ORDER NO. 207 YEAR 2013

In this case the Court considered a reference from two district courts concerning employment legislation which permitted various classes of supply teachers to be appointed under successive fixed-term contracts, without setting a limit on the total duration of such appointments or the number of renewals, and with no provision for the payment of damages in the event of their abuse. The Court held that the question as to whether the organisational requirements of the Italian school system constituted objective reasons within the meaning of Directive 1999/70/EC fell to be resolved by the ECJ, along with the question as to whether the fact that certain time limits had not been stipulated for the holding of competitive examinations for permanent appointments was compatible with clause 5(1) of the framework agreement. It accordingly sought a preliminary ruling from the ECJ and stayed proceedings pending receipt of that ruling.

ITALIAN REPUBLIC

IN THE NAME OF THE ITALIAN PEOPLE

THE CONSTITUTIONAL COURT

composed of: President: Franco GALLO; Judges: Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI, Giorgio LATTANZI, Aldo CAROSI, Marta CARTABIA, Sergio MATTARELLA, Mario Rosario MORELLI, Giancarlo CORAGGIO,

gives the following

ORDER

in proceedings concerning the constitutionality of Article 4(1) and (11) of Law no. 124 of 3 May 1999 (Urgent provisions on school staff) initiated by the *Tribunale di Roma* by two referral orders of 2 May 2012 and by the *Tribunale di Lamezia Terme* by two referral orders of 30 May 2012, registered respectively as nos. 143, 144, 248 and 249 in the Register of Orders 2012 and published in the Official Journal of the Republic nos. 4, 11, 21, 27, 33 and 44, first special series 2012.

Considering the intervention by the President of the Council of Ministers;

having heard the judge rapporteur Sergio Mattarella at the public hearing of 27 March 2013;

having heard the *Avvocato dello Stato* [State Counsel] Gabriella D'Avanzo for the President of the Council of Ministers.

Whereas Articles 11 and 117(1) of the Italian Constitution provide respectively that "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations"; and that "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations"; and thus a suspected incompatibility between national law and Community law involves a question of constitutionality with respect to the principles laid down by Article 11 and Article 117(1) of the Constitution, as supplemented and implemented by the relevant Community law.

Considering that

during the course of disputes initiated against the Ministry of Education, Universities and Research by second-level secondary school teachers and non-teaching staff, the *Tribunale di Roma* and the *Tribunale di Lamezia Terme* (employment division) raised a question concerning the constitutionality of Article 4(1) and (11) of Law no. 124 of 3 May 1999 (Urgent provisions on school staff), with reference to Article 117(1) of the Constitution and Clause 5(1) of the framework agreement concluded by ETUC, UNICE and CEEP on fixed-term work, annexed to Council Directive no. 1999/70/EC of 28 June 1999 (Council Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP);

the referring courts state that the claimants, who worked as teachers or administrative staff in schools under the terms of numerous successive fixed-term contracts, initiated proceedings seeking a ruling that the clauses imposing a term were unlawful and consequently ordering the administration to convert their employment contracts into permanent contracts, or to pay damages;

under the terms of certain recently enacted legislation – including Article 1(1) of Decree-Law no. 134 of 25 September 2009 (Urgent provisions to guarantee the continuity of the teaching and educational service for the year 2009-2010), converted with amendments into Article 1(1) of Law no. 167 of 24 November 2009, and Article 9 of Decree-Law no. 70 of 13 May 2011 (European semester – initial urgent provisions on

the economy), converted with amendments into Law no. 106 of 12 July 2011 – contracts concluded with a fixed term with teachers in order to cover annual supply teaching may only be converted into permanent contracts following the granting of tenure to the teachers, as is provided moreover under the general legislation applicable to public sector employment;

under Italian law, Legislative Decree no. 368 of 6 September 2001 (Implementation of Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP), which lays down the law governing fixed-term contracts, seeks to prevent the abuse of such contracts by setting at thirty six months the maximum period during which a worker may be employed under successive fixed-term contracts;

the said legislation must be deemed to be applicable also to the public administrations, without however providing – in such cases – for the conversion of contracts, but only a right to damages;

however the recruitment of school staff is not subject to these provisions, as it is regulated by a system of rules under which the school authorities are permitted, and indeed are required, to hire any given worker under fixed-term contracts from one year to the next, which may also be repeated over time, in order to fill vacant positions;

according to the *Tribunale di Roma* and the *Tribunale di Lamezia Terme*, this provision is not compatible with EU law since the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP on 28 June 1999 stipulates that the Member States shall be required to introduce into national law provisions necessary to prevent and to punish the abuse arising from the use of successive fixed-term contracts;

