Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 17 July 2014[1]

Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13

Raffaella Mascolo (C-22/13),
Alba Forni (C-61/13),
Immacolata Racca (C-62/13)
v
Ministero dell'Istruzione, dell'Università e della Ricerca
and
Fortuna Russo (C-63/13)
v
Comune di Napoli
(Requests for a preliminary ruling from the Tribunale di Napoli (Italy))
and
Carla Napolitano,
Salvatore Perrella,
Gaetano Romano,
Donatella Cittadino,
Gemma Zangari
v
Ministero dell'Istruzione, dell'Università e della Ricerca (C-418/13)

(Request for a preliminary ruling from the Corte costituzionale (Italy))

(References for a preliminary ruling — Social policy — Directive 1999/70/EC — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Successive fixed-term employment contracts — State schools sector — Clause 5(1) — Measures to prevent the misuse of fixed-term contracts — Concept of 'objective reasons' justifying such contracts — Penalties — Absence of compensation for damage — Prohibition on reclassification as an employment relationship of indefinite duration)

I – **Introduction**

1. Does national legislation under which fixed-term employment contracts may be concluded with teachers and administrative, technical and auxiliary staff in order to fill temporary vacancies in the State schools sector over an extended period of time, running to a number of years, without any definite time frame being specified for the conduct of competitions for the recruitment of staff, include sufficient measures to prevent and penalise the misuse of such contracts, as referred to in

1 — Original language: French.

clause 5 of the framework agreement on fixed-term work?[2] That is, in essence, the question referred to the Court by the Tribunale di Napoli (District Court, Naples (Italy)) (Cases C-22/13 and C-61/13 to C-63/13) and the Corte costituzionale (Constitutional Court, Italy) (Case C-418/13) in the context of the framework agreement.

II – **Legal framework**

A – *EU law*

1. Directive 1999/70

2. Article 1 of Directive 1999/70 provides:

'The purpose of the Directive is to put into effect the framework agreement … concluded … between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto.'

3. According to clause 1 of the framework agreement, which is entitled 'Purpose', the objective of that agreement is, first, to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and, secondly, to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

4. Clause 4 of the framework agreement, entitled 'Principle of non-discrimination', provides in paragraph 1:

'In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.'

5. Clause 5 of the framework agreement, entitled 'Measures to prevent abuse', states:

'1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as "successive";

(b) shall be deemed to be contracts or relationships of indefinite duration.'

2 — Framework agreement concluded on 18 March 1999 ('the framework agreement'), set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

2. Directive 91/533/EEC

6. The purpose of Directive 91/533/EEC[3] is to ensure that employees are provided with information on the essential elements of their employment contract or relationship.

7. According to Article 2(1) of that directive:

‘An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as “the employee”, of the essential aspects of the contract or employment relationship.’

8. Pursuant to Article 2(2)(e) of the directive, in the case of a temporary contract or employment relationship that information is to include ‘the expected duration thereof’.

9. Article 8(1) of the directive provides:

‘Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.’

B – *Italian law*

10. The first paragraph of Article 117 of the Constitution of the Italian Republic provides that ‘[l]egislative power shall be exercised by the State and the Regions in compliance with the Constitution and with the constraints deriving from Community law and international obligations’.

11. In Italy, the conclusion of fixed-term contracts in the public sector is governed by Legislative Decree No 165 laying down general rules concerning the organisation of employment in public authorities (decreto legislativo n. 165 — Norme generali sull’ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche) of 30 March 2001 (Ordinary Supplement to GURI No 106 of 9 May 2001) (‘Legislative Decree No 165/2001’).

12. Article 36 of Legislative Decree No 165/2001, as amended by Law No 102 converting into law, after amendment, Decree-Law No 78 of 1 July 2009 on crisis measures, the extension of time frames and the extension of Italy’s participation in international programmes (legge n. 102 Conversione in legge, con modificazioni, del decreto-legge 1° luglio 2009, n. 78, recante provvedimenti anticrisi, nonché proroga di termini e della partecipazione italiana a missioni internazionali), of 3 August 2009 (Ordinary Supplement to GURI No 179 of 4 August 2009), provides, under the title ‘Flexible forms of contract for the recruitment and employment of staff’:

‘1. For requirements connected with their everyday needs, public authorities shall recruit exclusively by means of permanent employment contracts following the recruitment procedures laid down in Article 35.

2. To meet temporary and exceptional requirements, public authorities may make use of the flexible forms of contract for the recruitment and employment of staff provided for in the Civil Code and the laws on employment relationships in undertakings, in accordance with existing recruitment procedures. Without prejudice to the competence of those authorities as regards defining their organisational needs in accordance with existing legislation, national collective agreements shall include provisions governing fixed-term employment contracts …

3 — Council Directive of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32).

3. In the interests of combating abuse in the use of flexible work, by no later than 31 December each year, on the basis of special instructions given in a directive of the Minister for Public Administration and Innovation, the public authorities shall, without it entailing any new or additional burden on public finances, prepare an analytic report on the categories of flexible work used. The report shall be sent, by no later than 31 January each year, to the evaluation units or to the internal supervisory departments referred to in Legislative Decree No 286 of 30 July 1999, as well as to the Department of Public Administration of the Presidency of the Council of Ministers, which shall draft an annual report to Parliament. Managers who have made unlawful use of flexible work shall not be awarded a performance bonus.

…

5. In any event, infringement of mandatory provisions on the recruitment or employment of workers by public authorities cannot lead to the creation of employment contracts of indefinite duration with those public authorities, without prejudice to any liability or sanction which those authorities may incur. The worker concerned shall be entitled to compensation for damage suffered as a result of working in breach of mandatory provisions. …'

13. According to the orders for reference, fixed-term work with public authorities is also subject to Legislative Decree No 368 implementing Directive 1999/70 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (decreto legislativo n. 368 — Attuazione della direttiva 1999/70/CE relativa all'accordo quadro sul lavoro a tempo determinato concluso dall'UNICE, dal CEEP e dal CES) of 6 September 2001 (GURI No 235 of 9 October 2001, p. 4) ('Legislative Decree No 368/2001').

14. Article 5(4a) of Legislative Decree No 368/2001, as inserted by Law No 247 of 24 December 2007 and amended by Decree-Law No 112 of 25 June 2008, provides:

'Without prejudice to the rules on successive contracts set out in the preceding paragraphs and without prejudice to various provisions of the collective agreements concluded nationally, regionally or by individual undertakings with the most representative national trade union organisations, where, as a result of a series of fixed-term contracts for equivalent tasks, an employment relationship between the same employer and the same worker continues for an overall period of more than 36 months, including any extensions and renewals, disregarding any breaks between one contract and another, the employment relationship shall be regarded as being a relationship of indefinite duration …'

15. In accordance with Article 10(4a) of Legislative Decree No 368/2001, as amended by Article 9(18) of Decree-Law No 70 of 13 May 2011 ('Decree-Law No 70/2011') converted by Law No 106 of 12 July 2011 (GURI No 160 of 12 July 2011):

'… also excluded from the application of the present decree are fixed-term contracts concluded in order to fill temporary vacancies for teaching and ATA [administrative, technical and auxiliary] staff ['ATA staff'], given the need to ensure the continuity of provision of teaching and educational services, including where teaching and ATA staff with permanent or fixed-term employment relationships are temporarily absent or unavailable. Article 5(4a) of the present decree shall not in any event apply.'

