the law n.107/2015 reforming the education sector, the EU Commission closed on 19 November 2015 the infringement procedure n.2124/2010, considering that the reform at stake made national law in compliance with clauses 4 and 5 of the framework agreement attached to the directive on the fixed-term contracts, as regards the public education sector, without taking a decision on the public non-school precarious employment, about which the Commission provided the different information in the cited communication of 26 August 2013 to extend to all the fixed-term contracts of the public sector the now closed infringement procedure.

Simultaneously, the Commission dealing with the issue of fixed-term work in the Italian public (non-school) sector started a pre-infringement procedures with the reference NIF 2014/4231, referring in particular to the prevention of abuses in renewing fixed-term contracts and the compensation for the damages suffered because of this abuse.

39 Court of Justice, judgement 26 November 2014, joint cases C-22/13, C-61/13, C-62/13 and C-418/13 *Mascolo, Forni, Racca, Napolitano* et al. vs *Miur*, as well as C-63/13 *Russo* vs *Comune di Napoli*, with the intervention of Cgil, Flc-Cgil and Gilda-Unams in the case *Racca* C-63/13, EU:C:2014:2124; on the issue see M. Aimo, "*I precari della scuola tra vincoli europei e mancanze del legislatore domestico"*, 2015, in *WP C.S.D.L.E. "Massimo D'Antona".IT*; L. Calafà, "*Il dialogo* multilevel *tra le Corti e la "dialettica prevalente": le supplenze scolastiche al vaglio della Corte di giustizia"*, in *Riv.it.dir.lav.*, II, 2015, 336 ss.; P. Coppola, "*Breve commento alla sentenza Mascolo della Corte di giustizia"*, 2015, on europeanrights.eu; M. De Luca, "*Un gran arrêt della Corte di giustizia dell'Unione europea sul nostro precariato scolastico statale: il contrasto con il diritto dell'Unione, che ne risulta, non comporta l'espunzione dal nostro ordinamento, né la non applicazione della normativa interna confliggente (prime note in attesa dei seguiti*)", in *Lav.pp.aa.*, 2014, 499 ss.; V. De Michele, "*L'interpretazione "autentica" della sentenza Mascolo-Fiamingo della Corte di giustizia UE sulla tutela "energica" del lavoro flessibile alle dipendenze di datori di lavoro pubblici e privati"*, on europeanrights.eu, 10 gennaio 2015; *id, "La sentenza Mascolo della Corte di giustizia sul precariato pubblico e i controversi effetti sull'ordinamento interno"*, *ibidem*, 11 novembre 2015; F. Ghera, "*I precari della scuola tra Corte di giustizia, Corte costituzionale e Giudici comuni"*, in *Giur.cost.*, 2015, 158 ss.; S. Galleano, "*La sentenza Mascolo sulla scuola rischia di avere effetti clamorosi per il precariato degli altri enti pubblici"*, on europeanrights.eu, 8 gennaio 2015; R. Irmici, "*La sentenza Mascolo della Corte di giustizia dell'Unione europea e lo strano caso del giudice del rinvio pregiudiziale che immette ma non converte"*, in *Nov.dir.amm.*, 2015, 2, 177 ss.; L. Menghini, "*Sistema delle supplenze e parziale contrasto con l'accordo europeo: ora cosa succederà?*", in *Riv.it.dir.lav.*, 2015, II, 343 ss.; M. Miscione, "*Il Tribunale di Napoli immette in ruolo i precari della Pubblica Amministrazione"*, in *Quot.giur.*, 5 gennaio 2015, n. 5; R. Nunin, "*«Tanto tuonò che piovve»: la sentenza "Mascolo" sull'abuso del lavoro a termine nel pubblico impiego"*, on this *Rivista*, 2015, 146 ss.; A.M. Perrino, "*La Corte di giustizia come panacea dei precari?*", in *Foro it.*, 2014, II, 93 ss.; V. Pinto, "*Il reclutamento scolastico tra abuso dei rapporti a termine e riforme organizzative"*, in *Lav.pubb.amm.*, 2015, 915 ss.; G. Santoro Passarelli, "*Contratto a termine e temporaneità delle esigenze sottostanti"*, in *Arg.dir.lav.*, 2015, 189 ss.; N. Zampieri, "*Sulle conseguenze nel lavoro pubblico della violazione delle disposizioni contenute nel d.lgs. n. 368/2001, in materia di assunzioni a tempo determinato, dopo le pronunce Affatato, Carratù, Papalia e Mascolo della CGUE"*, in *Ris.um., 2015,* 2, 213 ss.

After almost two years from the closure of the infringement procedure n.2010-2124, at the public hearing of 13 July 2017 before the II Sect. of the Court of Justice in the case Santoro vs Italian Government C-494/16, on the effective and equivalent sanction to punish and remove the abusive use of successive fixed-term contracts in the public sector for a total duration of more than 36 months, the EU Commission had to answer to the Court's several requests for clarifications on the status of the pre-infringement procedures, highlighting that it omitted to formally notify the infringement procedure for reasons of "opportunity", since the case, brought by the Tribunal of Trapani just in September 206, was pending before the Court of Justice.

The imposition of the Court of Justice towards the Commission was related to the duty to act on what complained by the counsels of the maritime workers at the hearing of 7 May 2017, who thought that the Jobs act I (d.l. n.34/2014), which had excluded the temporary objective reasons as preventive measures in the new wording of art.1 legislative decree n.368/2001, represented the answer of the national urgency legislation to the references for a preliminary ruling of the *Cassazione* that were discussed before the Court of Justice, in which the *Cassazione* stated the primacy of the protection principles listed by judgement Adeneler, recalled by judgement n.12985/2008 of the same *Cassazione*.

As a matter of fact, it was the same III Sect. of the Court of Justice, after having committed a factual (and subsequently a judicial) mistake (recognised with a presidential order of 17 September 2014) in its judgement Fiamingo of 3 July 2014 preferring the special legislation on the maritime labour to the application of the legislative decree n.368/2001 (which excluded neither the public employment nor the maritime labour from its scope of application), to sentence "in place of others" (in particular the Italian State) the innocent Luxembourg in its judgement of 26 February 2015, in record time and with the significant participation of the Italian Advocate-General Mengozzi (in the oral conclusions), for not having provided the preventive measure of the objective reasons as a form of anti-abuse protection of the inexistent category of the casual workers of the show business who benefitted in any case of significant forms of social protection.

Indeed, the first decision for the failure to implement directive 1999/70/EC was adopted by the Court of Justice actually with its important judgement Mascolo, in which the EU Court denied, in the references for a preliminary ruling of the Tribunal and of the Constitutional Court, the view adopted by the *Cassazione* with its judgement n.10127/2012 regarding the EU compatibility of the system of substitute teachers' recruitment.

As a matter of fact, after the first reference for a preliminary ruling in an incidental judgement of the Constitutional Court with the order n.207/2013[40], the Italian legislator seemed to have promptly adapted to the indications of the Court of Justice and of the Constitutional Court and of the infringement procedure n.2124/2010 of the EU Commission, in order to resolve the failure in implementing directive 1999/70/EC towards all the public precarious employees.

Coordinating with the order n.207/2013 of the Constitutional Court, indeed, Letta Government has set through art. 4(6) of the d.l. 31 August 2013, n.101 (converted with amendments into law n.125/2013) the plan of stabilisation of the public precarious employment even in the education sector, based on the accumulation of the even non-continuous service of at least 36

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40 Constitutional Court, order 18 July 2013, n. 207. On the first order to an incidental reference for a preliminary ruling of the Constitutional Court, see U. Adamo, "*Nel dialogo con la Corte di giustizia la Corte costituzionale è un organo giurisdizionale nazionale anche nel giudizio incidentale. Note a caldo sull'ord. n. 207/2013*", in www.forumcostituzionale.it, 24 July 2013; A. Adinolfi, "*Una "rivoluzione silenziosa": il primo rinvio pregiudiziale della Corte costituzionale italiana in un procedimento incidentale di legittimità costituzionale*", in *Riv.dir.int.*, 2013, n.4, p.1249; A. Celotto, "*Il completamento degli "strumenti di dialogo" tra Corte costituzionale e Corte di Lussemburgo*", in www.giustamm.it, 2013, n.12; A. Cerri, "*La doppia pregiudiziale in una innovativa decisione della Corte*", in *Giur.cost.*, 2013, n.4, p.2897; V. De Michele, "*L'ordinanza "Napolitano" di rinvio pregiudiziale Ue della Corte costituzionale sui precari della scuola: la rivoluzione copernicana del dialogo diretto tra i Giudici delle leggi nazionali ed europee",* in Id., "*Il dialogo tra Corte costituzionale e Corte di giustizia sui diritti dei lavoratori nel pubblico impiego, in absentia legum et contra legem*", in www.europeanrights.eu, 2015; A. Denuzzo, "*La Corte costituzionale e il rinvio pregiudiziale nella vicenda dei marchi territoriali pubblici di qualità per la valorizzazione dell'economia rurale*", in www.giurcost.org, 2014; G. Diotallevi, "*La crisi finanziaria europea e i diritti dei cittadini*", in *Quest.giust.*, 2014, n.1, p.103; T. Guarnier, "*Rinvio pregiudiziale interpretativo e giudizio di legittimità costituzionale. Nuovi scenari e nuove prospettive nel crocevia sopranazionale*", in *Dir.soc.,* 2013, n.2, p.237; B. Guastaferro, "*La Corte costituzionale ed il primo rinvio pregiudiziale in un giudizio di legittimità costituzionale in via incidentale: riflessioni sull'ordinanza n. 207 del 2013", in* www.forumcostituzionale.it, 2013; MP. Iadicicco, "*Il precariato scolastico tra Giudici nazionali e Corte di Giustizia: osservazioni sul primo rinvio pregiudiziale della Corte costituzionale italiana nell'ambito di un giudizio di legittimità in via incidentale*", in www.associazionedeicostituzionalisti.osservatorio.it, 2014; E. Lamarque, "*Le relazioni tra l'ordinamento nazionale, sovranazionale e internazionale nella tutela dei diritti*", in *Dir.pubbl.*, 2013, n.3, p. 727; M. Losana, "*La Corte costituzionale e il rinvio pregiudiziale nei giudizi in via incidentale: il diritto costituzionale (processuale) si piega al dialogo tra le Corti*", in www.associazionedeicostituzionalisti.rivista.it, 2014, n.1; E. Lupo, "*L'evoluzione del dialogo tra le Corti*", in *Quest.giust.*, 2014, n.1, p.33; L. Menghini, "*Riprende il dialogo tra le Corti superiori: contratto a termine e leggi retroattive*", su *Riv.giur.lav.*, 2013, 4, p.425; Id., "*Dialogo e contrasti tra le Corti europee e nazionali: le vicende del personale ATA non sono ancora terminate*", in *Lav.giur.*, 2014, n.5, p.455; A.M. Perrino, "*Nota e Corte cost., ord. n. 207/2013*", in *Foro it.,* 2013, I, p.3059; L. Pesole, "*Un altro passo avanti nel percorso: la Corte costituzionale rinvia alla Corte di Giustizia in un giudizio in via incidentale*", in www.federalismi.it, 2013, n.25; G. Repetto, "*I mutevoli equilibri del rinvio pregiudiziale: il caso dei precari della scuola e l'assestamento dei rapporti tra Corte costituzionale e Corte di Giustizia*", in www.diritticomparati.it, 2014; Id., "*La Corte costituzionale effettua il rinvio pregiudiziale alla Corte di giustizia UE anche in sede di giudizio incidentale: non c'è mai fine ai nuovi inizi*", in www.dirittocomparati.it, 2013; A. Ruggeri, "*I rapporti tra le Corti e tecniche decisorie, a tutela dei diritti fondamentali*", in *Quest.giust.*, 2014, n.1, p. 53; C. Salazar, "*La Corte costituzionale bussa ancora alle porte della Corte di giustizia dell'Unione europea: brevi note interno alla questione pregiudiziale sui docenti precari nella scuola pubblica*", in www.confronticostituzionali.eu, 2013; Id., "*Crisi economica e diritti fondamentali – Relazione al XXVIII convegno annuale dell'Aic*", in www.rivistaaic.it, 2013, n.4; L. Saltari, "*La precarietà del lavoro nella scuola italiana nel difficile dialogo tra le Corti*", in *Giorn.dir.amm.,* 2015, n.2, p.219; G. Tesauro, "*Il lavoro delle Corte – Anche le Corti cambiano*", in *Quest.giust.*, 2014, n.1, p.39; L. Trucco, "*L'uso fatto della Carta dei diritti dell'Unione nella giurisprudenza costituzionale (2000-2015)*", in www.giurcost.org, 2016, n.1; L. Barretta Uccello, "*La Corte costituzionale e il rinvio pregiudiziale nel giudizio in via incidentale*", in www.associazionedeicostituzionalisti.osservatorio.it, 2013.

months of the so-called "long-lasting precarious employees", through procedures exclusively reserved to those fulfilling the conditions set forth in art.1(519) l. n.296/2006 and in art.3(90) l. n.244/2007, for the education sector, applying the specific regulation of the sector.

Immediately after, with art.15(1) d.l. 12 September 2013, n.104 (converted with amendments into law n.128/2013), the urgency legislator has set a three-year plan for the years 2014-2016 to employ for an indefinite duration the teaching, educational and ATA staff, considering the vacant and available posts for each year and the necessity to cover the turn over, enabling the Ministry of Education to determine even the quota of the qualified "long-lasting precarious employees" teachers not placed in the GAE (i.e. rankings with limited available posts) to be assigned to the competition reserved for the only permanent posts.

The Letta's plan of stabilisation of the public precarious employment even in the education sector was substantially the same of the solution already set by Prodi's plan with the finance laws n.296/2006 for 2007 and n.244/2007 for 2008, and the Italian Government communicated this regularisation of the abusive use of the fixed-term contracts in the answer of 20 January 2014 to the reasoned opinion on the infringement procedure n.2124/2010.

The plan of Letta Government was significantly modified by the unexpected change of the Government (even if remaining in the same political hue) in February 2014, which wanted to set a plan of stabilisation of the (false) school precarious employees with the so-called law on the "*Buona scuola*" (i.e. "Good School", l. n.107/2015).

Law n.107/2015, however, failed in solving the problem of the long-term school precarious employees, with tens of thousands of teachers who completed more than 36 months of service and that are still substitute teachers and tens of thousands of teachers that, for the mere fact of being still assigned to the rankings blocked since 2007 but without having worked a day in the public school or having worked just for limited periods far in the past, have been employed for a indefinite duration in the school year 2015/2016.

Yet, judgement Mascolo of the Court of Justice could have definitely solved the problem of the public non-school precarious employment, answering also to the Tribunal of Napoli on the reference for a preliminary ruling brought with order C-63/13 for the case of a kindergarten teacher who had completed more than 36 years of service in the local school.