with regard to the school sector, Italian law does not stipulate a maximum duration for fixed-term contracts of employment, nor does it indicate the maximum number of permitted renewals;

pursuant to Article 4 of Law no. 124 of 1999, various forms of fixed-term contract may be concluded between the administration and teachers: annual supply teaching appointments to the "de iure" workforce relating to positions which are available and vacant, that is which are unfilled, expiring at the end of the school year (31 August); temporary supply teaching appointments to the "de facto" workforce, relating to positions which are not vacant but which are nonetheless available, expiring at the end

of the teaching period (30 June); and finally temporary supply teaching appointments, i.e. short term appointments, in residual situations which expire when the requirements in respect of which they were ordered no longer obtain;

according to the referral orders to this Court, the only reason which can support this system consists in the need to save public resources, an objective which, as important as it may be, cannot constitute that "social policy goal" the pursuit of which – according to the caw law of the Court of Justice of the European Union (hereafter also the Court of Justice) – justifies the use of successive fixed-term contracts of employment;

concluding that there cannot be any interpretative doubts concerning the relevant Community legislation in the present case that are such as to require a preliminary reference to the Court of Justice, the *Tribunale di Roma* and the *Tribunale di Lamezia Terme* hold that this legislation is certainly in contrast with the contested national legislation;

the contrast identified cannot be resolved by the ordinary court by setting aside the national legislation deemed to be incompatible with Community law; in order to do so, it would be necessary for the beneficial provision of the Directive to be directly effective, and hence unconditional and sufficiently precise, whilst in the present case the Court of Justice has held that clause 5(1) of the aforementioned framework agreement is neither unconditional nor sufficiently precise to be relied on by an individual before a national court (see the judgment of 15 April 2008, in Case C-268/06 [2008] ECR I-2483, *Impact*, and the judgment of 23 April 2009 in Joined Cases C-378/07 to C-380/07 [2009] ECR I-3071, *Angelidaki*);

according to the referring courts, it is also not possible to interpret the contested provision in a manner compatible with constitutional law, with the result that they have no other option than to raise a question concerning the constitutionality of the provision due to the violation of Article 117(1) of the Constitution, supplemented by the beneficial provision of the Directive;

the *Tribunale di Roma* and the *Tribunale di Lamezia Terme* accordingly raised a question of constitutionality before this court due to the violation of Article 117(1) of the Constitution, supplemented by the relevant Community law, in relation to the contested provision "insofar as it permits teaching positions and teaching appointments which are effectively vacant and available before 31 December and which are expected

to remain such for the entire school year to be covered by the appointment of annual supply teachers, pending the completion of competitive examination procedures to appoint tenured teaching staff, thereby resulting in a potentially unlimited succession of fixed-term contracts, which is moreover exempt from the requirement to state objective reasons and/or to stipulate a maximum duration or a limit on the number of renewals";

the President of the Council of Ministers intervened in all proceedings, represented by the State Counsel, asking that the question be ruled inadmissible or groundless;

according to the State Counsel, the argument contained in the referral order that the hiring of school staff under fixed-term contracts is due solely to economic reasons is groundless;

on the contrary, according to the State Counsel, the recruitment of such staff is based on an undisputed important goal – that of guaranteeing the right to education – with the result that the hiring of staff under permanent contracts for the full number of positions in the "de iure" workforce would not be a practicable hypothesis, as it cannot be known with certainty whether the school population will remain at the same levels in future;

such an eventuality would also violate Article 97 of the Constitution (which lays down, *inter alia*, the principle of the proper conduct and impartiality of the public administration), as it may give rise to an indiscriminate increase in staffing levels, which would be even more serious during a time such as the present in which there are irrefutable and serious requirements to save public money; this is especially so since clause 5 itself, referred to above, grants the Member States broad freedom of action in choosing the instruments intended to prevent the abuse of fixed-term contracts.