16. The rules governing fixed-term employment relationships of teaching and ATA staff are set out in Article 4 of Law No 124 on urgent measures concerning school staff (legge n. 124 — Disposizioni urgenti in materia di personale scolastico) of 3 May 1999 (GURI No 107 of 10 May 1999), as amended by Decree-Law No 134 of 25 September 2009, converted, after amendment, by Law No 167 of 24 November 2009 (GURI No 274 of 24 November 1999) ('Law No 124/1999'). According to the referring court in Cases C-22/13 and C-61/13 to C-63/13, that law does not apply to municipal schools, which thus remain subject to Legislative Decrees No 165/2001 and No 368/2001.

17. Article 4 of Law No 124/1999 provides:

'1. In order to fill teaching posts and senior teaching posts which are in fact vacant and are not filled by 31 December and which are expected to remain so for the entire school year, where it is not possible to fill the posts with a teacher from the provincial staff allocation list for tenured teaching staff or by calling upon surplus staff and provided that no tenured teaching staff have in any way been assigned to the posts, supply teaching posts of one year shall be created, pending the completion of competitive selection procedures for the recruitment of tenured teaching staff.

2. In order to fill non-vacant teaching posts and senior teaching posts which become *de facto* available by 31 December and up to the end of the school year, temporary supply teaching posts lasting until the end of teaching activities shall be created. Provision shall also be made to create temporary supply teaching posts until the end of teaching activities in order to cover teaching hours which are not included in the calculation of the official weekly teaching schedule of tenured staff.

…

11. The provisions of the preceding paragraphs shall apply also to [ATA] staff. …

…

14a. Fixed-term contracts concluded for the supply teaching posts referred to in paragraphs 1, 2 and 3, in so far as they are necessary in order to ensure the continuity of provision of teaching and educational services, may be converted into employment relationships of indefinite duration only upon the grant of tenure in accordance with prevailing provisions and on the basis of the ranking lists provided for by the present law and by Article 1(605)(c) of Law No 296 of 27 December 2006, as amended.'

18. According to Article 1 of Decree No 131 of the Ministry of Education (decreto del Ministero della pubblica istruzione, n. 131) of 13 June 2007, the tasks assigned to teachers and school administrative staff thus fall into three categories:

— one-year appointments to vacant, unfilled posts, that is to say, posts not filled by tenured staff;

— temporary appointments, lasting until the end of the teaching activities, to posts that are not vacant but are unfilled too; and

— temporary appointments for any other purposes or short-term temporary appointments.

19. The grant to teachers of tenure, as referred to in Article 4(14a) of Law No 124/1999, is governed by Articles 399 and 401 of Legislative Decree No 297 laying down the consolidated text of the provisions regulating teaching (decreto legislativo n. 297 — Testo unico delle disposizioni legislative in materia di istruzione) of 16 April 1994 (Ordinary Supplement to GURI No 115 of 19 May 1994) ('Legislative Decree No 297/1994').

20. In accordance with Article 399(1) of Legislative Decree No 297/1994:

'Teaching staff for nursery, primary and secondary schools, including arts academies and institutes of art, shall be recruited, as to 50% of the posts available each school year, by way of competition on the basis of tests and qualifications and, as to the remaining 50%, from the permanent ranking lists referred to in Article 401.'

21. Article 401(1) and (2) of that decree provides:

'1. The ranking lists relating to competitions organised solely on the basis of qualifications for teaching staff in nursery, primary and secondary schools, including arts academies and institutes of art, shall become permanent ranking lists which are to be used for the purposes of the grant of tenure, as referred to in Article 399(1).

2. The permanent ranking lists referred to in paragraph 1 shall be supplemented periodically by the inclusion of teachers who have been successful in the most recent regional competition conducted on the basis of qualifications and tests, in respect of the same category of competition and the same post, and by the inclusion of teachers who have applied for the transfer of their place on the corresponding permanent ranking list of another province. At the same time as new candidates are included in the lists, the ranking order of candidates already included on the permanent lists shall be updated.'

III – **The background to the disputes in the main proceedings**

A – *Cases C-22/13 and C-61/13 to C-63/13*

22. Ms Mascolo, Ms Forni, Ms Racca and Ms Russo were recruited under successive fixed-term contracts to work as teachers, in the case of Ms Mascolo, Ms Forni and Ms Racca, in the employment of the Ministero dell'Istruzione, dell'Università e della Ricerca (Ministry of Education, Universities and Research, 'the Ministry') and, in the case of Ms Russo, in the employment of the Comune di Napoli (Municipality of Naples). Under those contracts, they worked for their respective employers for the following periods: Ms Mascolo for a total of 71 months over a period of nine years (between 2003 and 2012), Ms Forni for a total of 50 months and 27 days over a period of five years (between 2006 and 2012), Ms Racca for a total of 60 months over a period of five years (between 2007 and 2012) and Ms Russo for a total of 45 months and 15 days over a period of five years (between 2006 and 2011).

23. Taking the view that those successive fixed-term employment contracts were unlawful, the applicants in the main proceedings brought actions before the Tribunale di Napoli seeking, by their main claim, the reclassification of the fixed-term contracts as employment relationships of indefinite duration and, consequently, their establishment as tenured staff,[4] together with payment of the salaries corresponding to the periods during which their employment was interrupted between the end of one contract and the commencement of the next, and, in the alternative, compensation for the damage suffered.

24. According to the Ministry and the Comune di Napoli, on the other hand, Article 36 of Legislative Decree No 165/2001, as amended by Law No 102, prohibits any reclassification of the employment relationships. Article 5(4a) of Legislative Decree No 368/2001 does not apply, in view of Article 10(4a) of that decree, inserted by Article 9(18) of Decree-Law No 70/2011. Nor do the applicants in the main

4 — Having been granted tenure during the course of the proceedings as a result of her progression up the permanent ranking list referred to in Article 401 of Legislative Decree No 297/1994, Ms Racca has amended her initial application to a claim for full recognition of the length of her service and compensation for the damage suffered.

proceedings have a right to damages, given that the recruitment procedures were lawful and that the constituent elements of an unlawful act were, in any event, not proven. Lastly, given that there was no connection between the various fixed-term contracts and that the subsequent contracts did not, therefore, constitute the continuation or extension of previous contracts, there was no abuse.