Briefly, the relevant paragraphs of judgement Mascolo are:

• Art. 117(1) of the Italian Constitution requires the legislative power to be in compliance with the EU constraints, among which directive 1999/70/EC (paragraphs 11 and 14) and the anti-abuse sanctions set forth in the national legislation which implements the framework agreement on fixed-term work fall among the "cases provided by law", through which the precarious employees can have access to a permanent post in the public administration (paragraph 14), exactly as already specified by judgement *Valenza*[41] (paragraph 13);

• the Italian State, in correctly implementing directive 1999/70/EC, providing for effective and vigorous measures able to prevent and, in case, to sanction abuses in the succession of fixed-term employment contracts with public administrations, as stated by art.5(4-*bis*) of the legislative decree n.368/2001 (paragraph 55; the same in order *Affatato*[42], paragraph 48), conforms to the principle of sincere cooperation with the EU Institutions of art.4, point 3, of the TEU, from which the national judge cannot deviate without violating in a flagrant manner the EU law (paragraphs 59-61);

• the legislative decree n.368/20011 was directly applicable to all the public administrations, as *res incontroversa* in the reference for the preliminary ruling made by the national judges (paragraph 14);

• instead, Art.36(5) legislative decree n.165/2001 is not applicable to the public administration, in the case of legitimate recruitment made through selective rankings (paragraph 114). This national provision impedes the conversion in contracts of indefinite duration of all the illegitimate fixed-term contracts and it has been already declared in contrast with directive 1999/70/EC by order Papalia[43] of the Court of Justice, since it does not ensure an effective anti-abuse protection;

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41 Court of Justice, judgement 18 October 2012, from C-302/11 to C-305/11, *Valenza et al*, EU:C:2012:646. The preliminary references were made by the Council of State. On *Valenza* judgement see A. De Stefano, "*Una email per una breve riflessione: Il lavoro a tempo determinato e quello a tempo indeterminato sono la stessa cosa*?" *(Court of Justice, VI Section, judgement 18 October 2012, in the joint cases from C-302/11 to C-305/11)*, in *Rass.Avv.Stato*, 4, pp. 33-34.

42 Court of Justice, order 1 October 2010, case C-3/10, *Affatato* vs *ASL Cosenza*, EU:C:2010:574. On the case see V. De Michele, "*La giurisprudenza della Corte di Giustizia nel 2010 e l'interpretazione "infinita" sul contratto a termine",* in *Il diritto del lavoro dell'Unione europea*, by R. Foglia and R. Cosio (edited by), Milan, 2011, p.459 ss.; W.Ferrante, "*Il divieto di conversione a tempo indeterminato dei contratti a termine nel pubblico impiego"*, in *Rass.Avv.Stato*, 2011, 2, I, p.12; A.M.Perrino, "*Nota a ordinanza Affatato della Corte di giustizia"*, su *Foro it.*, 2011, IV, 69; N.Zampieri, "*Il rapporto di lavoro a termine, la sentenza Affatato e il Collegato lavoro"* in *Ris.um.,* 2011, 1, p.138 et seqq.

43 Court of Justice, order 12 December 2013, case C-50/13, *Papalia* vs *Comune di Aosta*, EU:C:2013:873; in *Foro it.*, 2014, IV, 91, with the comment by A.M. Perrino, "*La Corte di giustizia come panacea dei precari?*". On the order *Papalia* v. Ales, see "*Contratti a termine e pubbliche amministrazioni: quousque tandem"*, in *Riv.it.dir.lav.*, 2014, II, 86 et seqq.; B. Cimino, "*Restano incerte le prospettive del precariato pubblico dopo l'ordinanza Papalia della Corte di giustizia"*, in *Lav.pubbl.amm.*, 2014, II, 1033 ss.; V. De Michele, "*La sentenza "integrata" Carratù-Papalia della Corte di giustizia sulla tutela effettiva dei lavoratori pubblici precari"*, in *Lav.giur.*, 2014, 241 ss.; R. Nunin, "*Impiego pubblico, violazione delle regole sul contratto a termine e adeguatezza delle sanzioni: spunti recenti dalla Corte di*

• in a context as that of the Italian school recruitment, only the replacements of absent staff with a right to the retention of the post are coherent with the EU concept of temporary objective reasons of clause 5(1)(a) of the framework agreement (paragraphs 90-93), endorsing the choice of Letta Government (abandoned by the subsequent Government) to eliminate the annual replacements until 30 June, allowing only those which are temporary and are due to parental leave (paragraph 93);
• it is not possible to discriminate, for the purpose of applying the anti-abuse protections, between the teachers assigned to GAE and the staff not included into these rankings but qualified to teach, because the Court points out (paragraph 89) that in the GAE there are both the teachers who won a public competition but without obtaining any permanent post and those who have followed courses of qualification held by the «scuole di specializzazione per l'insegnamento» (i.e. "schools of specialisation for teaching", paragraph 89) or other courses of qualification (paragraph 111);
• budgetary reasons cannot justify the abusive use of fixed-term contracts (paragraphs 106 and 110).

With its judgement n.260/2015[44] the Constitutional Court recognised the right of the public precarious employees of opera foundations to the conversion in contracts of indefinite duration of the individual fixed-term contracts not justified by objective reasons, notwithstanding the existence of provisions completely against the protection of the reclassification of the employment relationship, moreover the Court applied judgement *Mascolo* and the "infringement" judgement *Commission vs Luxembourg* limited to the shared part of the Court of Justice's reasoning, according to which the objective reasons represents the balance between the rights to job security of employees and the needs of the employers.

giustizia", in *Riv.giur.lav.*, 2014, II, 124 et seqq.

44 Constitutional Court, judgement 11 December 2015, n.260. On the judgement see V. De Michele, "*Le ragioni oggettive "retroattive" del contratto a termine nella sentenza n. 260/2015 della Corte costituzionale"*, in *Lav.giur.*, 2016, n.2, 151 ss.; L. Menghini, "*Fondazioni lirico sinfoniche e contratti di lavoro a termine: dalla Corte costituzionale soluzioni specifiche nette e rilevanti indicazioni di carattere generale"*, waiting to be published in *Riv. giur. lav.*, 2016; A.M. Perrino, "*Nota a Corte cost., sent. n. 260/2015"*, in *Foro it.*, 2016, n.1, I, p.1; C. de Martino, "*La Corte costituzionale sull'acausalità del contratto a termine: lo strano caso delle fondazioni lirico-sinfoniche"*, in *Var. temi dir.lav.*, 2016, 3, pp.599-618.

Moreover, the Constitutional Court, with judgement n.187/2016[45] (and the simultaneous orders nn.194-195/2016) on the school recruitment and on the precarious teachers of *Conservatoires*, applied for the second time judgement *Mascolo* of the EU Court, on one hand recognising its value as "*ius superveniens*" for the solution of the disputes in the main proceedings on the unique useful sanction to definitely remove the consequences of the "EU offence", i.e. job stability (here there is a clear reference to paragraph 55 of judgement *Mascolo*); on the other declaring illegitimate art.4(1) of law n.124/1999 which allowed the annual replacements not justified by objective reasons (since referred to vacant posts) with effects *ex tunc*.

7. The Court of Justice with order León Medialdea and judgements Porras, Andrés and López, Pérez López highlights the failure of Spain to implement directive 1999/70/EC, imposing on all Member States the sanction of the stabilisation of the public precarious employees

The Court of Justice with its order *León Medialdea*[46] dealt with the issue of the nature of the «non-permanent contract of indefinite duration », highlighting the fraudulent attempt of the Spanish legislation to transform the abusive successive fixed-term contracts in the public sector into non-permanent contracts of indefinite duration (*relación laboral por tiempo indefinido no fijo*), similarly to what provided for the "temporary agents" of EU Commission.

For a city employee in service almost without interruption for 11 years on the basis of two successive fixed-term contracts converted, as unique sanction, in a «non-permanent contract of indefinite duration» until the suppression of the post and the subsequent conclusion of the contractual relationship for budgetary reasons, the Court of Justice declared the contrast with clause 5 of the framework agreement on the fixed-term work of the national legislation regarding the *relación laboral por tiempo indefinido no fijo*.

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45 Constitutional Court, judgement 20 July 2016, n.187 and orders nn.194 e 195/2016, all of them lodged on 20 July 2016. On judgement n.187/2016 see M. Miscione, "*La fine del precariato pubblico ma non solo per la scuola pubblica*", in *Lav. giur.*, 2016, n.8-9, p.745; V. De Michele and S. Galleano, "*La sentenza "Mascolo" della Corte costituzionale sui precari della scuola*", on www.europeanrights.eu, 1 September 2016; G. Franza, "*Giochi di prestigio per i precari della scuola: la Consulta "cancella" l'illecito comunitario*", in *Mass.giur.lav.*, n.8-9, 2016, 615 et seqq.; A. Paolitto, "*Il precariato scolastico tra "la buona scuola" e il dialogo "multilevel" delle Corti: l'occasione per un bilancio*", in *giustiziacivile*.com, n.9/2016, 8 September 2016; F. Putaturo Donati, "*PA e contratti illegittimi: note critiche sul riconoscimento del danno (extra)comunitario",* in *Mass.giur.lav.*, 8-9, 2016, 603-614

46 Court of Justice, order 11 December 2014, case C-86/14, *Marta León Medialdea vs. Ayuntamiento de Huétor Vega*, EU:C:2014:2047.

The order *León Medialdea*, indeed, at paragraphs 40 and 41 reclassified in a fixed-term contract, and as such falling in the scope of application of directive 1999/70/EC, the «non-permanent contract of indefinite duration», in order to consequently state that Spanish national legislation does not provide for any effective measure to sanction the abusive use of a succession of fixed-term contracts in the public sector, as in judgement Mascolo as regards the public school precarious employment.

The Court Justice gives also to the national judge the solution to remove the failure of implementation, underlining at paragraph 50 that EU law requires the judge of the reference for a preliminary ruling to grant that the sanctions chosen by national law created a sufficient and dissuading situation to ensure the full effectiveness of the provided preventive measures in compliance with clause 5(1) of the framework agreement.

Therefore, national judges, through a conforming interpretation, shall do everything possible, taking into account all national regulations and applying the methods of interpretation allowed by the law, to ensure the full effectiveness of directive 1999/70/EC and to reach a solution compliant with the directive purposes (order *León Medialdea*, paragraph 55).

According to the Court, therefore, it is up to the referring judge to interpret the relevant national provisions – legislation and collective agreements and/or practice – when the abuse of successive fixed-term contracts took place, so to apply an effective measure to sanction and to properly punish such an abuse and to eliminate the unlawful consequences (order *León Medialdea*, paragraphs 56 e 57).

The extremely clear reference of the Court of Justice is to the expansion to the fixed-term contracts, disguised as non-permanent contracts of indefinite duration (in the private sector, who were already non-permanent fixed-term employees in the public sector), of the sanctioning regulation provided for the "permanent" contract of indefinite duration in the private sector in cases of unlawful termination of the contract or of the sanctioning regulation provided for the abusive use of the fixed-term contract in the private sector.

In order to guarantee an effective protection, therefore, the Spanish judge shall act either equating sanctions in the private sector for horizontally equivalent situations of the same contractual type (contracts of fixed-term employment) or applying clause 4 of the framework agreement and the principle of equality and non-discrimination of the employment conditions in case of termination of the contract between fixed-term employees (fixed-term contract in the private sector, as reclassified

by the Court of Justice compared to the original national concept of "non-permanent contract of indefinite duration") and "comparable" employees of indefinite duration ("permanent" employees of indefinite duration of the private sector).

It is necessary to properly consider that the Spanish failure of implementation of directive 1999/70/EC on the public precarious employment as underlined by order *León Medialdea* was undoubtedly very relevant, but still less dangerous for the future of the whole EU structure than the legislative behaviour of Italy (as highlighted by judgement *Mascolo*), that first has correctly implemented the framework agreement on fixed-term work even for public employment (through the legislative decree n.368/2001 and, in particular, art.5(4 *bis*)), but then has adopted provisions which eliminate or impede the protection in cases of abusive conclusion of successive fixed-term contracts with the public administrations.

After the decisions of 20 July 2016 of the Constitutional Court, three judgements of the Court of Justice of 14 September 2016 on the Spanish public precarious employment in cases *de Diego Porras*[47], *Martínez Andrés* and *Castrejana López*[48], *Pérez López*[49] seemed to conclude the difficult interpretative "journey" of directive 1999/70/EC made by the Court of Justice, that seemed to have found in judgement *Mascolo* a stable point of arrival, thanks to its implementation as «*ius superveniens*» in the Italian legislation through the cited decisions of the Constitutional Court and the recognised formal and substantial equivalence of the sanctions and effective protections between public and private sector, with the extension, anticipated by judgement *Carratù* (paragraphs 46-48), of clause 4 of the framework agreement even to the employment conditions at the moment of unlawful termination of the fixed-term contract because made without any objective reasons and/or on the basis of fraudulent reiteration, as regards the unjustified terminations of the employment contract because without any cause of the comparable contracts of indefinite duration.

8. The EU Commission gives false information to the European Parliament on the Italian implementation of directive 1999/70/EC towards the precarious managers and substitute teachers and legitimises the Italian Jobs Act with the repeal of the national protection legislation

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47 Court of Justice, judgement 14 September 2016, C-596/14, *de Diego Porras vs Ministero de Defensia*, EU:C:2016:683; on the judgement see V. De Michele, "*Le sentenze "spagnole" della Corte di giustizia Ue e la stabilizzazione del precariato pubblico in Italia e in Europa"*, on www.europeanrights.eu, November 2016.

48 Court of Justice, judgement 14 September 2016, C-184/15 and C-195/15, *Martínez Andrés* vs *Servicio Vasco de Salud and Juan Carlos Castrejana López vs Ayuntamiento de Vitoria*, EU:C:2016:680. On the judgement see V. De Michele, "*Le sentenze "spagnole"….", cited supra note* 46.

49 Court of Justice, judgement 14 September 2016, C-16/15, *María Elena Pérez López* vs *Servicio Madrileño de Salud (Comunidad de Madrid)*, EU:C:2016:679; see V. De Michele, "*Le sentenze "spagnole"….", cited supra note* 46.

Notwithstanding the aforementioned copious and well-established case-law of the Court of Justice as regards the wide scope of application of the principle of non-discrimination and of the preventive measures of directive 1999/70/EC, it is necessary to point out an uncooperative behaviour of the EU Commission towards the Petitions Committee of the EU Parliament, in a way to determine, with questionable information, the dismissal of petition n. 0167/2016, presented by F. D'A., an Italian citizen, an official employed for an indefinite duration, manager for many years under a fixed-term contract of the *Agenzie delle Entrate*, related to the alleged failure of the Italian State to implement directive 1999/70/EC in the Italian public administration.