Whereas

as regards this Court's jurisdiction to assess the compatibility of national legislation with EU law, it must be recalled that, according to the principles laid down in the judgment of the Court of Justice of 9 March 1978 in Case C-106/77 [1978] ECR 629 (*Simmenthal*), and the subsequent case law of this Court, specifically judgment no. 170 of 1984 (*Granital*), in cases involving a provision of EU law with direct effect, it is for the ordinary national court to assess the compatibility with Community law of the contested national legislation by making – if appropriate – a preliminary reference to the Court of Justice, and in the event that they are incompatible to rule itself that the

provision of Community law should apply in place of the national provision; on the other hand, in cases involving a contrast with a provision of Community law without direct effect – a contrast ascertained as the case may be by reference to the Court of Justice – where it is impossible to resolve the contrast through interpretation, the ordinary court must refer a question of constitutionality to the Constitutional Court, whereupon it will then be for this Court to assess whether there is a contrast which cannot be resolved through interpretation and, as the case may be, to annul the law that is incompatible with Community law (to the same effect, see judgments no. 284 of 2007, no. 28 and no. 227 of 2010 and no. 75 of 2012);

the Court of Justice has held that clause 5(1) of the framework agreement lacks direct effect (see the judgment of 15 April 2008 in Case C-268/06 [2008] ECR I-2483, *Impact*, paragraphs 71, 78 and 79, and the judgment of 23 April 2009, in Joined Cases C-378/07 to C-380/07 [2009] ECR I-3071, *Angelidaki*, paragraph 196), as it is *inter alia* necessary to assess the existence of any "objective reasons" within the meaning of the Directive which may justify a departure by national law from the principles laid down in it;

it is not possible to resolve the question through interpretation, as was correctly stated by the referring courts, which could not in fact thereby overcome the asserted contrast between national law and the Directive;

in fact, according to clause 5(1) of the framework agreement concluded by ETUC, UNICE and CEEP on fixed-term work annexed to Council Directive no. 1999/70/EC of 28 June 1999 (Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP), to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, the Member States are required – where there are no equivalent legal measures to prevent abuse – to introduce one or more measures of implementation unless there are objective reasons which justify the renewal of such contracts, or to establish rules specifying the maximum overall duration of successive fixed-term employment contracts or relationships or the number of renewals of such contracts or relationships;

the Court of Justice has held that Directive 1999/70/EC and the framework agreement annexed to it must be interpreted as applying to fixed-term employment contracts and relationships concluded with the public administrations and other public-

sector bodies (see judgments of 8 September 2011 in Case C-177/10 [2011] ECR I-7907, *Rosado Santana*, of 7 September 2006 in Case C-53/04 [2006] ECR I-7213, *Marrosu and Sardino* and of 4 July 2006 in Case C-212/04 [2006] ECR I-6057, *Adeneler*);

according to the case law of the Court of Justice, clause 5(1) of the framework agreement must be interpreted as precluding the use of successive fixed-term contracts of employment which are justified by the sole fact that they are provided for under a general legislative or regulatory provision of a Member State, whilst vice versa the temporary requirement for replacement staff, provided for under national law, may in principle amount to an objective reason within the meaning of that clause (see judgment of 26 January 2012 in Case C-586/10, not yet published in the ECR, *Kucuk*, paragraphs 30-31);

it must be recalled in relation to the implementation of that directive that:

1) competitive examinations represent a necessary and mandatory procedure also for hiring school staff, including teaching and non-teaching staff, pursuant to Article 97(3) of the Constitution, which provides that employment in the public administration is accessed through competitive examinations;

2) the Directive was implemented by Legislative Decree no. 368 of 6 September 2001 (Implementation of Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP);

3) Article 36(5) of Legislative Decree no. 165 of 30 March 2001 (General provisions on the regulation of employment in the public administrations) provides that, under all circumstances, "the violation of mandatory provisions applicable to the hiring or employment of staff by the public administrations may not result in the establishment of permanent employment relations with those public administrations, without prejudice to any responsibility or sanctions incurred. The worker concerned shall be entitled to payment of the damages resulting from the provision of labour in breach of mandatory provisions";

4) this provision was held by this Court to comply with Articles 3 and 97 of the Constitution (judgment no. 89 of 2003); moreover, the Court of Justice held that it does not violate clause 5 of the framework agreement on fixed-term work, provided that provision is made "in the sector under consideration, [for] other effective measures to

avoid and, as necessary, penalise the abusive use of successive fixed-term contracts" (see the order of 1 October 2010 in Case C-3/10 [2010] ECR I-121, *Affatato*, paragraph 51);

5) for school staff, Article 10(4-bis) of Legislative Decree no. 368 of 2001, which implemented the Directive at issue here, stipulates that the provisions of the Decree requiring the payment of damages in the event of abuse arising from successive fixed-term contracts within public sector employment shall not apply to fixed-term contracts concluded to grant supply teaching appointments to teaching and ATA (administrative, technical and auxiliary) school staff since the need to conclude fixed-term contracts, which may be successive, for supply teaching appointments in the schooling sector meets with the specific and irrepressible requirements of that sector;