25. In the proceedings before the referring court, the principal question is whether the system used by the Italian State for the replacement of permanent workers in the State schools sector is incompatible with clause 5 of the framework agreement. The Tribunale di Napoli observes that that system is based on ranking lists, in which the supply teachers are included in order of length of service. They may, depending on the posts available, be granted tenure as a result of their progression up those lists. According to that court, the system lends itself, as is demonstrated by the number and overall duration of the fixed-terms contracts concluded in the cases in point, to the misuse of fixed-term employment contracts in the State schools sector. The Tribunale di Napoli emphasises,[5] in particular, that the system includes no measures to prevent abuse, for the purposes of clause 5(1)(a), (b) and (c). It also queries the system is compatible with a number of general principles of EU law and with provisions of the Charter of Fundamental Rights of the European Union ('the Charter').

B – *Case C-418/13*

26. Ms Napolitano, Ms Cittadino, Ms Zangari, Mr Perrella and Mr Romano were recruited by the Ministry under successive fixed-term employment contracts, the first four as teachers and Mr Romano as an administrative officer, in various schools. Under their respective contracts they worked for periods of between four and seven school years.

27. Taking the view that their successive fixed-term employment contracts were unlawful, the applicants in the main proceedings brought actions before the Tribunale di Roma (District Court, Rome) and the Tribunale di Lamezia Terme (District Court, Lamezia Terme) respectively, seeking, by their main claim, the reclassification of their respective contracts as employment contracts of indefinite duration and, consequently, their establishment as tenured staff, together with payment of the remuneration due in respect of the periods during which their employment was interrupted between the end of one contract and the commencement of the next. In the alternative, the applicants in the main proceedings sought compensation for the damage suffered.

28. In the cases brought before them, the Tribunale di Roma and the Tribunale di Lamezia Terme questioned the compatibility of Article 4(1) and (11) of Law No 124/1999 with clause 5 of the framework agreement, inasmuch as that national provision enables the authorities to recruit, without limit, teaching, technical and administrative staff under fixed-term contracts in order to fill vacant posts in a school's table of staff. Considering that this issue could not be settled either by means of interpretation in conformity with EU law, as the wording of Article 4(1) and (11) is unequivocal, or by the non-application of the national provisions at issue, as clause 5 of the framework agreement does not have direct effect, those courts referred a preliminary issue to the Corte costituzionale concerning the constitutional legality of Article 4(1) and (11) of Law No 124/1999 in the light of its compatibility or otherwise with Article 117 of the Constitution of the Italian Republic.

29. In its order for reference, the Corte costituzionale notes that the Italian legislation which applies to the schools sector makes no provision regarding the maximum duration of fixed-term contracts under which staff are engaged or the maximum number of times that they may be renewed, within the meaning of clause 5(1)(b) and (c) of the framework agreement. It nevertheless wonders whether the legislation might be justified by 'objective reasons' within the meaning of clause 5(1)(a).

5 — Contrary to what the Corte suprema di cassazione (Supreme Court of Cassation) held in Judgment No 10127/12.

30. The Corte costituzionale points out in this connection that, at least in principle, the national legislation is structured in such a way that the employment of school staff under fixed-term contracts might reflect objective reasons, as referred to in clause 5(1)(a) of the framework agreement. Nevertheless, it entertains doubts as to whether various provisions of national law are compatible with clause 5.

IV – **The questions referred for a preliminary ruling**

31. The questions referred by the national courts for a preliminary ruling overlap to some degree. The first six questions referred in Cases C-22/13, C-61/13 and C-62/13 are identical. The three questions referred in Case C-63/13 are the same as the second, third and fourth questions referred in Cases C-22/13, C-61/13 and C-62/13. In Cases C-61/13 and C-62/13 a seventh question is referred to the Court of Justice. Finally, the content of the questions referred in Case C-418/13 is substantially the same as that of the first question referred in Cases C-22/13, C-61/13 and C-62/13.

32. In the interests of clarity, I shall set out below all of the questions referred by the two courts.

33. In Cases C-22/13 and C-61/13 to C-63/13, the Tribunale di Napoli decided to stay the proceedings and to refer the following seven questions to the Court for a preliminary ruling:

‘(1) Does the regulatory framework for the schools sector, as described, constitute an equivalent measure within the meaning of clause 5 of [the framework agreement set out in the annex to] Directive [1999/70]?

(2) When is an employment relationship to be regarded as being for the public service of the “State”, for the purposes of clause 5 of [the framework agreement set out in the annex to] Directive [1999/70] and, in particular, for the purposes of the expression “specific sectors and/or categories of workers”, and thus capable of justifying results that are different from those which ensue from employment relationships in the private sector?

(3) Having regard to the details contained in Article 3(1)(c) of [Council] Directive 2000/78/EC [of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16)] and in Article 14(1)(c) of Directive 2006/54/EC [of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23)], does the notion of employment conditions contained in clause 4 of [the framework agreement set out in the annex to] Directive [1999/70] also include the consequences of the unlawful interruption of an employment relationship? If the answer to the preceding question is in the affirmative, is the difference between the consequences normally provided for in national law for the unlawful interruption of employment relationships of indefinite duration and for the unlawful interruption of fixed-term employment relationships justifiable under clause 4?

(4) By virtue of the principle of sincere cooperation, is a State precluded from presenting to the Court of Justice ... in a request for a preliminary ruling on interpretation a deliberately untrue description of a national legislative framework and are the national courts obliged, in the absence of any alternative interpretation of national law that also satisfies the obligations deriving from membership of the European Union, to interpret, where possible, national law in accordance with the interpretation given by the State?

(5) Is a statement of the circumstances in which a fixed-term employment contract may be converted into a permanent contract one of the conditions applicable to the contract or employment relationship contemplated by Directive [91/533], in particular, by Article 2(1) and (2)(e) thereof?

(6) If the answer to the preceding question is in the affirmative, is a retroactive amendment to the legislative framework which does not guarantee that employees can claim the rights conferred on them by that directive, that is to say, that the conditions of employment specified in the document under which they were engaged will be observed, contrary to Article 8(1) of Directive [91/533] and to the objectives of that directive, in particular those mentioned in the second recital of the preamble thereto?

(7) Must the general principles of [EU] law presently in force concerning legal certainty, the protection of legitimate expectations, equality of arms in proceedings, effective judicial protection, the right to an independent court or tribunal and, more generally, the right to a fair hearing, which are guaranteed by [Article 6 TEU], read in conjunction with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and with Articles 46, 47 and 52(3) of the [Charter], be interpreted as precluding, within the scope of Directive [1999/70], the adoption by the Italian State, after a significant period of time (three and a half years), of a legislative provision — such as Article 9 of Decree-Law No 70/2011, which added to Article 10 of Legislative Decree No 368/2001 a paragraph 4a — which is liable to alter the consequences of ongoing proceedings by placing the worker directly at a disadvantage and benefiting the State in its capacity as employer, and by eliminating the possibility conferred by the national legal system of penalising the abusive repeated renewal of fixed-term contracts?'