As regards the applicability of directive 1999/70/EC even upon the managers employed for a fixed-term in the public sector the *Cassazione* had already declared itself in favour with its judgement n.5516/2015 which has stated, referring to judgements Impact[50], *Zentralbetriebsrat der Landeskrankenh user Tirols*[51], Gavieiro Gavieiro and Iglesias Torres (cited), Rosada Santana[52] and Valenza, that the prohibition of different treatment of the fixed-term employee employed without any justifying objective reason derives from the EU regulation of the fixed-term work, on the basis of the principle of non-discrimination of clause 4 of the framework agreement CES, UNICE and CEEP on the fixed-term work, attached to directive 1999/70/EC, that in the well-established interpretation of the EU Court is sufficiently precise in order to be invoked by a single individual against the State and directly applied by judges, even disapplying a national non-conforming regulation.

Vice versa, the EU Commission incredibly asked the Petitions Committee for the dismissal of petition n.0167/2016 with the answer of 28 October 2016, on the grounds that «[m]*anagers are appointed for specific, managerial tasks. This is also illustrated by the special selection procedures the petitioner had to undergo (as described in his complaint). It therefore seems that fixed-term employment of this category of workers satisfies the definition of "objective reasons" as interpreted by the Court of Justice of the European Union (CJEU) in Case C-190/13, Samohano. The appointment of managers under successive fixed-term contracts can be considered as justified by objective reasons, in line with Clause 5(1)(a) of Directive 1999/70/EC.*».

The answer of the EU Commission gives opinable information, because it does not comply with the concept of «objective reasons» of clause 5(1)(a) of the framework agreement on fixed-term

50 Court of Justice, Grand Chamber, judgement 15 April 2008, case C-268/06, Impact, EU:C:2008:223.

51 Court of Justice, judgement 22 April 2010, case C-486/08, Zentralbetriebsrat der Landeskrankenh user Tirols, EU:C:2010:215.

52 Court of Justice, judgement 8 September 2011, C- 177/10, Rosado Santana, EU:C:2011:557.

work adopted by the consistent case-law of the Court of Justice from judgement Adeneler to judgements Márquez Samohano, wrongly cited[53], Mascolo and Commission vs Luxembourg; objective reasons that meet the temporary and contingent needs of the specific working activity requested from the fixed-term employee and not the more or less specific nature of the tasks carried out and of the selective competitions requested to obtain the managing post, even considering the fact that the public competition represents the ordinary method for assigning public employment posts in Italy.

Yet, the inaccurate information given by the EU Commission on petition n.0167/2016, ordinarily, would not have had any practical consequence but just the subsequent dismissal of the petition by the Petitions Committee.

The other way around, modifying the positive interpretation of the *Cassazione* in the cited judgement n.5516/2015[54] on the precarious managers in the public sector regarding the application of directive 1999/70/EC, the same *Cassazione* with its judgement n.17010/2017[55] dismissed the appeal of a manager of the private sector who had asked the conversion in indefinite duration of the successive fixed-term contracts concluded with the same employer and with an overall duration of more than 5 years, on the basis of the fact that directive 1999/70/EC is not applicable to the employees qualified as managers, wrongly recalling again, as the EU Commission did for petition n.0167/2016, both judgement *Kücük*[56] and judgement Márquez Samohano, since «*this judgment was cited also by the Petitions Committee of the EU Parliament, established on the basis of artt. 20 and 227 TFEU and of art. 44 of the EU Charter of Fundamental Rights, in the answer of 28 October 2016 to the Italian citizen's complaint, who worked for several years as a fixed-term manager, for the alleged failure of Italy to implement directive 1999/70/EC. The Commission therefore assumed that "the appointment of managers through successive fixed-term contracts can*

53 The conclusions of judgement Márquez Samohano are coherent with the circumstances of the main dispute, involving a university associate professor who performed as ordinary work activity the one as self-employed worker, therefore his teaching activity was neither exclusive nor his prevalent working activity, therefore it was theoretically justified by temporary needs and contingent objective reasons: « *Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding national rules, such as those at issue in the main proceedings, which allow universities to renew successive fixed-term employment contracts concluded with associate lecturers, with no limitation as to the maximum duration and the number of renewals of those contracts, where such contracts are justified by an objective reason within the meaning of clause 5(1)(a), which is a matter for the referring court to verify. However, it is also for that court to ascertain that, in the main proceedings, the renewal of the successive fixed-term employment contracts at issue was actually intended to cover temporary needs and that rules such as those at issue in the main proceedings were not, in fact, used to meet fixed and permanent needs in terms of employment of teaching staff* ».

54 Cassazione, S.L., judgement 19 March 2015, n.5516.

55 Cassazione, S.L., judgement 10 July 2017, n.17010.

56 Court of Justice, judgement 26 January 2012, case C-586/10, *Kücük*, EU:C:2010:39.

be deemed to be justified by objective reasons, in line with clause 5(1)(a) of directive 1999/70/EC, […] *linked to the particularities of this specific type of employment which justify the use of successive fixed-term contracts".*».

So, the *Cassazione* with its judgement n.17070/2017 put erroneously the blame on the Petitions Committee of the EU Parliament (which obviously did not adopt any decision on the issue, but merely decided to dismiss petition n.0167/2016) for the opinable communications and the wrongful interpretation by EU Commission of the EU case-law, in order to deny the effective protection granted by the correct application of the anti-discrimination and anti-abuse measures provided by directive 1999/70/EC, which, instead, were recognised by the previous judgement n.5516/2015 of the same Supreme Court.

In recalling judgement *Kücük* of the Court of Justice, the *Cassazione* with its judgement n.17070/2017 made the same interpretative mistake of the previous judgement n.10127/2012 of the Court on public school precarious employees, when it was categorically stated the compatibility with directive 1999/70/EC of the school recruiting system, disproved both by the Constitutional Court with the order for a preliminary ruling n.207/2013 and by the Court of Justice with its judgement Mascolo.

Unlike this isolated judgement of the Italian *Cassazione*, it is necessary to note that the German Federal Labour Supreme Court with its judgement of 18 July 2012, n.7, resuming the proceedings after the preliminary ruling, solved the issue of the precarious official of the justice administration of Land Nord Westfalia, Mrs Bianca *Kücük*, who had worked as a precarious employee for 11 consecutive years under thirteen fixed-term contracts to replace a single permanent official absent because of several maternity and other general leaves, i.e. for objective reasons strictly temporary, and asked for the stabilisation of the post, notwithstanding the rigorous application by the public administration of the national rules (art.14(1)(3) TzBfG).

The German Federal Labour Supreme Court stated that the public precarious employee had suffered for a contractual abuse according to the German Law and, since the civil law categories of both Italy and Germany are identical, it is possible to assume that the same concept of contractual abuse still exist under Italian law.

The same conduct of manipulating the case-law of the Court of Justice and of refusing to supervise the right application of directive 1999/70/EC by Member States was adopted by the EU Commission when it endorsed and supported the choice made by the Italian legislator with the Jobs Act (d.l. n.34/2014) to eliminate the preventive measure of the temporary objective reasons,

dismissing on 2 July 2015 the request of CGIL, i.e. the main trade union in Italy, to start an infringement procedure with the complaint CHAP(2014)2554.

It is no a coincidence that the national legislation with the Jobs Act decided to eliminate all the anti-abuse protections against the increase of precarious fixed-term contracts after the changes of art. 3b CEOS with effect from 1 January 2014 and the increase to 6 years of the limit of maximum overall duration of the employment relationship of the contract agents of the Commission.

The development of the Italian legislation on fixed-term contracts changed completely in less than two years, from 18 July 2012 (with the l. n.92/2012, so-called “Fornero” Reform) to 21 March 2014 (with the d.l. n.34/2014, so-called Jobs act), but with always the allegedly identical purpose to fulfil the EU duties and the indications coming from, *ratione temporis*, the EU Commission.

With the Fornero reform of l. n.92/2012, it was recalled the centrality of the employment relationship of indefinite duration and several limits were set for the use of fixed-term contracts, allowing employers to conclude just one “acausal” contract of the maximum duration of one year with the employees never employed before in that business (a sort of “probationary” contract) and conforming the anti-fraud regulation in the succession of fixed-term contracts to the twofold protection of the objective reasons and of a significant minimum period of time (two or three months) between two different fixed-term contracts, in compliance with judgement Adeneler of the Court of Justice and with the indications to reintroduce more rigidity of the letter Trichet-Draghi to the Italian Republic of August 2011.

On the contrary, with the Jobs act I of 2014 (d.l. n.34/2014) the fixed-term contract became the rule even for the temporary agents, while the contracts of indefinite duration became the exceptions, on the basis of the facts that both the private and public employers can widely derogate from the three-year maximum duration clause.

It is no a coincidence that the reasoning of the EU Commission on the dismissal of the Jobs act is the same that led to the quasi-simultaneous dismissal of the infringement procedure on the school precarious employment n.2124/2010 of 19 November 2015.

It is held that, as the Commission already did in case Huet, in order to satisfy the minimum requirements of clause 5 of the framework agreement, it is sufficient that at least one of the provided preventive measures is adopted, in the case at hand the clause of 36 months duration of service even non-continuously with equivalent tasks – art.5(4 bis) of the legislative decree

n.368/2001 of 25 June 2015, art.19 legislative decree n.81/2015 -, without being necessary to verify if the provision is effectively sanctioning, as in the case of the repealed temporary objective reasons, and that this measure cannot be easily circumvented differentiating the tasks and so boundlessly increasing the precarious fixed-term contracts.

As regards public school, moreover, art.1(131) of l. n.107/2015 provides that, from 1 September 2016, the replacements of the teaching and ATA staff cannot exceed the overall duration of, even non-continuous, 36 months for filling vacant and available posts, without any anti-abuse sanction: the clause of the maximum overall duration of employment relationships represents the insurmountable limit to use the now professionalised staff, which cannot be used anymore by the public school institutions. This is the same as for the contract agents of the Commission.

9. The EU Commission leads to the crisis of the national system of protection of Italian public employees and provokes the temporary "*autodichia*" of the *Cassazione* and the "clash" with the Court of Justice on Taricco II case.

The Commission's "political" attitude of disempowerment of the preventive measures provided in directive 1999/70/EC and, in particular, of the fundamental rule according to which the contract of indefinite duration represents the prototype of employment relationships while the fixed-term contract is the exception, provoked a proper crisis in the judicial system of effective protection of the public precarious employees in Italy, with judgements of *Cassazione* which are clearly in contrast with the case-law of the Court of Justice and, in particular, with judgements Mascolo and Adeneler, modifying the Supreme Court's original attitude of a correct application of the EU law (see *Cassazione*, judgement n.12985/2008) and of the establishment of a common system of principles and protection.

a) Judgement n.5072/2016 of the *Cassazione* Joint Sessions on the public precarious employment

In particular, the *Cassazione* Joint Sessions in judgement n.5072/2016[57] established the principle of absolute prohibition of conversion of fixed-term contracts in the public sector even in cases in which the employment by public administration was legitimately based on a competitive and selective procedure (cases which roughly encompass all the situations), with the application, in order to punish the abusing use of flexible contracts, of just the compensation provided under art.32(5) of the law n.183/2010 as the "all-encompassing" sanction of the so-called «Community damage» suffered by all the public employees towards whom there was an abusing use of fixed-term, even in the case the public precarious employee completed more than 36 months of service, in violation of the principles stated by the Court of Justice in judgement Mascolo and in the orders Affatato and Papalia and by the Constitutional Court in judgement n.260/2015 as regards the public precarious employees of the opera foundations.

b) Judgement n.11374/2016 of the *Cassazione* Joint Sessions on the "acausal" contracts

Additionally, the same *Cassazione* Joint Sessions with its judgement n.11374/2016[58] declared legitimate the "acausal" contracts of Poste Italiane/State concluded pursuant to art.2(1 bis) of the legislative decree n.368/2001, stating that the repealing of the preventive measure of temporary objective reasons was outweighed, even retroactively, with the clause of maximum duration of non-continuous 36 months of service with equivalent tasks set forth in art.5(4 bis) of the legislative decree n.358/2001, stating the compatibility of the national Jobs act with directive 1999/70/EC, in violation of the principles stated by the Court of Justice in judgements Adeneler, Sorge, Carratù and Mascolo and by the same *Cassazione* in hundreds of judgements starting from the pivotal judgement n.12985/2008, which applied judgement Adeneler on the unique fixed-term contract not justified by temporary objective reasons.

c) Judgements of 7 November 2016 of the *Cassazione* – Labour Section on the school

57 Cassazione, S.U., judgement 15 March 2016, n.5072 in *Mass.giur.lav.*, 2016, 590 et seqq., with an endorsing comment by A. Vallebona and a dissenting comment by F. Putaturo Donati, "*PA e contratti a termine illegittimi: note critiche sul riconoscimento del danno (extra)comunitario"*, in *Mass.giur.lav.*, 2016, 606 et seqq.; M. De Luca, "*Precariato pubblico: condizionalità eurounitaria per divieti nazionali di conversione"*, in *WP CSDLE "Massimo D'Antona"*.INT, n.134/2017; Id., "*Il giusto risarcimento per illegittima apposizione del termine a contratti privatizzati di pubblico impiego"*, in *Lav.giur.*, 2016, 1053 ss.; V. De Michele, "*Alla ricerca della tutela effettiva dei precari pubblici in Europa e in Italia"*, in *Labor*, 2017, 4, 415-434. For an endorsing and conforming interpretation see Cass., SS.UU., judgements 14 March 2016, nn.4911, 4912, 4913 and 4914 without reasoning and with a reference to the successive judgement n.5072/2016; see also, Cass., VI Sect. L, orders nn.6632/2017; 6631/2017; 2593/2017; 1872/2017; 1683/2017; 1681/2017; 25276/2016; 24169; 24168/2016; 23944/2016; 23943/2016; 23942/2016; 22088/2016; 21943/2016; 21937/2016; 16360/2016; 16359/2016; 16358/2016; 16230/2016; 16229/2016; 16228/2016; 16227/2016; 16262/2016; 16100/2016; 16099/2016; 16098/2016; 16097/2016; 16096/2016; 16095/2016; Cass., S.L., judgement n.14633/2016.

58 Cassazione, S.U., judgement 31 May 2016, n.11374.

Moreover, the Labour Section of *Cassazione* with tens of judgements starting from the first six ones lodged on 7 November 2016[59] concluded to "definitely" decide the cases on the school precarious employment expressly remarking the rejection of every effective protection. After four and a half years since judgement n.10127/2012[60] the Supreme Court integrally recalled its reasoning, refusing to rise the preliminary and constitutional requests asked by public school precarious employees (the former) or highlighted by the Public Prosecutor (the latter) and contrasting with judgement *Mascolo* of the Court of Justice and judgement n.187/2016 of the Constitutional Court, even if alleging to apply them.