6) to this effect, Article 70(8) of Legislative Decree no. 165 of 2001 provides that the recruitment of school staff shall occur without prejudice to the procedures laid down under Legislative Decree no. 297 of 16 April 1994 (Approval of the consolidated text of legislative provisions applicable to education in relation to schools of every type and level), which govern the establishment of the employment relationship with teaching staff;

7) specifically, Articles 399 and 551 of Legislative Decree no. 297 of 1994 stipulate that 50 percent of tenured teaching and administrative positions may be accessed through competitive examination and 50 percent through permanent aptitude lists including staff hired on fixed-term contracts who are qualified to teach;

8) Article 4(1) and (11) of Law no. 124 of 1999 – which is the object of the question of constitutionality referred to this Court – regulates the award of supply teaching appointments to cover vacant teaching and ATA positions; specifically, paragraph 1 provides that "teaching positions and appointments which are effectively vacant and available before 31 December, and which are expected to remain such for the entire school year, [shall be covered] by the award of annual supply teaching appointments, pending the completion of competitive examination procedures to appoint tenured teaching staff, unless it is possible to reallocate tenured teaching staff from the provincial workforce or to use surplus staff, provided that no tenured staff member has been assigned to those positions on any basis";

9) Article 1 of Decree no. 131 of the Ministry for Public Education of 13 June 2007 provides that three forms of appointment of teaching staff and school administrative staff may be made:

– annual supply teaching appointments for vacant and available positions which are unfilled;

– temporary supply teaching appointments until conclusion of teaching activity for non-vacant positions which are nonetheless available;

– temporary supply teaching appointments for all other requirements, namely short term supply teaching appointments;

the establishment of the three forms of supply teaching appointment provided for was necessary, under national law, pursuant to Articles 33 and 34 of the Constitution, which assert the fundamental right to study, which requires the state to organise the service in such a manner as to be able to adapt it also to the constant changes in the level of the school population, and hence Article 4 of Law no. 124 of 1999 – which has been referred to this Court for examination – complies with that requirement;

it could not be required that all annual supply teaching appointments (for vacant and available places) be made under permanent contracts because in this way the public administration would become exposed to the tangible possibility of hiring a greater number of teachers than necessary, an eventuality to be avoided as a general matter, especially during the current period in which there are serious requirements to contain public spending, in accordance *inter alia* with commitments resulting from requirements imposed by the European Union;

indeed, were the school population to fall subsequently, the fact that all effectively vacant teaching positions would be covered could result in teaching staff redundancies;

it is a service which can be activated upon request, since the right to study provided for under the Constitution establishes a situation in which the state may not refuse to provide the service, with the consequence that a request to receive education automatically activates the provision of the service;

the Italian school system incorporates structurally inherent requirements of flexibility which are the result of various factors, some of which are not dependent upon governmental choices, including: constant changes in the school population; the appointment of women to a large percentage of teaching positions, in particular in

primary schools, who require protection in relation to maternity leave; immigration (at the present time, around four million immigrants, who must of necessity be catered for by the school system); internal migratory flows between regions; schooling choices made by families; transfers of tenured teaching staff; the existence of disadvantaged schools and provisional appointments, above all in the islands and mountain areas; these are in addition to further aspects of flexibility resulting from governmental choices, including: frequent amalgamations of schools; different planning arrangements for classes; and the unification of courses of schooling;

accordingly, it must be acknowledged that it is indispensable that Italian law use a significant number of teachers and administrative school staff who have been hired under fixed-term contracts, precisely in order to guarantee their constant presence in sufficient numbers in order to cover the needs of all state schools;

the system of permanent aptitude lists for fixed-term staff, alongside competitive examinations, is able to ensure both that permanent school staff are hired according to objective criteria – i.e. without irregularities or inequalities – and to enable those staff to establish a reasonable likelihood over time that they may obtain a tenured position with a permanent contract;

moreover, national legislation is structured, at least as a matter of principle, in such a manner that the hiring of school staff under fixed-term contracts may comply with the objective reasons required under clause 5(1) of Directive no. 1999/70/EC of 28 June 1999 – notwithstanding that no provision is made for the maximum duration of such contracts or the maximum number of their renewals;

the Italian Court of Cassation also ruled to this effect in judgment no. 10127 of 20 June 2012;

a limited number of staff were hired on permanent contracts during the period falling between 1999 and 2011, with the exception of 2011 during which 66,000 new tenured staff were appointed, following a high number of staff retirements;

the use of fixed-term contracts is in marked decline, having passed from a total, including teaching and non-teaching staff, of 233,886 in 2007 to 125,934 in 2012;