34. In Case C-418/13, the Corte costituzionale decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must clause 5(1) of the [framework agreement] be interpreted as precluding the application of Article 4(1) *in fine* and (11) of [Law No 124/1999], which, after laying down rules on the creation of supply teaching posts of one year for "posts which are in fact vacant and are not filled by 31 December", goes on to provide that this is to be done by creating such annual posts "pending the completion of competitive selection procedures for the recruitment of tenured teaching staff" — a provision that permits fixed-term contracts to be used without a definite period being fixed for completing the competitive selection procedures, and in a clause that provides no right to compensation for damage?

(2) Do the requirements of the organisation of the Italian school system set out above constitute objective reasons within the meaning of clause 5(1) of [the framework agreement], of such a kind as to render compatible with EU law legislation, such as the Italian legislation, that does not provide a right to compensation for damage in respect of the appointment of school staff on fixed-term contracts?'

V – **Procedure before the Court**

35. The orders for reference were received by the Court on 17 January 2013 (in Case C-22/13), 7 February 2013 (in Cases C-61/13 to C-63/13) and 23 July 2013 (in Case C-418/13). By order of the President of the Court of 8 March 2013, Cases C-22/13 and C-61/13 to C-63/13 were joined. Written observations were lodged by Ms Mascolo, Ms Forni, Ms Racca and Ms Russo (in Cases C-22/13 and C-61/13 to C-63/13), Ms Napolitano, Ms Cittadino, Ms Zangari, Mr Perrella and Mr Romano (in Case C-418/13), the Italian Government and the European Commission. The Federazione

Gilda-Unams, the Federazione Lavoratori della Conoscenza (FLC CGIL) and the Confederazione Generale Italiana del Lavoro (CGIL) lodged observations solely in Case C-62/13. The Polish Government lodged observations in Cases C-22/13 and C-61/13 to C-63/13 and the Greek Government solely in Case C-418/13.

36. By decision of 11 February 2014, the Court joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13 for the purposes of the oral procedure and judgment, in accordance with Article 54(1) of the Rules of Procedure of the Court.

37. With a view to holding a joint hearing in these cases, the Court, pursuant to Article 61(2) of its Rules of Procedure, invited the parties wishing to appear to consult one another on their respective positions, to focus their pleadings on the interpretation of clause 5 of the framework agreement and to answer the seventh question referred in Cases C-61/13 and C-62/13.

38. At the hearing on 27 March 2013, oral submissions were made on behalf of Ms Mascolo, Ms Forni, Ms Racca, Ms Russo, Ms Napolitano and Ms Cittadino, the Ministry, the Comune di Napoli, the Federazione Gilda-Unams, the Federazione Lavoratori della Conoscenza (FLC CGIL), the Confederazione Generale Italiana del Lavoro (CGIL), the Italian Government and the Commission.

VI – **Analysis**

A – *The Court's jurisdiction and the admissibility of the requests for a preliminary ruling*

39. In the first place, in their written observations the Comune di Napoli, the Italian Government and the Commission have disputed the admissibility of the fourth question referred in Cases C-22/13, C-61/13 and C-62/13, which was also referred as the third question in Case C-63/13.

40. That question concerns, first, the interpretation of the principle of sincere cooperation in the light of the conduct of a Member State during an earlier set of preliminary ruling proceedings. Indeed, the premiss upon which the first question in Cases C-22/13, C-61/13 and C-62/13 is asked is that the interpretation of national law given by the Italian Government was incorrect. It is on the basis of that premiss that the Tribunale di Napoli refers, in its fourth question, to the interpretation of the national legal framework provided by the Italian Government in *Affatato*.[6] According to the Tribunale di Napoli, that interpretation is not consistent with that given by the Italian Government in the present cases. Consequently, it asks whether the Italian State has, as a result of that fact, breached its duty of sincere cooperation.

41. Secondly, the Tribunale di Napoli[7] also wishes to establish whether the duty of sincere cooperation requires it, when interpreting national law in accordance with EU law, to follow the interpretation provided to the Court of Justice in a different context by the Member State in which it has jurisdiction, even where that interpretation has been held to be wrong by a national court of a higher level.[8]

6 — In that case, the Italian Government had maintained that Article 5(4a) of Legislative Decree No 368/2001, which provides that successive fixed-term contracts exceeding a total duration of 36 months are converted into employment contracts of indefinite duration, applied to the public sector. See order in *Affatato* (C-3/10, EU:C:2010:574, paragraph 48).

7 — As regards this aspect of the question, the referring court starts from a different premiss, that is to say, that national law could be interpreted as meaning that Article 5(4a) of Legislative Decree No 368/2001, which provides for the reclassification of successive fixed-term contracts exceeding a total duration of 36 months as contracts of indefinite duration, does apply to the public sector, including the schools sector. See footnote 5 of this Opinion.

8 — The referring court states that, in Judgment No 10127/12, the Corte suprema di cassazione held that Article 5(4a) of Legislative Decree No 368/2001 did not apply to the public sector, including the schools sector, so that, in essence, the observations made in *Affatato* do not accord with reality (see order in *Affatato*, C-3/10, EU:C:2010:574, paragraph 48).

42. I would point out that, under the allocation of functions between the Court of Justice and the national courts which governs the preliminary ruling procedure, the Court of Justice has no jurisdiction to rule on the conduct of a Member State or to interpret rules of national law. It is for the national courts alone, and not for the Court of Justice, to interpret national law [9] and, consequently, to settle disputes connected with such interpretation.

43. In the second place, I must reject the arguments put forward in Case C-63/13 by the Comune di Napoli to the effect that the request for a preliminary ruling addressed to the Court is inadmissible. Essentially, it argues that interpretation of clause 5 of the framework agreement is not necessary, maintaining that it is clear from the order for reference that the Tribunale di Napoli considers, on the basis of the guidance given in the Court's case-law, that the preventive measures and sanctions laid down in Italian legislation to transpose the framework agreement are inadequate. Therefore, by examining all the facts of the case, the Tribunale di Napoli could have reached a decision on the basis of interpretation in conformity with EU law.

44. I would point out that, in the context of the judicial cooperation enshrined in Article 267 TFEU, questions on the interpretation of EU law benefit from a presumption of relevance. The Court may reject a request from a national court for a preliminary ruling only in certain specific circumstances. [10] Moreover, it is solely for the national court to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. [11]

B – *Substance*

45. By the questions which they have referred to the Court, the national courts seek, in essence, to establish whether national legislation relating to the State schools sector such as the Italian legislation at issue in the main proceedings is consistent with the framework agreement. In particular, the Tribunale di Napoli questions the compatibility of a number of provisions of Italian legislation with clause 5 of the framework agreement and with a number of general principles of EU law and provisions of the Charter.