The contractual abuse in the school sector, in line with what stated in art.1(131) and (132) of law n.107/2015, is considered outside the scope of the legislative decree n.368/2001, deemed once again non-applicable, so departing from the general principle of the same judgement n.5072/2016 S.U., and the "community offence" is considered to take place for substitute teaching and ATA staff only with the accumulation of 4 annual replacements. This is a paradoxical application of art.5(4-*bis*) of the legislative decree n.368/2001, in violation of art.136 Cost. for the declaration of unconstitutionality of art.4(1) of the law n.124/1999, that the Constitutional Court had recognised *ex tunc* for each annual replacement.

d) "Delay" judgement n.21972/2017 of the *Cassazione* Joint Sessions on 'exchange assistants'

The right to the conversion in contracts of indefinite duration of the fixed-term contracts concluded in the Italian public sector in cases of abusive and reiterated use of this flexible type of contract was already stated in the national practice in favour of the university assistants, now native-speaker assistants and experts, by the well-established case-law of the *Cassazione* (see for instance Cass., S.L., judgement n.19426/2003[61] and Cass., SS.UU., judgement n.8985/2010[62]), even if dealing with a private employment relationship (but with public contribution *ex* Inpdap), applying

59 Cassazione, judgement 7 November 2016, n.22552-22553-22554-22555-22556-22557, in *Riv.it.dir.lav.*, 2017, II, 347 et seqq., con nota di L. Calafà, "*The ultimate say della Cassazione sul "caso scuola"*"; for a conforming interpretation, see Cass., 2148/17; 290/17; 211/17; 75/17; 55/17; 27566/16; 27565/16; 27564/16; 25563/16; 25562/16; 25382/16; 25381/16; 25380/16; 24816/16; 24815/16; 24814/16; 24813/16; 24276/16; 24275/16; 24273/16; 24272/16; 24130/16; 24129/16; 24128/16; 24127/16; 24126/16; 24041/16; 24040/16; 24039/16; 24038/16; 24037/16; 24036/16; 24035/16; 24034/16; 23867/16; 23866/16; 23751/16; 23750/16; 23535/16; 23534/16; 22553/16; 22554/17; 22555/17; 22556/17.

60 Cassazione, S.L., judgement 20 June 2012, n.10127, in *LG*, 2012, 777 et seqq., with a comment by V. De Michele, "*Il Tribunale aquilano demolisce la sentenza antispread della Cassazione sul precariato scolastico"*, in *Lav.giur.,* 2012, 777.

61 Cassazione, S.L., judgement 18 December 2003, n.19426.

62 Cassazione, S.U, judgement 15 April 2010, n.8985.

the law n.230/1962 and the several judgements of the Court of Justice *in subiecta materia*, Allué and Coonan[63], Allué *et al*[64], Commission vs Italy[65], Commission vs Italy[66] and Delay[67].

Cassazione Joint Sessions with judgement n.21972/2017[68] succeeded in the difficult task of disapplying the whole *corpus* of the Court of Justice's case-law on the work stability and the judicial and economic equivalence of the university assistants, upholding the action brought by the University of Florence willing to apply the prohibition of conversion in the public sector of the "exchange assistants"'s employment relationship, with interpretative artifices understandable just from the point of view of the exclusive purpose to absolutely refuse the effective protection of the public precarious employees, which was already guaranteed, in the case, by judgement Delay of the Court of Justice.

e) **Judgement n.13721/2017 of the *Cassazione* Joint Sessions on honorary/voluntary judges**

The European Committee of Social Rights of the Council of Europe, deciding on the collective complaint n.102/2013 of *Associazione dei giudici di pace* (national association of justices of the peace) vs Italy for the omitted economic, judicial and pension equality with ordinary judges, found merits for the complaint violation of the Charter in the report to the Committee of Ministers of 5 August 2016.

The ECSR in the cited decision on the collective complaint n.102/2013 recalled judgement *O'Brien*[69] of the Court of Justice on a similar case referred to English honorary judges, who have been assimilated to ordinary judges as regards the pension rights.

In the communication DG EMPL/B2/DA-MAT/sk (2016) to the Italian Government the EU Commission closed case EU Pilot 7779/15/EMPL, announcing the next opening of an infringement procedure, on the compliance with UE law of the national regulation of the honorary judges (judges and and assistant prosecutors), as regards the abusive reiteration of fixed-term contracts (clause 5 of the framework agreement transposed in directive 1999/70/EC), the unequal treatment with regard to

63 Court of Justice, judgement 30 May 1989, case C-33/88, Allué and Coonan, EU:C:1989:222.

64 Court of Justice, judgement 2 August 1993, joint cases C-259/91, C-331/91 and C-332/91, Allué et al., EU:C:1993:333.

65 Court of Justice, judgement 26 June 2001, case C-212/99, Commission vs Italy, EU:C:2001:357.

66 Court of Justice, judgement 18 July 2006, case C-119/04, Commission vs Italy, EU:C:2006:489.

67 Court of Justice, judgement 15 May 2008, case C-276/07, Delay, EU:C:2008:282.

68 Cassazione, S.U, judgement 21 September 2017, n.21972.

69 Court of Justice, judgement 1 March 2012, C-393/10, *O'Brien* vs Ministry of Giustice, EU:C:2012:110. The preliminary reference was raised by the Supreme Court of the United Kingdom which, notwithstanding Brexit, keeps on having a relationship with the Court of Justice raising in the same case *O'Brien* the new preliminary reference C-432/17 to expand the pension prevention of the honorary judges part-time employed even for the service period prior to the entry into force of directive 97/81/CE.

the salary (clause 4 of the framework agreement transposed in directive 1999/70/EC), vacation (art.7, directive 2003/88, combined with clause 4 of the framework agreement transposed in directive 97/81/CE and with clause 4 of the framework agreement transposed in directive 1999/70/EC) and maternity leave (art.8 directive 92/85 and art.8 directive 2010/41).

In the communication of 23 March 2017 prot. D 304831 the Petitions Committee President, Mrs Cecilia Wikström, after the meeting of 28 February 2017 in which petitions nn. 1328/2015, 1376/2015, 0028/2016, 0044/2016, 0177/2016, 0214/2016, 0333/2016 and 0889/2016 on the regulation of justices of the peace in Italy have been discussed, invited the Ministry of Justice to find a fair compromise on the employment situation of the justices of peace, to eliminate «*the clear unequal treatment on the judicial, economic and social field between ordinary and honorary judges*».

The answer of the Italian Republic on this issue, however, was contemptuous, since the *Cassazione* Joint Sessions with its judgement n.13721/2017[70] declared the only "voluntary" nature of the work of justices of the peace, anticipating in this sense the legislative decree n.116/2017 of the reform of the honorary judges, which denies economic, judicial and pension equivalence between honorary and ordinary judges, subjecting the former to a strict hierarchical and organisational and nearly servile bond to the latter, demonstrating that the Italian legislation and Government do not intend at all to solve the problem of effective protection of those Italian servants who, according to data, solve 50% of the civil and criminal disputes, in reasonable time, ensuring a fair trial.

f) The Constitutional Court with the second incidental reference for a preliminary ruling avoids the direct "fight" between (part of) the *Cassazione* and the Court of Justice on Taricco II case, and the CJEU puts the Italian legislator (and the non-supervising EU Commission) in default

In the final considerations to the opinion of 23 March 2017 n.464/17 on the possibility of stabilisation of the employment relationships of the honorary judges before the legislative decree n.116/2017, the Council of State threatened to apply the "counter-limits", in the case, defined "highly improbable", in which the Court of Justice allowed the disapplication of such pivotal principle of the national legislation, i.e. the precarisation for an indefinite duration of the employment relationships in the public sector.

70 Cassazione, S.U., judgement 31 May 2017, n.13721.

The Council of State recalled the second order of incidental reference for a preliminary ruling of the Constitutional Court n.24/2017[71] (Case C-42/17 M.A.S. e M.B.), encouraged by two orders n.339/2015 of 18 September 2015 of the Court of Appeal of Milan and n.212/2016 of 8 July 2016 of the *Cassazione*, which contested judgement Taricco[72] of the Court of Justice, which allows the national judge to disapply the national provisions on the statute of time limitations for big tax frauds regarding the VAT regime, because violating art.325 TFEU, even asking to declare constitutionally illegitimate art. 2 l. n.130/2008 of ratification of Treaties, in so far as the national

71 Constitutional Court, order 26 January 2017, n.24, case C-42/17 of the Court of Justice. The order n.24/2017 was commented by A. Anzon Demming, "*La Corte costituzionale è ferma sui "controlimiti", ma rovescia sulla Corte europea di Giustizia l'onere di farne applicazione bilanciando esigenze europee e istanze identitarie degli Stati membri*", on www.associazionedeicostituzionalisti.osservatorio.it, 2017, num. 2; F. Bailo, "*Il principio di legalità in materia penale quale controlimite all'ordinamento eurounitario: una decisione interlocutoria (ma non troppo!) della Corte costituzionale dopo il caso Taricco*", on www.giurcost.org, 2017, num. 1; R. Calvano, "*Una questione pregiudiziale al quadrato .... o forse al cubo: sull'ordinanza n. 27/2017 della Corte costituzionale*", in Dir.um. e dir.intern., 2017, n. 1, pag. 301; F. Campodonico, "*Ancora sui termini di prescrizione in materia di frodi iva: la Corte costituzionale rimette la questione ai giudici di Lussemburgo*", in Dir.prat. trib., 2017, n.2, p. 808; A. Celotto, "*Caso Taricco: un rinvio pregiudiziale "muscoloso" e costruttivo (a prima lettura sulla ord. n. 24 del 2017 della Corte costituzionale)*", on www.giustamm.it, 2017, n. 2; G. Civello, "*La Consulta, adìta sul caso "Taricco", adisce la Corte di Giustizia: orientamenti e disorientamenti nel c.d. "dialogo fra le corti"*", on www.archiviopenale.it, 2017, n. 1; P. Corso, "*La normativa sulla prescrizione dei reati tributari non può essere disapplicata dal giudice nazionale*", in Riv. giur. trib., 2017, n. 3, p. 203; C. Cupelli, "*La Corte costituzionale ancora non decide sul caso Taricco, e rinvia la questione alla Corte di Giustizia*", on www.penalecontemporaneo.it, 2017; M. 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Il caso Taricco torna (catafratto) a Lussemburgo*", on www.associazionedeicostituzionalisti.osservatorio.it, 2017, n. 1; N. Lupo, "*Respinta dal referendum la riforma costituzionale, la Corte costituzionale affronta alcuni snodi importanti del sistema delle fonti del diritto*", on www.osservatoriosullefonti.it, 2017, n. 1; A. Martufi, "*La minaccia dei controlimiti e la promessa del dialogo: note all'ordinanza n. 24 del 2017 della Corte costituzionale*", on www.penalecontemporaneo.it, 2017; R. Mastroianni, "*La Corte costituzionale si rivolge alla Corte di giustizia in tema di "controlimiti" costituzionali: è un vero dialogo?*", on www.federalismi.it, 2017, n. 7; D. Negri, "*Dallo "scandalo" della vicenda Taricco risorge il principio di legalità processuale*", on www.archiviopenale.it, 2017, n. 2; F. Palazzo, "*La Consulta risponde alla "Taricco": punti fermi, anzi fermissimi, e dialogo aperto*", in Diritto penale e processo, 2017, n.. 3, p. 285; A. M. Perrino, "*Nota a Corte cost., ord. n. 24/2017*", in Foro it., 2017, n.2, I, p.393; G. Piccirilli, "*L'unica possibilità per evitare il ricorso immediato ai controlimiti: un rinvio pregiudiziale che assomiglia a una diffida (nota a Corte cost.., ord. n. 24/2017)*", on www.giurcost.org, 2017, n. 1; D. Pulitanò, "*Ragioni della legalità a proposito di Corte cost. n. 24/2017*", on www.penalecontemporaneo.it, 2017; G. Repetto, "*Una ragionevole apologia della supremacy. In margine all'ordinanza della Corte costituzionale sul caso Taricco*", on www.diritticomparati.it; G. Riccardi, "*"Patti chiari e amicizia lunga". La Corte costituzionale tenta il 'dialogo' nel caso Taricco, esibendo l'arma dei controlimiti*", on www.penalecontemporaneo.it, 2017; A. Ruggeri, "*Ultimatum della Consulta alla Corte di Giustizia su Taricco, in una pronuncia che espone, ma non ancora oppone, i controlimiti (a margine di Corte cost. n. 24 del 2017)*", on www.giurcost.org, 2017, n. 1; R. Sicurella, "*Oltre la 'vexata quaestio' della natura della prescrizione. 'L'actio finium regundorum' della Consulta nell'ordinanza Taricco, tra sovranismo (strisciante) e richiamo (palese) al rispetto dei ruoli*", on www.penalecontemporaneo.it, 2017; C. Sotis, "*"Tra Antigone e Creonte io sto con Porzia". Riflessioni su Corte costituzionale 24 del 2017 (caso Taricco)*", on www.penalecontemporaneo.it, 2017; M. Taglione, "*Brevi considerazioni sull'ordinanza della Corte costituzionale n. 24/2017*", on www.archiviopenale.it, 2017, n. 1; A. Terrasi, "*Note a margine dell'ordinanza della Corte costituzionale*

law allows and gives effect to art. 325(1) and (2) TFUE, as interpreted by judgement Taricco of the Court of Justice.

Advocate-General Bot[73] at paragraph 185 reminded the referred judge, who threatened the "counter-limits" as regards the duty of national judges to apply judgement Taricco, that at paragraphs 10 and 11 of the considerations presented in the case Gauweiler[74], the Italian Republic specified that the fundamental and supreme principles of the constitutional law, the violation of which by an act of the EU law would legitimate the beginning of the procedure of counter-limits, correspond to the essential constitutional guarantees, as the democratic nature of the Italian Republic provided by art.1 of the Italian Constitution or, also, the principle of equality of art.3, and

sul caso "Taricco": l'effetto delle norme dei trattati istitutivi dell'UE sulla legge penale sostanziale italiana", in Dir.um. e dir.intern., 2017, n.1, p.308.