moreover, competitive examination procedures were discontinued for a long time following the competitive examination announced in 1999 – following the approval of Law no. 124 of 1999 – but were re-launched by the competitive examination announced

in 2012, pursuant to the Decree of the Ministry of Education, Universities and Research of 3 August 2011, and procedures are currently being followed for the appointment under permanent contracts of 11,542 teaching staff, in addition to an identical number of staff hired from the permanent aptitude lists of fixed-term teachers; moreover, the hiring of around 5,300 non-teaching staff is planned;

the essence of Article 4(1) of Law no. 124 of 1999 – which is the object of the proceedings before this Court – does not appear to be objectionable since it regulates the type of supply teaching appointment – a provision necessary in order to ensure coverage for vacant positions from year to year – and it does not consequently require either that successive fixed-term contracts be used or that the right to damages be precluded;

moreover, the final part of the said provision lays down the requirement that annual supply teaching appointments for positions which are effectively vacant and available before 31 December be made "pending the completion of competitive examination procedures to appoint tenured teaching staff";

the provision referred to above contained in the final part of Article 4(1) of Law no. 124 of 1999 could establish the possibility that fixed-term contracts may be renewed without parallel provision for certain time-scales for the holding of competitive examinations;

this circumstance – along with the fact that there are no provisions recognising the right of school staff to damages in the event of the improper repetition of fixed-term contracts of employment – could conflict with the aforementioned clause 5(1) of Directive no. 1999/70/EC;

consequently, although the Court of Justice has already handed down various judgments on the matter, it appears necessary to request that Court to give a preliminary ruling on the interpretation of clause 5(1) of Directive no. 1999/70/EC in relation to the question of constitutionality referred to this Court, since there is a doubt regarding the precise interpretation of that provision of Community law and the resulting compatibility of the national legislation illustrated above;

as was held in order no. 103 of 2008 – when a question of constitutionality due to incompatibility with provisions of Community law is pending before this Court, where such provisions do not have direct effect they engage the principles laid down in Articles 11 and 117(1) of the Constitution;

the question referred to the Court of Justice for a preliminary ruling is relevant in the proceedings before the Constitutional Court, since the interpretation requested from that Court appears to be necessary in order to establish the precise meaning of the Community legislation for the purposes of the subsequent constitutionality proceedings which this Court will conduct with reference to the principle of constitutional law supplemented by the aforementioned Community legislation;

by the aforementioned order no. 103 of 2008, this Court referred a question for a preliminary ruling within proceedings in which it had been seized directly;

it must be concluded that this Court also has the status of a "national court" within the meaning of Article 267(3) of the Treaty on the Functioning of the European Union within proceedings in which it has been seized on an interlocutory basis.

Considering Article 267 of the Treaty on the Functioning of the European Union (TFEU) and Article 3 of Law no. 204 of 13 March 1958.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

1) orders that the following questions concerning the interpretation of clause 5(1) of the framework agreement concluded by ETUC, UNICE and CEEP on fixed-term work annexed to Council Directive no. 1999/70/EC of 28 June 1999 be referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union:

– Must clause 5(1) of the framework agreement concluded by ETUC, UNICE and CEEP on fixed-term work annexed to Council Directive no. 1999/70/EC be interpreted as precluding the application of Article 4(1), last proposition, and (11) of Law no. 124 of 3 May 1999 (Urgent provisions on school staff) – which stipulate, after regulating the award of annual supply teaching appointments for positions "which are effectively vacant and available before 31 December", that the positions be filled by the award of annual supply teaching appointments "pending the completion of competitive examination procedures to appoint tenured teaching staff" – enabling fixed-term contracts to be used without specifying certain time-scales for the holding of competitive examinations and under circumstances which do not provide for the right to damages?

– Do the organisational requirements of the Italian school system as set out above constitute objective reasons within the meaning of clause 5(1) of Directive no. 1999/70/EC of 28 June 1999 thereby rendering compatible with EU law legislation such as Italian law which does not provide for a right for damages in relation to the hiring of fixed-term school staff?

2) stays the present proceedings pending a ruling on the aforementioned preliminary question;

3) orders that a copy of this order be transferred immediately along with the case file to the Registry of the Court of Justice of the European Union.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 July 2013.

Signed:
Franco GALLO, President
Sergio MATTARELLA, Author of the Judgment
Gabriella MELATTI, Registrar
Filed in the Court Registry on 18 July 2013.
The Registrar
Signed: Gabriella MELATTI