46. The Court does not, in the context of a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with EU law. However, it can provide the national court with a ruling on the interpretation of EU law so as to enable that court to determine whether such compatibility exists in order to decide the case before it. [12]

1. Preliminary observations

47. The legal context of this case is complex. [13] I therefore think it necessary to begin by noting the essential components of the national system for the replacement of teaching staff which applies in the State schools sector [14] before proceeding to examine the questions referred for a preliminary ruling. On the basis of the information given in the orders for reference and obtained at the hearing, it appears to me that the system established by the Italian legislation operates, essentially, in the following manner.

9 — See, to that effect, judgments in *Dietz* (C-435/93, EU:C:1996:395, paragraph 39); *Thibault* (C-136/95, EU:C:1998:178, paragraph 21); and *Bouanich* (C-265/04, EU:C:2006:51, paragraph 51).

10 — Judgment in *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 35).

11 — Judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 32).

12 — Judgment in *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, (C-2/10, EU:C:2011:502, paragraph 35 and the case-law cited).

13 — I must emphasise that the legal context has been described in a rather confused fashion in the orders for reference from the Tribunale di Napoli.

14 — It is apparent from the documents before the Court that the concept of State schools must be understood as excluding municipal schools.

48. Legislative Decrees No 165/2001 and No 368/2001 transposed the framework agreement into Italian law in the public sector and the private sector respectively. However, it is apparent from the orders for reference that the national rules at issue in the main proceedings applicable to State schools derogate from the abovementioned legislative decrees in certain essential respects.

49. Under those rules, teaching staff are granted tenure by two different routes, that is to say, as to 50% of the vacant posts each school year, by way of competitions on the basis of tests and qualifications and, as to the remaining 50%, on the basis of the permanent ranking lists in which are included, amongst others, teachers who have already been successful in such competitions. [15] '[P]ending the completion of competitive selection procedures for the recruitment of tenured teaching staff', [16] vacant posts are filled by means of supply teaching appointments of one year, drawing from the ranking lists. Progression up the ranking lists, which may lead to the grant of tenure, occurs as a result of the repetition of supply teaching engagements.

50. In this connection, it is apparent from the written observations submitted by the applicants in the main proceedings in Case C-418/13 and from the observations which the Commission made at the hearing that the permanent ranking lists include the names not only of teachers who have been successful in open competitions on the basis of tests and qualifications and not managed to obtain a tenured post, but also of teachers who have attended teacher training colleges and have therefore followed courses to equip them for the teaching profession. The system of progression up the ranking lists, which is based on the length of service of the individuals whose names appear on the lists, thus enables tenure to be granted both to teachers who have been successful in open competitions and to those who have never passed such a competition but who have followed a teacher training course as referred to above.

51. The Corte costituzionale points out in this connection that no competitions were conducted between 1999 and 2011, [17] that, during that period, very few appointments were made in the schools sector on the basis of employment contracts of indefinite duration and that between 2007 and 2012 there was a marked decrease in the number of fixed-term employment contracts.

52. It is also apparent from the documents before the Court that access to the teacher training colleges was suspended indefinitely by Law No 133 of 25 June 2008.

53. It is in that context that the questions referred for a preliminary ruling must be examined.

2. The first question

54. By the first question referred for a preliminary ruling by the Tribunale di Napoli in Cases C-22/13, C-61/13 and C-62/13 and the first and second questions referred by the Corte costituzionale in Case C-418/13, which it is appropriate to examine together, those referring courts wish to establish, in essence, whether the Italian legislation applicable to fixed-term employment contracts concluded with teachers acting as temporary replacements in the State schools sector includes sufficient measures to prevent and penalise the misuse of such contracts and, therefore, whether that legislation is consistent with clause 5 of the framework agreement. [18]

15 — See Articles 399(1) and 401(1) and (2) of Legislative Decree No 297/1994.

16 — See Article 4(1) of Law No 124/1999.

17 — It is apparent from the documents before the Court that new competitions were organised in 2012.

18 — It is apparent from the Commission's written submissions that it has initiated the Treaty infringement procedure, alleging that the Italian Republic has failed to adopt appropriate measures to prevent the misuse of successive fixed-term contracts in the schools sector.

55. In order to determine whether the national legislation at issue in the main proceedings does include sufficient measures for the purposes of clause 5, I shall begin by examining the scope of the framework agreement before going on to consider the interpretation of that agreement in the light of relevant case-law.

a) The scope of the framework agreement

56. The Greek Government maintains that a Member State can exempt the teaching sector entirely from the obligations imposed by clause 5(1) of the framework agreement. In support of that view, it argues that clause 5(1) permits account to be taken of 'the needs of specific sectors and/or categories of workers'.

57. I must observe in this connection that the scope of the framework agreement is defined in clause 2(1) thereof, read in conjunction with clause 3(1), and that, in accordance with the Court's settled case-law, it is apparent from the very wording of clause 2(1) that the scope of the framework agreement is broad and that no particular sector is, in principle, excluded from its application.[19] Indeed, it applies generally to 'fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'.

58. Moreover, the Court has already held that the concept of 'fixed-term worker'[20] encompasses all workers without distinction as to whether their employer is in the public or private sector.[21]

59. Therefore, fixed-term employment contracts and relationships concluded in the State education sector cannot be excluded from the scope of the framework agreement.[22] I must therefore reject the argument put forward by the Greek Government in the context of the first question referred in Case C-418/13.

b) Interpretation of clause 5(1) of the framework agreement

60. It is clear from clause 1 of the framework agreement that the agreement's purpose is to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.[23] That framework therefore lays down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure,[24] and thus from being undermined

19 — Judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 56) and *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraphs 114 and 166); order in *Koukou* (C-519/08, EU:C:2009:269, paragraph 71); and judgments in *Sorge* (C-98/09, EU:C:2010:369, paragraphs 30 and 31); *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 39); and *Della Rocca* (C-290/12, EU:C:2013:235, paragraph 34).

20 — Under clause 3 of the framework agreement, a fixed-term worker is 'a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event'.

21 — Judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 56) and *Della Rocca* (C-290/12, EU:C:2013:235, paragraph 34).

22 — Under clause 2(2) of the framework agreement, the Member States and/or the social partners may exclude from the scope of the agreement only 'vocational training relationships and apprenticeship schemes' and 'employment contracts and relationships which have been concluded within the framework of a specific public or publicly-supported training, integration and vocational retraining programme'. Judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 57) and *Della Rocca* (C-290/12, EU:C:2013:235, paragraph 35).

23 — Judgment in *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 26).