72 Court of Justice, Grand Chamber, judgement 8 September 2015, case C-105/14, Taricco et al, EU:C:2015:555. The cited judgement was commented by Z.Skubic, *"Zastaranje davčnih goljufij po pravu EU - nedopustno*?", Pravna praksa 2015 nº 38 p.23-24; G.Mobilio, "*Dal caso Taricco al redde rationem tra Corte di Giustizia e Corte costituzionale"*, Quad.cost. 2015, p.1009-1013; A. Takis, Armenopoulos 2015 p.1969-1971, A.-L., Mosbrucker, "*Fraude à la TVA"*, Europe 2015 November Comm. nº 11, p.37; F. Rossi, "*La sentenza Taricco della Corte di Giustizia e il problema degli obblighi di disapplicazione in malam partem della normativa penale interna per contrasto con il diritto UE"*, Dir.pen. e proc., 2015, p.1564-1571; F. Viganò, "*Disapplicare le norme vigenti sulla prescrizione nelle frodi in materia di IVA?*", in this *Rivista*, 14 September 2015; C. Amalfitano, "*Da una impunità di fatto a una imprescrittibilità di fatto della frode in materia di imposte sul valore aggiunto?*", there, 22 September 2015; A. Venegoni, "*La sentenza Taricco: una ulteriore lettura sotto il profilo dei riflessi sulla potestà legislativa dell'Unione in diritto penale nell'area della lotta alle frodi"*, there, 29 October 2015; Id., "*Ancora sul caso Taricco: la prescrizione tra il diritto a tutela delle finanze dell'Unione ed il diritto penale nazionale"*, there, 30 March 2016; L. Eusebi, "*Nemmeno la Corte di Giustizia dell'Unione europea può erigere il giudice a legislatore. Note in merito alla sentenza Taricco"*, there, 10 December 2015; B. Romano, "*Prescrizione del reato e ragionevole durata del processo: principi da difendere o ostacoli da abbattere?*", there, 15 February 2016; E. Lupo, "*La* primauté *del diritto dell'UE e l'ordinamento penale nazionale. Riflessioni sulla sentenza Taricco*", there, 29 February 2016; G. Civello, "*La sentenza "Taricco" della Corte di Giustizia UE: contraria al Trattato la disciplina italiana in tema di interruzione della prescrizione del reato",* in *Arch. pen.*, n. 3/2015; F. Rossi, "*La sentenza Taricco della Corte di Giustizia e il problema degli obblighi di disapplicazione* in malam partem *della normativa penale interna per contrasto con il diritto UE*", in *Dir. pen. e proc.*, 2015, p. 1564 et seqq.; R. Lugarà, "*La tutela "multilivello" dei diritti come canone normativo. Brevi spunti a partire dal caso Taricco"*, in *Libero osservatorio del diritto*, 2015, p. 36 et seqq; S. Marcolini, "*La prescrizione del reato tra diritto e processo: dal principio di legalità sostanziale a quello di legalità processuale"*, in *Cass. pen.*, 2016, p. 362 et seqq.; D. Micheletti, "*Premesse e conclusioni della sentenza Taricco. Dai luoghi comuni sulla prescrizione al primato* in malam partem *del diritto europeo"*, on *www.lalegislazionepenale.eu*, 3 February 2016; V. Maiello, "*Prove di resilienza del* nullum crimen: *Taricco* versus *controlimiti"*, in *Cass. pen.*, 2016, p. 1250 et seqq; P. Faraguna – P. Perini, "*L'insostenibile imprescrittibilità del reato. La Corte d'appello di Milano mette la giurisprudenza "Taricco" alla prova dei controlimiti"*, in this *Rivista*, 30 March 2016; M. Luciani, "*Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale"*, in *Rivista AIC* n. 2/2016, 15 April 2016; M. Gambardella, "*Caso Taricco e garanzie costituzionali* ex *art. 25 Cost.*, in *Cass. pen.*", 2016, 1462 et seqq.; V. Manes, "*La "svolta" Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti*", in this *Rivista*, 6 May 2016; F. Viganò, *"Il caso* Taricco *davanti alla Corte costituzionale: qualche riflessione sul merito delle questioni, e sulla reale posta in gioco"*, there, 9 May 2016; R. Bin, "*Taricco, una sentenza sbagliata: come venirne fuori?*", there, 4 July 2016; C. Cupelli, "*Il caso Taricco e il controlimite della riserva di legge in materia penale"*, in *Giur. cost.*, 2016, 419 et seqq; A. Ciampi, "*Il caso Taricco impone la disapplicazione delle garanzie della prescrizione: un problema di rapporti fra diritto dell'UE e diritto nazionale e di tutela dei diritti fondamentali, non solo di diritto processuale internazionale"*, Corr.giur., 2016 p.113-121.

73 Conclusions submitted on 18 July 2017 in the case *M.A.S. and M.B.* C-42/17, on the preliminary reference made by the Constitutional Court with order n.24/2017. The Court of Justice has not decided yet.

74 Court of Justice, Grand Chamber, judgement 16 June 2015, C-62/14, *Gauweiler*, ECLI:EU:2015:400.

they would not include the procedural guarantees, notwithstanding their relevance, as the guarantee of impunity of the big tax fraudsters of the VAT regime or, in addition to what stated in the opinion of the Council of State on the stabilisation of honorary judges, the absolute prohibition of conversion in the public sector.

Advocate-General Bot in case Taricco II C-42/17 adds also in note 12 that the order of constitutional legitimacy made by *Cassazione Penale* (Criminal Section) is difficult to understand, since in the previous judgements n. 2210/16 and n.7914/2016 the same *Cassazione* applied the principles set forth in judgement Taricco, in the former, declaring that the statute of time limitations falls in a procedural-nature regime and, in the latter, confirming that the duty to disapply the statute of limitation regime is limited only to cases in which the time limit has not been expired yet.

Moreover, Taricco I judgement of the Court of Justice had given wide discretion to the national judges in deciding if and how to exercise the power to disapply the national provisions on the statute of limitations, having however the duty to also «*ensure that the fundamental rights of the persons concerned are respected. Indeed, in that case penalties may be imposed on those persons which, in all likelihood, would not have been imposed if those provisions of national law had been applied*» (Taricco judgement, paragraph 53) and to intervene just «*if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union* » (Taricco judgement, paragraph 58).

The Grand Chamber of the Court of Justice in the judgement of 5 December 2017 in the case C-42/17 “Taricco II” (EU:C:2017:936), even confirming the arguments of its decision of 8 September 2015 on the specific issue and the conclusions of Advocate-General Bot, reinforced the direct dialogue with the Constitutional Court in the second order of a reference for a preliminary ruling n.24/2017, further expanding the discretionary powers of the national judge not to disapply the national provisions on the criminal statute of limitations, after having obtained by the national law the modification of the periods of limitation pursuant to law n.105/2017.

Indeed, the Court of Justice states at paragraphs 41-42 that «*41.* [i]*t is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU, in the light of the considerations set out by the Court in paragraph 58 of the Taricco judgment. It is that legislature’s task to ensure that the national rules on limitation in criminal matters do not lead to impunity in a significant number of cases of serious VAT fraud, or are more severe for accused persons in cases of fraud affecting the financial interests of the Member State concerned than in those affecting the financial interests of the European Union. 42.*

It should be recalled here that an extension of a limitation period by the national legislature and its immediate application, including to alleged offences that are not yet time-barred, do not, in principle, infringe the principle that offences and penalties must be defined by law (see, to that effect, the Taricco judgment, paragraph 57, and the case-law of the European Court of Human Rights cited in that paragraph).».

Therefore, it was a duty of the EU Commission to supervise on the correct application by the Italian Republic of art.325 TFEU and on the cooperation in the prosecution of the VAT frauds, a duty which was disobeyed, as for the application of directive 1999/70/EC, and which provoked a possible clash between the Court of Justice and the national Supreme Courts as regards the constitutional counter-limits.

Moreover, the Court, in "communitarising" (not the counter-limits, but) the principle that offences and penalties must be defined by law in light both of art.49 of the Charter of EU Fundamental Rights and of art.7 ECHR (paragraph 52), recalls the "constitutional" relevance, in the EU legal order as well as in national legal systems, of that principle as to its requirements concerning the foreseeability, precision and non-retroactivity of the criminal law applicable (paragraph 51).

All this reasons brought the Court of Justice to find, in Taricco II judgement, in *idem sentire* with the Constitutional Court which will so declare inadmissible the constitutional legitimacy questions raised by the Court of Appeal of Milan and by the *Cassazione*, that art.325(1) and (2) TFUE shall be interpreted as imposing upon national judges the duty to disapply, in the criminal proceedings related to VAT frauds, the national provisions on statute of limitation, considered part of national substantive law, which prevent the application of effective and dissuasive sanctions in a significant number of cases of severe tax frauds affecting the financial interests of the EU or which provide, in cases of the cited tax frauds affecting the EU financial interests, shorter periods of limitation than the ones prescribed in cases of tax frauds affecting the financial interests of the particular Member State, except for the case in which a similar disapplication entails a violation of the principle that offences and penalties must be defined by law because of the insufficient definiteness of the applicable law, or the retroactive application of a criminal provision prescribing more severe penalties than the ones into force at the time of the commission of the crime.

The dialogue between the Court of Justice and the Italian Constitutional Court, successfully started in the cases of the school precarious employees with the order n.207/2013, is reinforced with Taricco II case as regards the sharing of common European and national constitutional principles

and the identification of those who are truly responsible for the omitted correct application of the EU law, i.e. the legislators (and Governments) of the Member States as well as, for an insufficient supervision, the EU Commission.

10. The new references for a preliminary ruling to the Court of Justice by Italian courts for the protection of the public precarious employees' rights.

a) The double reference for a preliminary ruling of the Tribunals of Trapani and Foggia

Answering to the "temporary" refusal of the *Cassazione* to have a dialogue with the Court of Justice, the Tribunal of Trapani[75] raised preliminary references on the long-lasting precarious employees of the Sicilian local authorities (more than 36 months of continuous fixed-term service) in contrast with the just compensatory sanction of the «community damage» made up by the Joint Sessons in judgement n.5072/2016, asking to the EU Court the possibility of equating public and private workers in the application of the sanction against the abusive use of contracts a fixed-term, in light of the principles set by the Court of Justice in judgements Marrosu-Sardino[76] and Mascolo.

Even the Tribunal of Foggia[77] proposed an incidental ruling before the Constitutional Court, challenging the legal principle established by the *Cassazione* Joint Sessions in the application of the only compensation under art.32(5) of the law n.183/2010 as an "overall" sanction of the damage suffered by the whole public precarious employees, in a case of healthcare precariat with the

75 Tribunal of Trapani, order 5 September 2016, case C-494/16, *Santoro*; see G. Bolego, "*Tecniche di prevenzione e rimedi contro l'abuso dei contratti a termine nel settore pubblico"*, in *Labor*, 2017, 21 et seqq; L.Busico, "*Le conseguenze dell'abuso del contratto di lavoro a tempo determinato da parte delle P.A.: la parola fine è ancora molto lontana"*, *there*, 26 novembre 2016**;** F. Chietera**, "***L'incerto cammino del precariato non scolastico verso la stabilizzazione"*, in *LG*, 2017, 5 et seqq; F. Putaturo Donati**, "***Precariato pubblico, effettività delle tutele e nuova questione di legittimità costituzionale"*, in *ADL*, 2017, 65 et seqq.

76 Court of Justice, judgement 7 September 2006, case C-53/04, *Marrosu-Sardino* vs *Azienda Ospedaliera S.Martino di Genova*, EU:C:2006:517; on the issue see A.Miscione, "*Il contratto a termine davanti alla Corte di giustizia: legittimità comunitaria del d.lg. n. 368 del 2001"*, in Arg. dir. lav., 2006, 6, 1639; L.Nannipieri, "*La Corte di giustizia e gli abusi nella reiterazione dei contratti a termine: il problema della legittimità comunitaria degli artt. 5, d. lgs. n. 368/2001 e 36, d. lgs. n. 165/2001"*, in Riv.it.dir.lav., 2006, II, p.742-764; L.Zappalà, "*Abuse of Fixed-Term Employment Contracts and Sanctions in the Recent ECJ's Jurisprudence"*, Giorn.rel.ind., 2006, p.439-444; G.Franza, "*Lavoro a termine: è ormai completa l'interpretazione della direttiva"*, Mass.giur.lav., 2006, p.752-755; A.M.Perrino, "*Perplessità in tema di contratto di lavoro a termine del pubblico dipendente"*, in Foro it, 2007, IV, Col.75-81; L. De Angelis, "*Il contratto di lavoro a termine nelle pubbliche amministrazioni alla luce della giurisprudenza comunitaria: spunti di riflessione"*, in Foro it., 2007, IV, Col.344-348; V. De Michele, "*Contratto a termine e precariato"*, cit., 173-177; S. Sciarra, "*Il lavoro a tempo determinato nella giurisprudenza della Corte di giustizia europea. Un tassello nella "modernizzazione" del diritto del lavoro"*, report on *Il giudice del lavoro e le fonti comunitarie ed internazionali*, Roma, 17 January 2008, Incontro di studio CSM, p. 12-16

77 Tribunal of Foggia, order 26 October 2016 n.32/2017; see G. Bolego, "*Tecniche di prevenzione e rimedi contro l'abuso…."*, cit.; L.Busico, "*Le conseguenze dell'abuso del contratto di lavoro a tempo determinato da parte delle P.A.:….."*, cit.**;** F. Chietera**, "***L'incerto cammino del precariato non scolastico verso la stabilizzazione"*, cit.; F. Putaturo Donati, **"***Precariato pubblico, effettività delle tutele e nuova questione di legittimità costituzionale"*, cit.; S. Galleano, "*L'ordinanza 26.10.2016 del Tribunale di Foggia alla Corte costituzionale nel settore sanitario: una mossa decisiva per la soluzione del problema del precariato pubblico?"*, on www.europeanrights.eu, 1 November 2016.

exceedance of 36 months of service after the employment through a public selective competition, to ask the application of the sanction of the conversion in contracts of indefinite duration of the successive fixed-term contracts pursuant to art.5(4-bis) of the legislative decree n.368/2001, with the subsequent declaration of constitutional non-legitimacy of the provisions which impede an effective protection of job stability.

b) The EU reference for a preliminary ruling made by Court of Appeal of Trento on the school precarious employment

The Court of Appeal of Trento[78] criticised before the Court of Justice the tens of judgements of the *Cassazione* on the school precariat, stating that the interpretative lines of Supreme Court and art.1(131) and (132) of law n.107/2015, differently from what stated by EU Commission in dismissing the infringement procedure n.2124/2010, are in contrast with the judgements of the Court of Justice and, in particular, with judgement *Mascolo* and the order *Papalia*.

The subjective rights of the teachers of *Comparto AFAM* (sector of the Higher Education in Art, Music and Dance), who became permanent staff after more than 11 years of replacements for vacant and available posts and in the absence of any competition for more than 25 years in the specific sector, to the compensation of the damages suffered for the unlawful precarisation of the employment relationships after the omitted application by the State of the sanctions set forth in the legislative decree n.368/2001, was supported by the written considerations of some trade unions, who signed the *Comparto Scuola* and the *Comparto AFAM*, i.e. CGIL, FLC-CGIL and CGS (ex GILDA-UNAMS), in the case C-494/17, as already happened in *Mascolo* case.