24 — Judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 63); *Impact* (C-268/06, EU:C:2008:223, paragraph 88); and *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraph 73). In the European Union, most of the new jobs created in recent years (even before the crisis) have been based on temporary contracts and other non-standard forms of employment. See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 April 2012 entitled 'Towards a job-rich recovery' (COM(2012) 173 final, p. 12).

as a result of the use of fixed-term contracts over an extended period of time.[25] Indeed, temporary employees are in danger, during a substantial part of their working lives, of being excluded from the benefit of stable employment which, however, as the framework agreement makes clear, constitutes a major element in the protection of workers.[26]

61. To this end, the framework includes two types of measure: measures to prevent abuse, laid down in clause 5(1) of the framework agreement, and measures to penalise abuse, laid down, in particular, in clause 5(2)(b).[27]

i) The existence of measures to prevent abuse

62. The Member States are under an obligation ('a mandatory requirement of effective adoption') to introduce one or more of the measures listed in clause 5(1)(a) to (c) of the framework agreement where their domestic law does not already include equivalent legal measures.[28] The measures concerned relate, respectively, to objective reasons justifying the renewal of successive fixed-term employment contracts or relationships, the maximum total duration of such employment contracts or relationships, and the number of such contracts or relationships.

63. The referring courts, the applicants in the main proceedings and the Commission are all agreed, in substance, that the Italian legislation at issue in the main proceedings makes no provision regarding either the number of successive contracts or their maximum total duration for the purposes of clause 5(1)(b) and (c) of the framework agreement. In particular, the Tribunale di Napoli states that, since the entry into force of Decree-Law No 70/2011, Article 10(4a) of Legislative Decree No 368/2001 has excluded the application to the State schools sector of Article 5(4a) of that decree, which provides that fixed-term employment contracts exceeding a duration of 36 months are to be reclassified as employment contracts of indefinite duration, thus making it possible to renew contracts any number of times.

64. On the basis of my own analysis of the documents before the Court, I share that opinion. If, therefore, the aforesaid legislation at issue satisfies neither clause 5(1)(b) nor clause 5(1)(c) of the framework agreement, it is necessary to consider whether it includes a preventive measure for the purposes of clause 5(1)(a) or, failing that, a measure equivalent to those described in clause 5.

65. As is indicated in all of the written observations, the answer to this question must be sought in the case-law of the Court, more specifically in its judgment in *Kücük*.[29] That judgment addressed the question whether a temporary need for replacement staff envisaged by national legislation may constitute an objective reason within the meaning of clause 5(1)(a) of the framework agreement. It would, therefore, be useful to summarise the Court's reasoning in that judgment.

25 — Paragraph 6 of the general considerations in the framework agreement states that contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance.

26 — Judgment in *Mangold* (C-144/04, EU:C:2005:709, paragraph 64). The Court has also held that it is clear from the second recital in the preamble to the framework agreement and from paragraph 8 of the general considerations in that agreement that only in certain circumstances are fixed-term employment contracts capable of responding to the needs of both employers and workers. See order in *Vassilakis and Others* (C-364/07, EU:C:2008:346, paragraph 83).

27 — See Opinion of Advocate General Poiares Maduro in *Marrosu and Sardino* (C-53/04, EU:C:2005:569, point 29).

28 — Judgments in *Marrosu and Sardino* (C-53/04, EU:C:2006:517, paragraphs 44 and 50) and, more recently, *Márquez Samohano* (C-190/13, EU:C:2014:146, paragraph 42).

29 — C-586/10, EU:C:2012:39. Regarding that judgment, see the commentary by Robin-Olivier, S., and Rémy, P., 'La protection des travailleurs atypiques est-elle en régression? Double réflexion sur l'arrêt Kücük de la Cour de justice', *Revue de droit de travail*, 2013, p. 645.

66. First of all, the Court held that the concept of objective reasons justifying, in a particular context, the renewal of fixed-term employment contracts or relationships must refer to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts.[30] On the other hand, a national provision which merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner by a rule of statute or secondary legislation does not accord with the stated requirements.[31]

67. Secondly, the Court held that a provision which allows for the renewal of fixed-term contracts to replace other employees who are temporarily unable to perform their tasks is not per se contrary to the framework agreement.[32] In that connection, the Court stated that the fact that an authority has a large workforce renders the frequent use of temporary replacements inevitable, inter alia because of the unavailability of employees on sick, maternity, parental or other leave. The temporary replacement of employees in such circumstances may, according to the Court, constitute an objective reason under clause 5(1)(a) of the framework agreement, justifying the use of fixed-term agreements and the renewal of such contracts as the need arises.[33]

68. However, the Court stated that, while the replacement of staff may, in principle, be accepted as an objective reason for the purposes of clause 5(1) of the framework agreement, the competent authorities must ensure that the actual application of that objective reason satisfies the requirements of the framework agreement, having regard to the particular features of the activity concerned and to the conditions under which it is carried out. In the application of the relevant legislation those authorities must therefore be in a position to identify objective and transparent criteria in order to verify whether such contracts actually respond to a genuine need of a temporary, rather than a fixed and permanent nature.[34]

69. Lastly, the Court held that the renewal of fixed-term contracts in order to cover fixed and permanent needs is not justified under clause 5(1)(a) of the framework agreement. It pointed out that it is for all the authorities of the Member State concerned to ensure, for matters within their respective spheres of competence, that clause 5(1)(a) of the framework agreement is complied with by ascertaining that the renewal of successive fixed-term contracts is actually intended to cover temporary needs and that the national legislation at issue is not in fact being used to meet an employer's fixed and permanent staffing needs. In particular, the Court stated that 'it is for those authorities to consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term employment contracts ..., even those ostensibly concluded to meet a need for replacement staff, are not abused by employers'.[35]

70. I would observe that, in the disputes in the main proceedings, the national legislation at issue is formulated in a rather general and abstract fashion, with no tangible link to the specific content of the activity concerned by the successive fixed-term contracts in question or the precise manner in which that activity is carried out. Legislation of that nature does not appear to permit, when it is applied by the competent authorities, objective and transparent criteria to be identified for the purpose of verifying whether there is a genuine need for temporary replacement.

30 — See, to that effect, judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 69); *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraph 97); and *Kücük* (C-586/10, EU:C:2012:39, paragraph 27).

31 — Judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 71) and *Kücük* (C-586/10, EU:C:2012:39, paragraph 28).

32 — Judgment in *Kücük* (C-586/10, EU:C:2012:39, paragraph 30).

33 — Ibidem (paragraph 31).

34 — See, to that effect, ibidem (paragraphs 34 and 36).

35 — Ibidem (paragraphs 39 and 40).

71. Moreover, even if national legislation such as that at issue in the main proceedings may, in principle, disclose an objective reason for the purposes of clause 5(1)(a) of the framework agreement,[36] I still question whether the system for the renewal of successive fixed-term contracts established by that legislation was put in place solely in order to cover the temporary needs of authorities for teaching staff.

72. That does not appear to be the case. Indeed, it is clear on reading the orders for reference that the aforesaid Italian legislation applicable in the State schools sector restricts neither the conclusion nor the renewal of successive fixed-term employment contracts with supply staff to the replacement of staff that are temporarily absent. On the contrary, it appears to me that this use of temporary staff also serves the purpose of meeting *fixed and permanent staffing needs*.[37]

73. In particular, the Corte costituzionale points out in this connection that Article 4(1) *in fine* of Law No 124/1999 states that posts which are in fact *vacant and are not filled* by 31 December are to be filled by creating supply teaching posts of one year 'pending the completion of competitive selection procedures for the recruitment of tenured teaching staff'.[38] That court states that Article 4 therefore also explicitly provides for the renewal of fixed-term employment contracts with supply staff in order to fill vacant posts. Thus, even if the recruitment of supply staff is, in principle, temporary, the fact that no precise time frame has been fixed for conducting competitions for the recruitment of tenured staff means that it is completely uncertain when such competitions will be held. As the Commission has argued in its written observations and oral submissions, it is impossible to know when that might be, since it is dependent on the necessary financial resources being in place and on organisational decisions which are left to the discretion of the authorities.

74. It follows, in my opinion, that the legislation at issue in the main proceedings permits the use of fixed-term contracts for the purpose of covering 'long term' the 'permanent needs' of the schools sector, a use which is reprehensible and supposed to be prevented by the adoption of one or more of the restrictive measures provided for in clause 5 of the framework agreement.[39]

75. Admittedly, the case-law of the Court states that, by virtue of clause 5(1) of the framework agreement, the Member States have a certain discretion as to how they achieve the objective referred to in that clause. However, it goes on to state that that discretion is subject to the Member States' guaranteeing the result imposed by EU law, as is clear not only from the third paragraph of Article 288 TFEU, but also from the first paragraph of Article 2 of Directive 1999/70 read in the light of recital 17 in the preamble to that directive.[40]

76. I do not consider that the result imposed by the framework agreement is guaranteed by the aforesaid legislation at issue. On this point I must reject the arguments put forward by the Italian Government and, in substance, by the Greek Government to the effect that the legislation relating to the appointment of school staff is justified, the alleged justifications being (i) the very significant degree of flexibility that is called for by the close relationship between the need to recruit temporary

36 — For example, as a result of the fact that the schools sector employs a large workforce for which temporary replacements are necessary.

37 — 'A system in which permanent jobs are done by individual temporary agents, who are replaced by other individual temporary agents, contravenes the framework agreement, in the letter of the law and in the spirit of the law. Employers cannot take the easy route of employing successive temporary personnel for permanent jobs. Besides, such a system is contrary to the principle that employment should be on the basis of an indeterminate period and that it is only possible to offer temporary contracts if there are objective reasons', Blanpain, R., *European Labour Law*, 12th edition, Wolters Kluwer, 2010, p. 472.

38 — Emphasis added. Under Article 4, the authorities may conclude various types of fixed-term contracts with teachers, covering: (i) supply teaching posts of one year, terminating at the end of the school year (31 August), in order to fill vacant, unfilled posts in the '*de jure*' table of staff for a school, that is to say, posts for which there is no tenured member of staff; (ii) temporary supply teaching posts in order to fill non-vacant posts in the school's table of staff which become *de facto* available, terminating at the end of teaching activities (30 June); and, finally, (iii) temporary or short-term supply teaching posts in other situations, which terminate when the circumstances which made them necessary no longer exist.

39 — See Opinion of Advocate General Jääskinen in *Jansen* (C-313/10, EU:C:2011:593, point 35).

40 — *Angelidaki and Others* (C-387/07 to C-380/07, EU:C:2009:250, paragraph 80) and *Kücük* (C-586/10, EU:C:2012:39, paragraph 48).

members of staff and the unpredictable, cyclical variations in the school population and (ii) reasons of a financial nature which have meant that numerous recent measures to rein in public spending have imposed restrictions in respect of the number of appointments to tenured positions and the use of fixed-term contracts in the schools sector.

77. First of all, as regards the argument concerning flexibility in the education sector, as the Corte costituzionale pointed out, it is true that the school service, in that it corresponds to the fundamental right to education, is available on demand. The mechanism which is designed to meet the need for supply staff requires a certain flexibility that is linked to factors such as changes in the school population, sick leave and maternity leave. Thus, according to the Corte costituzionale, the system of permanent ranking lists, associated with the system of open competitions is, in principle, capable of guaranteeing that objective criteria are observed when school staff are taken on under fixed-term employment contracts. That system also offers the staff a reasonable chance of obtaining a tenured position and employment under a contract of indefinite duration.

78. However, as is clear from point 73 of this Opinion, the fact that no precise time frame has been fixed for conducting open competitions, which have been held up for over ten years,[41] means that it is completely uncertain when such competitions will be held, and demonstrates that fixed-term contracts have been used to meet the fixed and permanent needs of the authorities concerned, a matter which is for the referring courts to verify.

79. Secondly, as regards the argument concerning the financial constraints recently imposed by numerous national measures in the schools sector, I am of the opinion that these cannot warrant the misuse of successive fixed-term contracts. It therefore falls to the referring courts to assess whether the financial constraints imposed on a public authority by numerous provisions constitute a sufficiently specific justification for using fixed-term contracts, in accordance with the requirements laid down in the Court's case-law mentioned in points 66 to 69 of this Opinion. According to that case-law, national provisions which merely authorise recourse to successive fixed-term employment contracts in a general and abstract manner by a rule of statute or secondary legislation do not accord with the requirement that the use of successive fixed-term contracts be justified by reference to precise and concrete circumstances. The Court has held in this connection that such circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State.[42]

80. Moreover, general provisions imposing financial constraints give the State schools sector, as employer, a great deal of freedom to conclude fixed-term contracts abusively, whereas the purpose of the framework agreement is to prevent such abuse. It seems to me that such freedom goes beyond the margin of discretion which the Member States are accorded under the framework agreement.

81. Consequently, as is clear from point 30 of this Opinion, even if the system at issue in the main proceedings is, in principle, structured in such a way as to reflect objective reasons, as referred to in clause 5(1)(a) of the framework agreement, the Italian Government has failed to demonstrate the existence of specific justification. I am referring here, in particular, to the temporary, rather than permanent, nature of repeated use of fixed-term contracts in the schools sector. On the contrary, it seems to me to emerge clearly from the documents before the Court that the use of such contracts constitutes an abuse in some respects, inasmuch as its purpose is to respond to *structural needs for teaching staff*. Those structural needs are evidenced by the considerable number of members of staff

41 — See point 51 of this Opinion.