It is necessary to underline, then, that by contesting judgements of the *Cassazione* of 7 November 2016 on the school precarious employment and judgement n.5072/2016 of the Joint Sessions on public employment, the CGS proposed a collective claim n.144/2017 before the EU Committee of Social Rights of the Council of Europe for the violation of the EU Social Charter made by Italy towards all public precarious, in particular referring to the negative consequences of law n.107/2015 for the school, complaining the omitted application of judgement Mascolo by the *Cassazione* Joint Sessions in judgement n.5072/2016. Even the ANIEF trade union submitted an analogous collective complaint before the ECSR n.146/2017, complaining an identical violation by the *Cassazione* as regards the school precarious employees. Both the complaints were declared inadmissible and the Italian Government asked to the ECSR to extend the original deadline of 15 November 2017 for the submission of its written considerations until 8 January 2018.

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78 Court of Appeal of Trento, order 17 July 2017, case C-494/17, *Rossato* vs Ministero dell'Istruzione.

Eventually, some actions have been already brought before the European Court of Human Rights against the Italian Republic, declared admissible and joint to the first action n.22417/17 Billeci. Likewise, an action has been brought on the grounds of violation of the European Convention on Human Rights made by the Supreme Court in denying any effective compensatory protection and the job stability for substitute teachers. This is action n.69611/2017 Tenore and Anief vs the *Cassazione*'s judgements on the school precarious employees nn. 164/2017 (Billeci et al), 24040/2016 (Altobelli), 24273/2016 (Maggi), 27566/2016 (Molinari and Buccarelli), 27564/2016 (Papa), 26171/2016 (Capicci) 75/2017 (Sacco), 27565/2016 (Giammaria) and 9058/2017 (Tenore and Anief).

c) The EU preliminary rulings on the concept of "voluntary" honorary judge

Justices of the peace of L'Aquila[79] and Roma[80] with three orders censored through the EU preliminary reference the judgement of the *Cassazione* Joint Sessions n.13721/2017 which, anticipating the content of the honorary judges reform (legislative decree n.116/2017), excluded that the employment relationship of the justices of the peace shall be deemed to fall within the public employment, pseudo self-employment or even self-employment, stating its nature as "volunteer work", as in the case of volunteer fire department in France of petitions nn.737-13, 966-13, 1047-13, 1071/16 discussed in the public hearing of 22 November 2017 in the Petitions Committee.

In the orders for preliminary references of the justices of the peace it is asked the retribution, judicial and contribution equivalence with the ordinary judges, in applications of directives 2003/88/CE and 1999/70/CE, even under the job stability point of view, raising even the (central) question of the independent and impartial judge who effectively protects the fundamental rights of worker, especially in carrying out judicial functions.

The case of honorary judges represents even a relevant challenge for the national legislator against the EU Parliament, the EU Commission, the Court of Justice and the Council of Europe, after the audition of the petitions submitted by the justices of the peace and already discussed in the hearing of 28 February 2017 before the Petitions Committee.

Moreover, in addition to the absence of effective protection of the honorary judges, it is necessary to note also the Kafkaesque hoax of the incredible case of the public ex-precarious

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79 Justice of the peace of L'Aquila, order 2 August 2017, case C-472/17, *Di Girolamo* vs Ministry of Justice.

80 Justice of the peace of Roma, order 16 October 2017, case C-600/17, *Cipollone* vs Ministry of Justice; Justice of the peace of Roma, order 3 November 2017, case C-626/17, *Rossi ed altri* vs Ministry of Justice, which involved 900 honorary judges (n.658 justices of the peace, n.102 honorary judges of Tribunal e n.140 honorary vice prosecutors) and of the honorary judges trade unions Unagipa, *Associazione nazionale Giudici di pace, Coordinamento magistratura giustizia onoraria, Organismo unitario della magistratura onoraria–magistrati onorari uniti*.

employees of the Italian *Croce Rossa* (Red Cross), employed first as "volunteers" and then under fixed-term employment contracts, which were stabilised pursuant to art.1(518) of the law n.296/2006 and judgement n.6077/2013[81] of the *Cassazione* Joint Sessions to have completed the 36 months of service in the public administration, and then converted under mobility from 1 February 2017 in permanent staff of indefinite duration in service at the chancellery of the Ministry of Justice, i.e. in the same judiciary posts in which the honorary judges work, who are instead considered volunteers even having always acted as servants of the State, just like ordinary judges.

For honorary judges the situation becomes even more absurd and untenable, referring to the fact that *Cassazione* with its judgement n.17101/2017[82] recognised as employee of the Ministry of Justice a community service employee (*lavoratore socialmente utile*, L.S.U.), specifying that, referring to the issue of the employment for community services, the legal qualification of this particular employment, having an educational and assistive nature, does not factually exclude that the employment relationship can have the characteristics of an ordinary employment relationship with the subsequent application of art 2126 c.c. and, for the purposes of the classification as employment relationship towards the public administrations, it reveals that the worker is effectively included in the public organisation and its tasks involve a service falling within the institutional purposed of the Administration.

As regards the qualification of community service employee as employed workers, the *Cassazione* with its judgement n.17101/2017 recalls the principles stated in judgement *Sibilio*[83] of the Court of Justice, in turn recalled from judgement *O'Brien*, at paragraphs 48-51, including the opinion of the referring judge (the Tribunal of Napoli), which is the same of the one expressed in judgement n.17101/2017 of the *Cassazione*, cited in the unique note at paragraph 48.

On the other hand, I Sect. of the Court of Justice – chaired by the Italian Vice President of the Court of Justice Tizzano – agreeing with the conclusions of the Italian Advocate-General Mengozzi[84], with its judgement Fenoll[85] on the preliminary questions raised by the French *Cassation*, specified that the concept of «*subordinate employee*» of art.7 of the directive 2003/88/CE, concerning some aspects of the working time-frame, and art.31(2) of the Charter of the EU Fundamental Rights shall be interpreted in the sense that it can encompass the case of a disabled

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81 *Cassazione*, S.U., judgement 12 March 2013, n.6077.

82 *Cassazione*, S.L., judgement 11 July 2017, n.17101.

83 Court of Justice, judgement 15 March 2012, case C-157/11, *Sibilio vs Comune di Napoli*, EU:C:2012:148.

84 The conclusions of Advocate-General Mengozzi in case Fenoll C-361/13 were lodged on 12 June 2014, EU:C:2014:1753.

85 Court of Justice, judgement 26 Marcg 2015, case C-316/13, *Fenoll*, EU:C:2015:200.

admitted in a "centre of assistance through work" (CAT), notwithstanding the French Law considers the work done at CAT as having merely a social protection and welfare nature.

Moreover, as noted in the order of a reference for a preliminary ruling made by a justice of the peace of Rome in the case C-626/17 Rossi et al. at paragraph 75, for ordinary judges the Constitutional Court with its judgement n.223/2012 stated the application of the same principles of impartiality and independence of the magistracy which, however, have never been applied by the Ministry of Justice towards the honorary judges.

The Constitutional Court, indeed, in deciding issues related to the provisions on retribution and the regulation on the salary adjustments, in particular referring to financial-economic measures that have delayed or in any case regulated its effects, stated, in general, that the independence of the judicial organs is realised even through «*the establishment of guarantees regarding the status of the constituents in its various forms, concerning, among the other things, not only the career progression, but also the economic treatment* » (judgement n. 1 of 1978), and that «*with a mechanism of automatic adjustment of the economic treatment of judges, the law, on the basis of constitutional principles, has sheltered the autonomy and independence of magistracy from any interference which could, even if only theoretically, impair this function, through a contractual dialectic. In this constitutional framework, therefore, the relationship between the State and the magistracy, as an autonomous and independent order, exceeds the characteristics of a mere employment relationship, in which the contracting-employer can be simultaneously a part and a regulator of this relationship*».

In case 472/17 Di Girolamo on the first reference for a preliminary ruling raised by the justice of the peace of L'Aquila on the qualification of the honorary judges' employment relationship as regards the right to an allowance, which was not paid, for the holidays period, the President of the Court of Justice with the order of 28 November 2017, after having already dismissed on 13 September 2017 the request for accelerated proceedings pursuant to art.105(1) of the Court's Rules of Procedure without giving any written reason (but significantly speeding up the ordinary timing of the preliminary ruling procedure, fixing the deadline for the submission of the parties' written considerations on 22 November 2017), thought that the formalisation of the essential parts of the preliminary request of the "voluntary" national judge was necessary.

Then, at paragraph 10 of the order of 28 November 2017 in the case C-472/17 Di Girolamo, the President of the European Court Laenarts underlined that: «*As regards this issue, the referring judge asks to the Court to give answers in order to «reaffirm» the primacy of EU Law and to grant*

an effective protection of the justices of the peace, which annually and quickly solve half of the overall criminal and civil disputes. A fast decision of the case at hand would give back to these workers the conditions of impartiality and independence of the judge previously established by law, pursuant to art. 47 of the Charter. Indeed, these conditions would be extremely impaired by the absolute precarious condition of these workers' employment, notwithstanding their stable and structural involvement in the Italian administration of justice».

Simultaneously, with its judgement King[86] the Court of Justice recognised that a worker who worked on the basis of a «self-employed commission-only contract» (as in the case of Italian honorary judges) shall be identified as a «worker» pursuant to directive 2003/88 and shall benefit of the allowance provided for the paid annual holiday (judgement King, paragraph 13).

11. The EU Commission reacts to the criticism of having favoured the Jobs Act and restores *motu proprio* the objective reasons of legislative decree n.81/2015: the fake news related to the "acausal" fixed-term contracts in the preliminary case Sciotto on the public precarious employees of the opera house foundations

The EU Commission has recently, and unexpectedly, reacted to the Italian petitioners' criticism presented at the hearing of 22 March 2017 of the Petitions Committee of the European Parliament (hearing in which the Commission was represented by a precarious contract agent), in which several petitions on precarious employment were discussed, then become object of the public hearing of 22 November 2017, for the reasons to have unlawfully closed the infringement procedure n.2010/2124 on the school precarious employment and to have hastily dismissed on 2 July 2015 the CGIL's request to start an infringement procedure on the Jobs Act, with the complaint CHAP(2014)2554.

The opportunity was the reference for a preliminary ruling made by the Court of Appeal of Rome[87], which submitted to the Court of Justice a non-admissible preliminary request outlining a national absolute absence of the preventive measures set forth in clause 5(1) of the framework agreement on the fixed-term work for the fixed-term employees of the opera foundations.

The instrumental attempt of the Court of Appeal of Rome is that of protecting the «living law» of the *Cassazione* on the education, on the public precarious employment and on the "acausal" contracts of Poste Italiane and Jobs act and that of guiding towards the (unique) protection of the

86 Court of Justice, judgement 29 November 2017, case C-214/16, King vs The Sash Window Workshop Ltd and Richard Dollar, EU:C:2017:914.

87 Court of Appeal of Rome, order 15 May 2017, case C-331/17, *Sciotto* vs Teatro dell'Opera di Roma.

clause of maximum duration of 36 months of service, which was, by the way, applied in a dispute of a worker who did not claim for the application of the provisions on the succession of contracts (not applicable in the sector of the opera foundations pursuant to art.11(4) legislative decree n.368/2001) and in any case she could not claim for such application since the different fixed-term contracts did not exceed the limit of art.5(4-bis) legislative decree n.368/2001, omitting to specify that the well-established case-law of the *Cassazione*[88], of the Constitutional Court[89], of the Court of Justice in judgement Commission vs Luxembourg (the only formal judgement of non-implementation of directive 1999/70/EC) as regards the show-business sector had established the principle of the application of objective reasons as unique preventive and sanctioning measure for the legitimate setting of the contractual term, even with regard to the first and unique fixed-term contract.

The EU Commission's reaction was unexpected in the written considerations of the case Sciotto C-331/17 compared to the previous administrative practice to legitimate the Jobs Act of d.l. n.34/2014 and of legislative decree n.81/2015 through the dismissal of the complaint for an infringement procedure.

The EU Commission answers at paragraph 56 of the written considerations lodged on 19 September 2017 to the Court of Appeal of Roma, which in the order for a preliminary ruling invoked the authority of "living law" of judgement n.11347/2016 of the Joint Sessions on the "acausal" contracts of Poste Italiane, claiming that the framework agreement, in particular its clause 5, impedes the application of a national provision, as the one applied in the main proceedings, which does not provide for any measure (pursuant to the cited clause) aiming at preventing the abuse of fixed-term contracts.

The EU Commission at paragraphs 7 and 8 of the written considerations of case Sciotto C-331/17 highlights, and its view is shareable[90], that the temporary objective reasons of clause 5(1)(a) of the framework agreement transposed in directive 1999/70/EC even as regards the first and possibly unique fixed-term contract are still, notwithstanding the Jobs Act, the applicable preventive measures in the national legal system, except for the opera foundations (paragraph 9 of the Commission's written considerations) for which art. 1(1) and (2) of the legislative decree

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88 See *Cassazione*, judgements nn.208/2017; 18512/2016; 17064/2015; 10924/2014; 10217/2014; 10124/2014; 10123/2014; 10122/2014; 243/2014; 6547/2014; 5749/2014; 5748/2014; 18263/2013; 11573/2013; 247/2011.

89 Constitutional Court, judgement 11 December 2015, n.260, cit..

90 See on the issue V. De Michele, "*Il d.lgs. n. 81/2015 e la (in)compatibilità con il diritto dell'Unione europea*", in E.Ghera and D.Garofalo (edited by), *Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act*

n.368/2001 is not applicable, as provided by art.3(6) d.l. n.64/2010 (converted into law n.100/2010 with amendments).

In particular, according to EU Commission art.1(1) and (2) of the legislative decree n.368/2001 pursuant to the wording of the regulation applicable to the case at stake (*ante* d.l. n.34/2014) would have substituted by identical provisions, respectively art.1(1) and art.19(4) of the legislative decree n.81/2015, since, according to clause 5(1) of the framework agreement, in relation also to n.7 of the general considerations of the same framework agreement, «*27. .....there is an abuse in the case of successive use of fixed-term contracts not justified by objective reasons. 28. As regards this issue, in the cited judgment Commission vs. Luxembourg on occasional workers in the show-business sector, the Court recalled that the purpose of clause 5(1) of the framework agreement is that of limiting the use of a succession of fixed-term contracts or employment relationship, because this is considered as a potential source of abuse damaging workers, and such purpose is pursued through some "minimum protection" provisions aiming at avoiding the precarisation of employees' relationships …………….. 32. In the cited judgement, the Court found the incompatibility with clause 5 of the framework agreement of the national provision that does not require the employment of fixed-term employees to be justified by specific needs linked to the nature of the job, but that, instead, provides for the general and abstract use of this form of employment, so to allow that some employees can be employment under fixed-term contracts even for jobs that, by their nature, are not temporary.*» (Commission's written considerations case Sciotto C-331/17, paragraphs 27-28 and 32).