42 — Judgments in *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraph 96) and *Kücük* (C-586/10, EU:C:2012:39, paragraph 27). The Court cites as legitimate social-policy objectives measures aimed at offering protection for pregnancy and maternity and to enable men and women to reconcile their professional and family obligations (judgment in *Kücük*, C-586/10, EU:C:2012:39, paragraph 33).

who have been placed in an insecure professional position for more than ten years, without any restriction being imposed on the number of contract renewals or the maximum duration of the contracts. In my opinion, a sizeable proportion of the posts in question could have been filled permanently using contracts of indefinite duration, while still preserving the necessary flexibility to which the Corte costituzionale rightly refers.

82. Consequently, it falls to the referring courts to assess whether the use of teachers over extended periods of time under a number of fixed-term contracts, in the circumstances of the cases in the main proceedings, is consistent with clause 5 of the framework agreement.

ii) The existence of measures to penalise abuse

83. According to the referring courts, the legislation at issue in the main proceedings does not include any penalties for the misuse of fixed-term contracts. Indeed, following the entry into force of Decree-Law No 70/2011, fixed-term employment contracts may be converted into employment contracts of indefinite duration, under Article 4(14a) of Law No 124/1999, only in the event of the grant of tenure on the basis of the ranking lists. Furthermore, it is clear from the orders for reference that, in the schools sector, the system for the compensation of damage suffered by employees as a result of the misuse of fixed-term contracts does not apply. [43]

84. Under clause 5(2) of the framework agreement, the Member States, after consultation with the social partners, and/or the social partners are to determine, 'where appropriate', under what conditions fixed-term contracts (i) are to be regarded as successive and (ii) are to be deemed to be contracts of indefinite duration. They therefore enjoy a broad discretion in determining, in accordance with the existing social and statutory context, whether it is appropriate to adopt conversion measures. [44]

85. Nevertheless, according to the settled case-law of the Court, where misuse of successive fixed-term contracts has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to punish that abuse and nullify the consequences of the breach of EU law. According to the very wording of the first paragraph of Article 2 of Directive 1999/70, the Member States must 'take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by [the] Directive', [45] by means of either the conversion of those relationships into permanent contracts or the award of damages. [46]

86. In the present instance, as is clear from points 63, 64, 78 and 83 of this Opinion, the legislation at issue in the main proceedings, as described in the orders for reference, does not include sufficient measures either to prevent or to penalise the misuse of successive fixed-term contracts, as referred to in clause 5 of the framework agreement. Depriving teaching staff in the schools sector from protection in such a way clearly exceeds what is permitted by the wording of clause 5(1) and (2) of the framework agreement and runs counter to the framework established by that agreement, [47] this being a matter for the national courts to verify.

43 — According to the Tribunale di Napoli, even though Article 36(5) of Legislative Decree No 165/2001 provides, in theory, for compensation for harm suffered by public sector employees recruited unlawfully under fixed-term arrangements, it does not in practice enable them to obtain compensation. In Judgment No 10127/12, the Corte suprema di cassazione held that Article 36 does not apply where fixed-term contracts have exceeded the maximum duration of 36 months, on the ground that the recruitment under fixed-term arrangements was in accordance with the legislation and that the defect is unrelated to the manner in which the work is performed. It also held that workers unlawfully employed under fixed-term arrangements do not suffer damage since they are paid a salary under their contract and must know that it is invalid.

44 — See Opinion of Advocate General Poiares Maduro in *Marrosu and Sardino* (C-53/04, EU:C:2005:569, point 30).

45 — See, in particular, judgment in *Vassallo* (C-180/04, EU:C:2006:518, paragraph 38 and the case-law cited).

46 — See, in particular, *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraphs 160 to 166).

47 — The Italian Government observes that national law could offer solutions in this regard, and this appears to be confirmed by the observations of some of the applicants in the main proceedings, who refer to the recent Decree-Law No 104 of 12 September 2013. According to those applicants, that decree-law could provide stability of employment for employees in the schools sector who have been employed for more than 36 months, by way of their establishment as tenured staff for the period 2014 to 2016.

c) Interim conclusion

87. National legislation, such as the Italian legislation at issue in the main proceedings, which, first, authorises the renewal of fixed-term contracts in order to fill vacant posts for teachers and ATA staff in State schools pending the carrying out of competitive selection procedures for the recruitment of tenured staff, without there being the slightest certainty as to the date on which such selection procedures will be completed and, therefore, without defining objective and transparent criteria by reference to which it may be verified whether the renewal of such contracts actually responds to a genuine need and is such as to achieve the objective pursued and necessary for that purpose, and secondly, lays down no measure to prevent and penalise the misuse of successive fixed-term employment contracts in the schools sector cannot be regarded as justified by objective reasons within the meaning of clause 5(1)(a) of the framework agreement. However, it is for the referring courts to ascertain, in the light of the foregoing considerations, whether those circumstances are present in the cases before them.

3. The second and third questions

88. Since I propose that the first question should be answered in the negative, I believe that it is unnecessary to answer the second and third questions referred in Cases C-22/13, C-61/13 and C-62/13 or the first and second questions referred in Case C-63/13, which concern the consistency with the framework agreement of the aforesaid national legislation at issue.

4. The fifth to seventh questions

89. In view of the answer which I propose to the first question, the referring court in Cases C-22/13 and C-61/13 to C-63/13 has all the information necessary properly to resolve the disputes in the main proceedings.[48]

VII – **Conclusions**

90. In light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Tribunale di Napoli in Cases C-22/13 and C-61/13 to C-63/13 and by the Corte costituzionale in Case C-418/13 as follows:

National legislation, such as that at issue in the main proceedings, which, first, authorises the renewal of fixed-term contracts in order to fill vacant posts for teachers and administrative, technical and auxiliary staff in State schools pending the carrying out of competitive selection procedures for the recruitment of tenured staff, without there being the slightest certainty as to the date on which such selection procedures will be completed and, therefore, without defining objective and transparent criteria by reference to which it may be verified whether the renewal of such contracts actually responds to a genuine need and is such as to achieve the objective pursued and necessary for that purpose, and secondly, lays down no measure to prevent and penalise the misuse of successive fixed-term employment contracts in the schools sector cannot be regarded as justified by objective reasons within the meaning of clause 5(1)(a) of the framework agreement on fixed-term work concluded on 18 March 1999, set out in the annex to Council Directive 1999/70/EC of 28 June 1999

48 — In its judgments in *Scattolon* (C-108/10, EU:C:2011:542, paragraph 84) and *Carratù* (C-361/12, EU:C:2013:830, paragraph 49), the Court stated that, in view of the other answers which it had provided in those cases, it was no longer necessary to answer the fourth and sixth questions referred in those cases respectively, which were formulated in terms similar to those of the seventh question in Cases C-61/13 and C-62/13.

concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. However, it is for the referring courts to ascertain, in the light of the foregoing considerations, whether those circumstances are present in the cases before them.