Moreover, EU Commission in the written considerations of the case Sciotto C-331/17 at paragraphs 35-38 referred to the necessity of identifying the temporary objective reasons to justify the use of fixed-term contracts, in a way which is perfectly in line with the interpretation of the Constitutional Court in judgment n.260/2015 on the unlawfulness of the provisions which could be considered a barrier for the job stability of the public precarious employees of the opera foundations.

Eventually, the EU Commission in the written considerations of the case Sciotto C-331/17 at paragraphs 46-51, recalling in particular judgements Porras (paragraphs 21, 25, 30-32) and Impact (paragraphs 59-60) of the Court of Justice, stigmatised, as already said by Advocate-General Mengozzi in the very long note 73 of the cited written conclusions of case Regojo Dans criticising order Vino of the Court of Justice, the "horizontal" discrimination «*between the fixed-term employees of the opera house foundations and the workers employed by other employers, who (the*

latter) shall be employed under fixed-term contracts which are justified by objective reasons». An even more serious discrimination is that of the Poste Italiane case, in which, on the basis of judgement n.11347/2017 of the *Cassazione* Joint Sessions, it is possible to discriminate between the workers of Poste Italiane pursuant to art.1(1) of the legislative decree n.368/2001, who have the right to the conversion even for just one fixed-term contract non-justified by objective reasons in a contract of indefinite duration, and those workers employed under the special art.2(1 bis) of the legislative decree n.368/2001, who instead are not entitled to such conversion.

The EU Commission, surprisingly (but the view is shareable), proposes to the national judge to "disapply" the national rule (already applied by the cited judgements of the *Cassazione* for the employees of the opera house foundations) which hinders the protection of workers, stating the direct application of the objective reasons to justify the use of fixed-term contracts and re-establishing, in this way, the relationship rule-exception between, respectively, the contract of indefinite duration and the fixed-term contract. The EU Commission's request, therefore, is that of non-applying the national provisions which are completely in contrast with the application of any preventive and sanctioning measure against the abuse of fixed-term contracts in the quasi-public sector of the opera, in light of the concept of objective reasons adopted in Adeneler judgement of the Court of Justice.

12. The re-opening of the dialogue of the *Cassazione* with the Court of Justice on the effective protection of public precarious employees

The moment of severe departure from the protection of the fundamental rights of the public precarious employees in the recent case-law of the *Cassazione* is going to be overcome to re-establish the traditional active dialogue with the Court of Justice. This is so, even thanks to the new cited references for preliminary rulings.

First, the *Cassazione* with its judgement n.25672/2017[91] recognised the applicability of the protections set forth in directive 1999/70 for the abuse of fixed-term contracts in the case of the Sicilian public precarious employees, employed for several years on the basis of initial assistive projects or as community service workers, correctly applying of the Court of Justice's judgements *in subiecta materia*.

Moreover, the Italian Supreme Court revoked the ordinary practice to assign to the "excerpt" Section (VI Sezione) in the "non-participated" (i.e. without the participation of the attorneys and the

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91 *Cassazione*, S.L., judgement 27 October 2017, n.25672.

parties) Council Chamber the compensation cases and the effective anti-abuse sanction of the school precarious employment, disposing with some interlocutory orders of 21 November 2016[92] the reference of the cases to the public hearing before the Labour Section (IV Section), with the participation of the parties and of the attorneys, for a deepening on the issue in the pending of the preliminary reference made by the Court of Appeal before the Court of Justice in case Rossato C-494/17.

Eventually, the *Cassazione* revoked the identical practice to assign to the VI Section in the "non-participated" Chamber of Council the cases on the effective anti-abuse sanction of the public precarious employees, establishing the public hearing of 8 November 2017 (judgement n.4790/2014 R.G. Cass.) and the new discussion on the case of healthcare precarious employment analogous to the one decided for the only compensatory protection provided by judgement n.5072/2016 of the Joint Sessions.

The Supreme Court demonstrated also in this case the readiness for a deepening of the issue and for a possible new preliminary reference before the Court of Justice on the application of clause 4 of the framework agreement on fixed-term work, in the comparison of the employment conditions between comparable employees of indefinite duration (ex fixed-term employees become permanent with the stabilisation measure to remedy the abusive use of fixed-term contracts for more than 36 months) and the public fixed-term employees who are in the same identical situation of contractual abuse (i.e. they have completed more than 36 months of service).

13. The conclusions of Advocate-General Szpunar in the case Santoro and judgement Andrés and López of the Court of Justice on the categories of fixed-term employees comparable for the purspose of public precarious employees' stabilisation

The conclusions of the Advocate-General Szpunar of 26 October 2017 in case Santoro C-494/16 make the Supreme Court to think about the equivalent and effective sanction for the cases of abuses of fixed-term contracts in the public sector.

Advocate-General Szpunar in the written conclusions of case C-494/16 states that, in contrast with what underlined by the Tribunal of Trapani in the order for a preliminary ruling, the comparison for the purpose of applying the principle of equality of the measures to adopt in cases of abuse of fixed-term contracts cannot be done towards the fixed-term employees in the private sector, for whom, in line with the principle of autonomy of the national legal system, it is provided

92 *Cassazione*, Sez. VI L, orders 21 November 2017 nn.27615-6-7-8.

a sanctioning regime which prescribes the conversion in contracts of indefinite duration, except for the contracts of the public sector.

According to Advocate-General Szpunar the sanctioning equality shall refer to similar situations regarding the same public employees' category, even if Advocate-General Szpunar states that «*the search for similar situations shall not be limited to situations regarding the same category of public employees*.».

Advocate-General Szpunar in the introduction at paragraphs 1-2 stated that the order of the Tribunal of Trapani belongs to a series of references made by Italian judges, dealing with the issue of the compatibility of the prohibition, for the public sector, of the conversion of fixed-term contracts into one contract of indefinite duration in the case of abuse of fixed-term contracts, citing in note 3 the Court of Justice's judgements Marrosu and Sardino (EU:C:2006:517, recalled in the referring order), Vassallo (EU:C:2006:518); Fiamingo *et al* (EU:C:2014:2044, paragraphs 62-64), Mascolo *et al* (EU:C:2014:2401), order Affatato (EU:C:2010:574). This last order, then, indirectly cited the presidential order of 16 March 2010 (EU:C:2010:144) dismissing the request for an expedited procedure brought by the Tribunal of Rossano in the Affatato case C-3/10.

Yet, according to the Polish Advocate-General, in contrast with the previous "Italian" preliminary rulings, the referring judge, in the case, analyses which measures shall be adopted to sanction the abuse of fixed-term contracts, underlining that the Court will so expand its case-law related to directive 1999/70 and the framework agreement. Actually, the clarification appears to be "curious", paradoxical, since even in the cases of judgements Marrosu-Sardino, Vassallo, Mascolo (paragraph 55; paragraphs 59-61), and of order Affatato and Papalia (EU:C:2013:873, cited by Advocate-General Szpunar at paragraph 56 on the loss of opportunity) the central controversial issue was always which type of national measures should be adopted in order to sanction the abuse of fixed-term contracts in the public sector.

There is a sort of "institutional" sarcasm in Advocate-General Szpunar's invitation for the Court of Justice to deal with this case as something new, addressed, it seems, to the internal use and that seems to be the consequence of the oral discussion of the hearing of 13 July 2017, in which the Advocate[93] raised before the Court the issue of the conditionality as a solution to the problem of the effective protection of public precarious employees, on the basis of the conclusion of judgements Marrosu-Sardino and Vassallo which stated the EU "conditional" compatibility of the national

93 See Michele De Luca, "*Privato e pubblico nei rapporti di lavoro privatizzati"*, in *Atti del Convegno nazionale del Centro studi "D. Napoletano"* of 9 – 10 March 2007 at Unical di Arcavacata di Rende, Lav.prev.oggi, suppl. n.6, 2008, 261.

measure of compensation of damages set forth in art.36(5) (previously comma 2) legislative decree n.165/2001, compared to the standard of equality and effectiveness which the national judge should have respected.

Substantially, if the living-law interpretation of the *Cassazione* Joint Sessions in judgement n.5072/2016 did not respect, according to the Court's opinion, to the standards of equality and effectiveness required by judgement Marrosu-Sardino, the sentence of incompatibility with directive 1999/70/EC of the compensatory measure of art. 36(5) legislative decree n.165/2001 of order Papalia would be confirmed and, therefore, the Court of Justice should assert the primacy of EU Law over the national law which does not have any effective measure, applying therefore to the fixed-term public employees, in case of contractual abuse and in particular of succession of fixed-term contracts, the same type of protection prescribed for the workers of the private sector.

Similar thoughts echo the idea of note 11 of paragraph 35 of the written conclusions of the Advocate-General and it gives the interpretative key of the statement of paragraph 35, in which Szpunar finds that the Court of Justice has already declared that clause 5 of the framework agreement does not impede, theoretically, the fact that the abuse of successive fixed-term contracts is punished with variable sanctions depending on the working sector or the category of the employee concerned, as long as the relevant national legal system provides, for that sector of category of employee, an equivalent and effective measure in order to avoid and sanction the abuses.

As a matter of fact, note 11 of the written conclusions of the Advocate-General recalls paragraphs 40, 41 and 48 of judgement Andrés and López (EU:C:2016:680) of the Court of Justice.

In judgement Andrés and López, the Court of Justice uses as *tertium comparationis* for the sanctioning "equalisation" (= working reinstatement) able to identify an equivalent and effective measure to punish the abuse of public "occasional" fixed-term contracts, the category of the non-permanent workers for an indefinite duration employed in the private sector, which in the order León Medialdea the Court re-qualified in fixed-term contracts of the "private/public" sector to equalise, as regards the employment conditions, either to permanent contracts of indefinite duration of the private sector or public permanent contracts.

Therefore, exactly in line with that happened in case Russo C-63/13 of the teacher who exceeded 36 months of service and who so requested the established of a stable employment relationship (Mascolo judgement, paragraph 55), the Court of Justice highlighted that the Supreme Tribunal of the Basque Country, being the referring judge, thinks that there is indeed an effective

measure against the abuse of a succession of fixed-term contracts for the workers subject to the labour ordinary law, since the case-law of the Supreme Court enshrined the concept of «non-permanent employee of indefinite duration», determining all the follow-up consequences for the national law and, in particular, the right for the employee to the retention of the post (paragraph 46).

The Court of Justice in judgement Andrés and López, so, concludes that, if the referring judge should find the non-existence in the Spanish legal system of any other effective measure to avoid and sanction the abuses towards public employees, this would impair the purpose and the *effet utile* of the framework agreement (paragraph 49), so determining a failure in implementing directive 1999/70.

In this case, the duty to adopt all the general or particular provisions aiming to grant the fulfillment of the duty of loyal cooperation is upon all the organs of the EU Member States, so also for the judicial ones, on the basis of their competences (paragraph 50), and therefore it is up to the judicial authorities of the Member State concerned to grant the fulfilment of clause 5(1) of the framework agreement, ensuring that the employees employed under an abusive succession of fixed-term contracts are not discouraged from claiming before the national authorities their rights provided in national legal system in implementing the preventive measures of clause 5(1) of the framework agreement, hoping to keep on working in the public sector (paragraph 51, recalling paragraph 165 of judgement Angelidaki).

In particular, according to the EU Court, the national judge shall ascertain that all the fixed-term employees, employed pursuant to clause 3(1) of the framework agreement, can claim the application towards their employers of the sanctions provided by the national provisions in cases of abuse of successive contracts, i.e. regardless of the qualification of their contract according to the national law (paragraph 52, recalling paragraph 166 of Angelidaki judgement).

Therefore, according to the Court of Justice, since in the main proceedings there is not any other equivalent and effective protection measure towards the employees, the equalisation between the fixed-term employees and the non-permanent workers employed for an indefinite duration, pursuant to the national case-law, can be a measure suitable to sanction the abuse of fixed-term contracts and to delete the consequences of the violation of the provisions of the framework agreement.

On the issue of the equalisation between public and private employment, judgement Angelidaki was already clear in stating at paragraph 170 that where the national legal system of the Member State concerned (Greece) does not entail, during the considered period, other effective

measures, for instance because the sanctions provided in art. 7 of the cited decree are not applicable *ratione temporis*, the conversion of the fixed-term contracts in contracts of indefinite duration pursuant to art. 8(3) l. 2112/1920 could be an appropriate measure.

The Court of Justice in order Papalia and then in judgement Mascolo as regards the Italian cases and now in judgement Andrés and López as regards Spanish public precarious employment seems to have overcome the distinction as regards the sanctioning system between public and private employers, blurring the differences between these two sectors and, as added in judgement Andrés and López, between the categories (of fixed-term contracts), on the basis of the fact that the regulatory difference of fixed-term contracts cannot be justifies where in the sector or category differently regulated an equivalent anti-abusive sanctioning system is missing, i.e. in the case of a failure to implement directive 1999/70.

Referring all these considerations into the Italian legal system, the national case-law has already recognised the right to the conversion of the public fixed-term contracts into contracts of indefinite duration in cases of abuse of the flexible contract towards:

• the university assistants, now assistants and native language experts, employed on the basis of a contract formally qualified as private, pursuant to the application of l. n.230/1962, except for the late and autarchic change of heart of the Joint Sessions in judgement n.21972/2017 in the case Delay;

• the INAIL usher, employed pursuant to art.16 of law n.56/1987, even if under a contract formally qualified private (but with public contribution *ex* Inpdap), stabilised after judgement n.9555/2010 of the *Cassazione*;

• precarious employees of the public commercial institutions (*Enti pubblici economici*), employed pursuant to the legislative decree n.368/2001, even if formally qualified private and with Inps contribution, with the application of the sanctions prescribed by the private provisions according to what stated by the *Cassazione* Joint Sessions in judgement n.4685/2015 (paragraph 14);

• precarious employees of the opera house foundations being public commercial institutions, employed pursuant to the legislative decree n.368/2001, under provisions both formally and as regards contributions similar to the ones of the “privatised” public employment, for whom art. 3(5) d.l. n.64/2010 (converted with amendments into law n.100/2010) prescribes as regards the employment for an indefinite duration the establishment of procedural competitions, and for whom, as stated even in n.260/2015 of the Constitutional Court and in the well-established case-law of the *Cassazione* (see for instance Cass. n. 208/2017), the temporary objective reasons required since the

very first (and possibly unique) fixed-term contract, applying clause 5(1)(a) of the framework agreement, are the unique preventive measure provided by the national legal system;

• fixed-term non-managing employees being in service for at least 36 months at the public administrations, who have successfully undertaken selective or competitive procedures prescribed by law, pursuant to art. 1(519) of the law n.296/2006 (see judgement of the Joint Sessions n.6077/2013 as regards the employees of the Red Cross);

• fixed-term non-managing employees being in service for at least 36 months at the independent authorities (*Autorità Indipendenti*), employed without any public competition and stabilised without competitive or selective procedures, as provided by art.75(2) d.l. n.112/2008 (see judgement *Valenza* of the Court of Justice, EU:C:2012:646, paragraphs 13, 14 and 16);

• tens of thousands of teachers, in the local public school rankings, become permanent staff since 1 September 2015, pursuant to art.1(95) and seqq. of law n.107/2015, without any service title in the school public administrations and just for the fact of being assigned to a permanent and until exhaustion selective ranking, with the possibility of entering the ranking until 2007 even without passing any competitive procedure pursuant to art.399(1) legislative decree n.297/1994 (i.e. with the qualifying title of the "specialisation teaching schools", see *Mascolo* judgement, paragraph 89), and therefore on the basis of mere "automatisms" with the sliding of the G.A.E. rankings (see Constitutional Court, judgement n.187/2016, paragraph 8.1);

• officials employed for an indefinite duration under the labour level C/3 carrying out managerial services at the penal administrations, for whom art. 4 of law 154/2005 granted the manager stabilisation without any competition;

• fixed-term principal teachers, for whom art. 1(87) of law n.107/2015 granted the job stabilisation without any competition;

• the provincial and municipal fixed-term secretaries, for whom art. 11 of law n.124/2015 granted the stabilisation as local administrations' managers without any competition;

• the *Quirinale*'s fixed-term employees, being in service for at least 36 months, for whom decree n.26/N of April 2016 of the President of the Republic granted the job stabilisation.

14. Conclusion: the mission [im]possible of European Parliament on the effective protection of public (and private) precarious employees

Waiting for Italy and Spain, i.e. the Member States that saw more the "caused" public employment precarisation on the basis of structural deficiencies of the staff of public

administrations, to find in their national case-law the instruments suitable to solve the complex issue using all the indications and the interpretations of the Court of Justice, it is necessary to focus on the action of the EU Parliament on the real responsible of this incredible situation of social and economic discomfort which covers the situation of thousands of European citizens who stably work under public employers.

The actions of the EU Commission are not justifiable and extremely serious, since they represent a blatant violation of the Treaties and of the principle of sincere cooperation of the Court of Justice and the Parliament, violating its institutional role to guarantee the right application of the EU law by Member States, in particular as regards directive 1999/70/EC, which has been deleted from the Commission's agenda as applicable legislation in some Member States as Italy, Spain, France, Portugal, with regard to the anti-abuse prevention measures in the succession of contracts, particularly but not exclusively in the public sector.

Luxembourg, i.e. the Member State which has implemented better than anyone directive 1999/70/EC, has been harshly punished for somebody else (i.e. in lieu of Italy), because with judgement of 26 February 2015, three months after Mascolo judgement, the Court of Justice has verified the non-compliance of Luxembourg with directive 1999/70/EC as regards the occasional workers of the show business, highlighting the absence of the preventive measure of temporary objective reasons.

The Commission has applied neither to Italy nor to other States in a similar situation the principles stated in Mascolo and Commission v. Luxembourg judgements, principles which has been reaffirmed by the Court of Justice as regards the public precarious employment with its order León Medialdea of 11 December 2014 in case C-86/14 (Spain), with its order Popescu of 21 September 2016 in case C-614/15 (Romania), and with even three judgments of 14 September 2016 in the Spanish cases de Diego Porras (C-596/14), Martínez Andrés and Castrejana López (C-184/15 and C-195/15) and Pérez López (C-16/15).

In those decisions the Court has stated the right – denied by Commission – to the substantial and formal equality of sanctions and effective protections between the private and public sector, with an extensive application of clause 4 of the framework agreement even to the working conditions in case of wrongful termination of fixed-term employment because of the absence of objective reasons and/or of fraudulent reiteration of the contract, compared to the unlawful termination of the comparable contracts of indefinite duration.

The Court of Justice, therefore, has acknowledged the relevance of the sanction of stabilisation or of the conversion in contracts of indefinite duration of successive fixed-term contracts in the Italian and Spanish public sector, not only on the basis of clause 5 of the framework agreement on the preventive measures even regarding paragraph 2 related to the reclassification in indefinite duration (judgment Mascolo, paragraph 55), but also clause 4 of the framework agreement (see in particular, judgement Martínez Andrés and Castrejana López, conclusions).

The Commission has ignored the established case-law of the Court of Justice and, thus, made ineffective the primacy of EU over national law, provided by Declaration n.17 annexed to the Treaties, according to which « *in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.*».

The Commission has incredibly closed the infringement procedure n.2010-2124 on the precarious employment in public schools, which was started after the question of the European parliamentary Rita Borsellino of 16 April 2010 n.E-2354/10, when the Commission has verified that it was not true that the Italian Government had applied the sanction of conversion in contract of indefinite duration of the successive contracts concluded with the administrative, technical or auxiliary staff (ATA) in posts for more than 36 months, pursuant to art.5 (4-bis) of the legislative decree n.368/2001.

Notwithstanding the fact that the Court of Justice in judgement Mascolo has found that the application of the sanction of art.5 (4-bis) of the legislative decree n.368/2001 towards the school staff is prevented by two provisions adopted in 2009 and in 2011 (paragraphs 16, 20, 28 and 84) which impede the effective protection of the job security after 36 months, a sanction that instead shall be applied to public precarious employees other than the school staff in order not to violate the principle of sincere cooperation (paragraphs 55 and 59-61), the Commission closed the infringement procedure n.2010-2124 even for ATA staff. The ATA staff is excluded from the plan of permanent appointments set forth in l. n.107/2015, which is limited only to teachers in the rankings for the permanent appointments in the public school even those who have not done any day of service, but is not applicable for the ATA staff that operated for more than 36 months, for this the Constitutional Court has asserted in its judgement n.187/2016 that there is still a non-fulfilment of directive 1999/70/EC.

As said, judgement Mascolo said at paragraph 55 that public precarious staff other than the one of public schools, as in several Italian petitions discussed in the public hearing of 22 November

2017 of Petitions Committee of the Parliament, shall be employed under a contract of indefinite duration after 36 months of services by the public administrations, otherwise they would violate the TEU (art.4).

In response, however, the Italian Government has repealed, with its legislative decree 81/2015, the previous legislative decree n.368/2001, i.e. the national legislative act implementing directive 1999/70/EC and, therefore, to repeal art.5(4-bis) and to reintroduce (art.29(4) legislative decree n.81/2015) from 25 June 2015 the rule regarding the prohibition of the contract conversion in the public sector (art.36(5) legislative decree n.165/2001), declared in contrast with directive 1999/70/EC through order Papalia of 12 December 2013 (causa C-50/13), which regarded the case of the *maestro* of the band of *Comune di Aosta*, who remained a precarious employee for 30 years. Consequently, the Court of Justice in judgement Mascolo found that art.36(5) of the legislative decree n.165/2001 was no more applicable towards public precarious employees (paragraph 114).

The late redemption of the EU Commission, in the written considerations of the case Sciotto C-331/17, as regards the issue of the continuance in effects of the objective reasons of the legislative decree n.368/2001 even in the Jobs Act new regulation of the fixed-term contracts (and of the fixed-term supply contracts), will unavoidably determine an extremely severe discomfort for the national judges and the public and private employers, convinced that the fake news of the Italian Government on the ontological "acausal" nature of the new flexible working relationships after the d.l. n.34/2014, increasing the dispute that, since the apparent absence of any effective anti-abuse protection of legislative decree n.81/2015, seemed to be in a period of definitive and irreversible reduction.

The Commission lied to EU Parliament and to Italian citizens when, to legitimate the national increase of precarious employment of its contract agents, in the answer received on 27 January 2016 by the Petitions Committee, it asserted that the law n. 107/2015 «*limits the duration of fixed-term contracts for the teachers and ATA staff to a maximum of 36 months, even in the case in which these contracts are not successive. Eventually, the reform provides for a compensation for damages caused by the repetition of fixed-term contracts for a total duration of more than thirty-six months, even if not successive, for all the staff of public education*».

This is not true because art.1(131) of l. n.107/2015 prescribes only a limit of maximum of 3 annual replacements (which covers until 31 August the whole school year), allowing therefore the school administration to use limitless, as it did in the past, the so-called substitutions "*su organico di fatto" (*i.e. of the effectively needed number of teachers, they covers just until 30 June), that Letta

Government made a juridical and formal commitment to eliminate since replacements not justified by any objective reasons, limiting the fixed-term contracts in all the public sector to those concluded for exceptional or temporary replacement reasons (judgement Mascolo, paragraphs 92 e 93).

Commission lied since art.1(132) of the l. n.107/2015 provides for the compensation for damages caused by the abusive conclusion of fixed-term contracts, without indicating the criteria to calculate damages, just in favour of those who made more than 3 annual replacements, i.e. those who have accumulated at least 4 annual replacements. Therefore, the teachers or the ATA staff may have completed 10, 20 or 30 years of service in the public school, but still they would not be entitled to any compensation, not having accumulated, on the basis of a discretional choice of the Italian legislation, at least 4 annual replacements until 31 August.

As said above, the *Cassazione*, with several identical judgements made from 7 November 2016 (see for instance, judgement n.22552/2016), stated that the right to compensation for the damages suffered by teachers and ATA staff arises just when they have accumulated 4 annual replacements and not when they have completed the 36 years of service of art.5(4-bis) of the legislative decree n.368/2001 and, in any case, if the teaching or ATA staff has been employed as permanent staff pending the judgement it is not even entitled to such compensation, with the dismissal of the action and the restitution of the monthly salaries decided by the courts of appeal.

The responsible for these apodictic judgements made by *Cassazione*, contested by the Trento Court of Appeal in the pending preliminary ruling (case Rossato C-494/17), in contrast with judgement Mascolo of the Court of Justice and with judgement n.187/2016 of the Constitutional Court, is however the Commission, which has closed without reasons the infringement procedure n.2010-2124, notwithstanding the fact that a lot of teachers who have completed more than 36 months of service (more than 30.000) and the whole ATA staff have been excluded from the plan of permanent appointments of the l. n.107/2015.

The Commission endorsed and provoked with its complicit passiveness and its false communications to the Petitions Committee the refusal of the *Cassazione* in 2016 and in 2017 to apply the judgements of the Court of Justice on the effective protection of the public precarious employees, also of honorary judges, even asserting the compatibility with the EU legislation of the employment of directors through fixed-term contract without any reason, as resulting from the dismissal of petition n.0167/2016 with the answer of the Commission of 28 October 2016. The *Cassazione* with its judgement n.17070/2017 has erroneously recognised to the Petitions Committee

of the EU Parliament the responsibility for the false communications and for the wrong interpretation of the European case-law, which is attributable, instead, to the EU Commission, in order to deny the effective protection granted by the correct application of the anti-abuse and anti-discrimination measures provided by directive 1999/70/EC, in contrast with what instead stated by the previous judgement n.5516/2015 of the same Supreme Court.

Moreover, the same EU Commission underlined at paragraphs 30-34 of the of the written observations of case C-494/16 Santoro that, first, the *tertium comparationis* of the sanctioning anti-abuse protection shall be granted to analogous situations of the public precarious employees and not of private employees, highlighting that «*the principle of equivalence of the compensatory remedies indicated in judgement of the Joint Sessions n. 5072/2016 shall not be determined in light of what provided by the Italian law as regards the remedies available for employees damaged by an abusive use of fixed-term contracts by a private employer, but rather in light of what provided by the Italian law for analogous situation, regarding the same category of public administration employees.*» (paragraph 32).

The same was held by Advocate-General Szpunar in the written conclusions submitted on the 26 October 2017 in the case C-494/16 Santoro at paragraphs 30-38, 40, 42 and 46, but, as said, notwithstanding the pressures of the Court of Justice at the hearing of 13 July 2017 in the same preliminary ruling, the Commission has not yet formally notified to the Italian State the a infringement procedure n.2014-4231.

Therefore, the EU Commission is still "waiting for Godot" (i.e., in this case, judgement of the Court of Justice in the Santoro case C-494/16), before starting the infringement procedure n.2014-4231 for the failure of the Italian State to implement and apply directive 1999/70 for the whole public employment, even if it is perfectly aware of the national situation in which tens of thousands public precarious employees have been stabilised after having completed more than 36 months of service and they could be used as *tertium comparationis* and comparable employees of indefinite duration, in order to apply to the public fixed-term employees in case of abusive use of fixed-term contracts of the same sanction of working stability recognised to the former, with regard to the clause 4 of the framework agreement.

This situation, for which the Commission is totally responsible, can legitimate tens of thousands other public precarious employees (from Italy, Spain, France *etc*) in the same conditions to directly act before the Court of Justice and against the EU for the compensation for damages suffered since the unlawful actions made by the agents of the Commission and the precarious

employment status caused by the Commission, on grounds of non-contractual liability ex Art. 340 TFEU, having all the conditions been satisfied in light of the new case-law established by the EU General Court[94].

In order to avoid all these negative consequences and the disintegration of the systems of national protection of fundamental rights (particularly in Italy, where, as underlined, the situation is critical, as demonstrated by the high number of petitions), the European Parliament could even ask for a judicial review ex art.263 TFUE on the basis of the intentionally omitted activation by the EU Commission of the infringement procedures against all the Member States that have partially or totally failed to implement directive 1999/70, because it wanted to cover its organisational need for precarious contract agents.

Surely the Petitions Committee of the Parliament could encourage the EU Commission, as the Court of Justice successfully did in the hearing of 7 May 2014 in case Fiamingo *et al* C-362/13 in the person of Ms Toader, Judge of III Section of the European Court, to bring in few days, not against Luxembourg but against the Italian State, an action for the failure to implement directive 1999/70/EC as regards all the national situations of the public employment in which all the prevention and sanctioning measures of clause 5 of the framework agreement on fixed-term work have been omitted, in particular towards honorary judges (case C-472/17 Di Girolamo, C-600/17 Cipollone, C-626/17 Rossi), of the school precarious employees and the other public precarious employees (C-494/16 Santoro) and of the AFAM *Conservatoires* (C-494/17 Rossato), of the opera house foundations (C-331/17 Sciotto), without waiting for the judgements of the Court of Justice *in subiecta materia*.

In conclusion, in any event, the proposal made by the EU Commission to modify directly 1999/70 shall be harshly rejected by the European legislator: before thinking to modify one of the most important social directives, it is necessary to effectively implement it, avoiding to hinder its right implementation by all a Member States.

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94 EU General Court, judgement 8 November 2017, case T-42/16, De Nicola vs Consiglio Ue and Court of Justice Ue, EU:T:2017:791, paragraphs 39-43.